



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 2 OF 2001

REPUBLIC.....PROSECUTOR

VERSUS

PETER MBURU GATHAYO.....1ST ACCUSED

KAMAU KIAI MUKUNA.....2ND ACCUSED

JUDGMENT

The charge against the Accused Persons before this Court is Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63).

The particulars of the offence are that on the night of 9th February 2000 at Chania Village, Bahati in Nakuru District of the Rift Valley Province jointly murdered Ruth Wanjiru Gathayo.

PW1 John Nyoro, testified before this Court that on the material day he was deep asleep when his wife woke him up saying that his grandmother's house was on fire. They ran to the house and found that it was on fire and could not enter. He met the 1st Accused and David Mwangi PW 5 who had called them. Later the 2nd Accused joined them. He knew the 2nd Accused as a neighbour and his employee in his shamba. The 1st Accused is PW 1's step brother whose mother died ten years ago. Thus, the 1st Accused lived with the deceased in the same house. Their relationship went sour when the 1st Accused sold a piece of land belonging to the deceased and ran away. He later wanted to sell more land but the deceased refused because there were other siblings who needed a place to stay. This happened a year before the deceased died. At the time of the fire the 1st accused was just screaming but did nothing. Only PW 1 and two other people tried to enter and save the deceased.

Finally they entered in the house, pulled the deceased out, but she was completely burnt. They took the deceased to the 1st Accused's bedroom which was not on fire, while the 2nd Accused tried to stop the fire using water. In cross examination, PW 1 admitted that he knew the 2nd Accused for two years as his employee, a man of good conduct and even assisted them put out the fire. He had no grudge against the 2nd Accused.

PW 2 Ruth Wangari Ngoro, PW 1's wife testified that they were asleep when PW 5 (David) woke them up and informed them that the deceased's house was on fire. They ran to the house. On arrival they found the 1st Accused putting out the fire but did not see the 2nd Accused. Later the body of the deceased was removed from the house but she was already dead. She knew the 1st Accused who lived with the deceased but had no idea of how they related with each other.

PW 3, Samwel Kimani Mburu, told the Court that on the material night he was asleep when suddenly one of his mother's employee woke him up screaming that his step mother's house was on fire. He ran to

the scene and found the house on fire, about four people and the 1st Accused who is his nephew trying to put off the fire. The 2nd Accused came later and helped put out the fire. After struggling to get entry in the house they found the deceased already dead. PW 3 further said that he knew the 1st Accused who lived with the deceased. He did not know how they related but he heard the deceased complain several times that the 1st Accused went home drunk and quarrelled. The deceased requested PW 3 on several occasions to talk to the 1st Accused to stop drinking and quarrelling with her. PW 3 talked to the 1st Accused who always promised to reform.

PW 4, Stephen Waiyaki, testified that on the material night he was deep asleep when his neighbour woke him up screaming the deceased's house was on fire. He went to the deceased's house and found several people among them the 1st Accused who is his nephew standing by the house. The deceased's body had just been removed from the house on fire. He told the Court that he knew the 1st Accused who lived with the deceased and on several occasions the deceased complained of the 1st Accused's behaviour. He always went home drunk and quarrelled with the deceased.

PW 5, David Mwangi Waweru, told this Court that on the material night he was deep asleep when he was suddenly woken up by screams of "house on fire". He went out and saw the deceased's house was on fire. He ran to call his family, PW 3 and John Nyoro. They went and helped put out the fire. Other people present included the 1st and 2nd Accused Persons trying to put out the fire. The deceased was removed from the house. He did not know of any bad relationship between the 1st Accused and the deceased who lived together and were his immediate neighbours.

The evidence of PW 2, PW 5, PW 6 and PW 9 were all the same. PW 7, Sarah Wamwango Waguru, the 1st Accused's aunt and a daughter of the deceased testified that there was bad blood between the 1st Accused and the deceased. The 1st Accused was always drunk and quarrelled with the deceased even sometimes in the presence of PW 7 over food. PW 7 did not visit the scene on the material night but went there on the following day. The house was burnt and the deceased was dead. She had no grudge with the 1st accused.

PW 8, Dr. Kogutu testified on behalf of Dr. Otieno who examined the 1st and 2nd Accused persons and found them fit to stand trial. He conducted the post-mortem on the body of the deceased and formed an opinion that the cause of death was due to severe burns.

The 1st Accused chose to give unsworn statement in which he denied being linked to the murder of the deceased.

The 2nd Accused also chose to give unsworn statement in which he denied being linked to the murder of the deceased.

In his Submission, Mr. Ombati for the 1st Accused submitted that the Prosecution had not proved the case beyond reasonable doubt. The evidence is circumstantial and based on mere suspicion. There is no evidence to show that the 1st Accused killed the deceased. He argued that the Investigating Officer was not called to testify.

Mr. Musa for the 2nd Accused submitted that the Prosecution had not proved its case beyond reasonable doubt to convict the 2nd Accused. Mr. Mutuku, Counsel for the State, conceded that the Prosecution intended to rely on confessions which implicated both Accused Persons but that these confessions were disallowed.

Murder is defined in Section 203 of the Penal Code as follows;

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

Malice aforethought is further defined as

a) An intention to cause the death of the deceased, or any other person.

b) An intention to cause grievous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured.

c) An intention to commit felony.

The Prosecution relied on circumstantial evidence. In order for a Court to convict an Accused Person based solely on circumstantial evidence, the law as set out in the case of Kipkering arap Koske -vs- Republic 1949 16 EACA 135 is that:

a) the inculpatory facts must be incapable with the innocence of the accused.

b) they must be capable of no other conclusion or explanation except the guilt of the Accused.

As is clear from the evidence, the deceased died of severe burns when her house caught fire. There is no evidence about the cause of fire, how and when it started, and why the deceased was alone at the time. The Accused persons were among other people who tried to put out the fire.

No eye-witnesses were called to testify and there is absolutely nothing to connect the Accused persons with the death of the deceased. Their conduct did not suggest any involvement in the murder. All they did was help put out the fire. The 1st Accused reported the fire incident to the police. It would appear that he was arrested based on suspicion, arising out of his bad relationship with the deceased. However, suspicion alone is not enough to warrant a conviction.

The circumstantial evidence in this case does not point irresistibly to the guilt of the accused persons. See Musoke vs Republic (1958) E. A. All the assessors returned a verdict of not guilty.

In the result, I find both the Accused persons not guilty of murder and set them at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nakuru this 29th day of July 2004.

ALNASHIR VISRAM

JUDGE