



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 27 OF 2002

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KARANJA MUNGURA.....1ST ACCUSED

JOSEPH KARIUKI NGAHU.....2ND ACCUSED

JOHN MAINA MUCHERU.....3RD 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 17th and 18th day of September 1998 at Engineer Trading Centre in North Kinangop of Nyandarua District within Central Province, jointly murdered BERNARD WAMBUGU MBAITI.

It was the evidence of PW1 Samuel Kimani Njogu a Cobler testified before this Court that on 24th September 1998 at about 4-5 p.m. the 1st Accused approached him requesting him to lend him Shs 200/= to travel. PW 1 did not have the money but promised to help him by asking any other person. The 1st Accused showed PW 1 a wrist watch which he could retain as security for the Shs 200/=. PW 1 asked George Gitau whether he could lend the 1st Accused money but he declined. He went to Peter Kibe Njoroge (PW 3) who agreed to lend the 1st Accused Shs 200/= against the security of a wrist watch. The watch was produced in Court as PEX 1. The 1st Accused requested PW 1 whether he could spend the night at his place so that he could travel early the following morning but he said he could not because of a robbery that had taken place at PW 1's house. However, PW 1 requested his brother to accommodate the 1st Accused. That was the last time PW 1 saw the 1st Accused until his arrest.

PW 2 Francis Mbugua, a teacher at Nyandarua School for the deaf who was a colleague of the deceased testified before this Court that he knew the deceased very well having worked together for about 10 years. He knew the deceased had a Seiko wrist watch and could identify it. PW 2 identified the same watch in Court as the deceased's watch with a mark that he had seen before.

PW 3 Peter Njoroge Kibe, told this Court that on the 24th September 1998 he was at the shopping centre when PW 1 approached him requesting to be lent Shs 200/= on behalf of someone who he did not name, but who needed to travel. He did not have the money at the time but PW 1 insisted that if he gave him the Shs 200/= he would be given a wrist watch as security. The person who needed the money was not introduced to PW 3 but he saw him present there. He also understood the 1st Accused to be the owner of the wrist watch. He identified the 1st Accused in Court as the person who wanted the money, and

confirmed that he did lend Shs. 200/= to the 1st Accused, in exchange for the wrist watch. The 1st Accused promised to refund the money the next day, but he never did. PW 3 identified the wrist watch in Court as the one that he was given as security for Shs 200/=. After several days some men approached PW 3 asking for the watch and the 1st Accused because the watch he was told belonged to the deceased, not the 1st Accused.

PW 5 Joseph Kibira Kaharu, the deceased's brother-in-law identified the deceased's body for post mortem at Naivasha District Hospital.

PW 7 Nicholas Kariuki Kariri, a colleague of the deceased and a teacher at the Nyandarua School for deaf told this Court that on the 18th September 1998 he was on his way to School when a School worker informed him that the deceased's body was found lying by the road side. He saw the body. He was injured on the back of his head and there was blood all around him. PW 7 also identified the Seiko watch as the one belonging to the deceased.

PW 8 Consolata Muringi Mbaiti, a wife of the deceased testified before this Court that on the 17th September 1998 the deceased left home for his place of work and never returned that evening. The next day PW 8 was taking her child to school when she heard people saying that her husband had been killed. She went near a crowd of people and found the body of her husband lying down. PW 8 positively identified PEX1 – the watch as belonging to her deceased husband.

PW 9 I. P. Wilson Macharia, was attached to the Kinangop police station as a Deputy O. C. S. He recorded statements of inquiry from the 1st Accused in Kikuyu after cautioning the accused of the same. This statement was objected to by the Defence Counsel and this Court upheld the same as inadmissible.

PW 10, Dr. Kenneth Odhiambo, performed a post mortem on the deceased body and formed the opinion that the cause of death was due to head injury caused by a sharp object. He also produced reports after examining the Accused persons and found them fit to stand trial.

PW 11 PC Joseph Muriuki, testified that he took over the case from the former investigating officer who handed him the file and all the exhibits for further investigations. He produced a wrist watch in Court as exhibit PEX 1 and an axe PEX 6 and photos showing the body of the deceased.

The 1st Accused chose to give unsworn statement in which he denied being involved in the murder of the deceased. He told the Court that he had a watch that got spoilt by water and later Njuguna gave him a watch.

