



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 37 OF 2000

REPUBLICPROSECUTOR

VERSUS

MICHAEL MUCHERU GATUACCUSED

J U D G E M E N T

MICHAEL MUCHERU GATU (the accused) is charged with five counts of Murder contrary to Section 203 read with Section 204 of the Penal Code. Particulars of the offence are the same, save that in each count the accused is charged with a distinct person. These particulars are that on the 10th of July, 1999 at Gitambaa village within Thika District of the Central Province murdered the following people: Peter Mbuthia Mwangi (count 1); Pauline Wanjiru Mbuthia (Count 2); Margaret Mugure Mbuthia (count 3); Robert Mwangi Mbuthia (Count 4) and Catherine Wanjiru Mbuthia (Count 5).

The deceased in count 1 was the husband of the deceased in count 2. The deceased in count 3,4 and 5 were their children. While the accused was the elder brother to the deceased in count 1.

All the five deceased persons were burnt to death during the night of 9th and 10th July, 1999 as they slept in their house. It is the prosecution's case that their house was set ablaze by the accused, which he denied through his counsel Mr. Edwin Mugu and in the unsworn statement. The prosecution called a total of 19 witnesses through Mr. Mungai, learned state counsel.

Any person who was malice aforethought causes the death of another person by an unlawful act or omission commits murder.

It is trite law that the burden of prove the guilty of an accused person lies throughout on the prosecution. The standard of proof is proof of guilt beyond reasonable doubt. An accused person assumes no burden of prove his innocence. Whatever defence he may raise to the criminal charge through sworn evidence, or unsworn statement in the dock, or through the cross examination of prosecution witnesses, is to be considered only on a balance of probabilities, and if it is found to be probably true, then the benefit of doubt raised is to be given to that accused, who shall then be acquitted. It is only when the accused's defence is rejected, and when the prosecution has proved the guilt of that accused, beyond reasonable doubt that he shall be convicted.

The prosecution set out to prove that all the five accused persons died in the fire which burnt their house. IP Jacob Muli (PW15) who was the officer-in-charge of crime at Ruiru police station was on duty during the night of 9th and 10th July, 1999. At about 4.00 a.m. the accused and members of the public made a report to him that a family of five people had been burnt to