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

The 3rd Accused similarly, chose to give unsworn statement in which he denied killing the deceased and stated that he did not know either the deceased or his co-accused.

In his Submissions Mr. Keboga for the 1st Accused argued that the Prosecution had failed to prove its case beyond reasonable doubt. They relied on the fact that the 1st Accused was found in possession of a wrist watch which was identified by witnesses to belong to the deceased. The 1st accused did not deny having a watch, though not similar to the one produced in Court. All the evidence is circumstantial and does not point to the accused's guilt.

Regarding the 3rd Accused he submitted that he was wrongly charged in this case simply because of mistaken identity. The prosecution had not proved any connection between the 3rd accused and the death of the deceased.

Mr. Acholla, for the 2nd Accused, submitted that the prosecution had not proved its case beyond reasonable doubt. There is no direct evidence pointing to this accused's guilt.

Mr. Mutuku for the Republic conceded that the prosecution relied on confessions which implicated both 2nd and 3rd Accused persons but that these confessions were disallowed. The circumstantial evidence against them was also not strong, he agreed. However, circumstantial evidence against the 1st accused was strong. The deceased was killed on 17th August, 1998 and it was within the following four days when the 1st Accused went looking for money to travel. He was in possession of the watch identified by witnesses as the one belonging to the deceased. He wanted to use this as security. This evidence was given by PW 1 and corroborated by PW 3. The prosecution relied on the doctrine of recent possession to connect the 1st accused to the murder of the deceased. See **Robinson Siko Ogembo vs Republic C. A. 124 of 2001 Nakuru.**

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.

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.

The facts as seen are that the deceased was killed and his body found lying by the roadside. His watch was stolen, which led to the arrest of the Accused persons.

As mentioned above in **Kipkering’s** case, all the evidence must point to the accused’s guilt. There is absolutely no evidence presented before this Court to link the 2nd and 3rd Accused persons to the death of the deceased. The Counsel for the State conceded the same and admitted that they relied on confessions which were held inadmissible by the Court. The assessors returned a verdict of not guilty against them. I agree with that and find the 2nd and 3rd Accused not guilty of murder.

On the other hand there is ample unbroken chain of evidence to connect the 1st Accused with the murder of the deceased. The deceased was found dead on 18th of September 1998. Four days later the 1st Accused was in possession of a watch that he claimed to be his and approached PW 1 with it, to deposit the same as security for a loan of Shs 200/=. PW 1 saw the watch and so did PW 3 who kept it as security for the money he lent the 1st Accused. They all identified the watch produced in Court as exhibit as the one that the 1st Accused deposited with PW 3. The evidence relating to the ownership of the watch is corroborated by the unchallenged testimony of PW 2 (a colleague of the deceased) and PW 8 (the deceased’s wife). Both identified the watch in Court as that belonging to the Accused.

This Court has noted, and warned itself, that this case is based on circumstantial evidence and revolves around a single piece of evidence – the wrist watch. I am absolutely convinced that the circumstantial evidence here meets the standard set out in **Koske v. R (Supra)**. Applying the doctrine of recent possession as expounded in the case of **Ogembo v. R. (supra)** I am satisfied that all the evidence points to the guilt of the 1st Accused. He did not deny being in possession of the watch and of pledging the same as security, simply argued that it was not the one produced in Court. However, the evidence is overwhelming that the watch he was found in possession of, and which he pledged as security, was the deceased’s watch. There is no doubt about it. His conduct at the time was also not consistent with his

innocence. First, he was ready to pledge a Seiko watch as security for only Shs 200 loan; and secondly he never returned to collect or redeem “his” watch, indicates guilt, not innocence.

PW 10 testified that he performed a post mortem on the deceased and found a head injury caused by a blunt object. This is enough proof that the person who inflicted the injuries knew at very best he would cause grievous harm or kill the deceased. This constitutes malice.

All the assessors returned a verdict of guilty of murder against the 1st Accused person. I agree with them, and I find the 1st Accused John Karanja Mungura guilty of Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63). And I find the 2nd Accused Joseph Kariuki and 3rd Accused John Maina not guilty and set them at liberty forthwith unless otherwise lawfully held.

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

ALNASHIR VISRAM

JUDGE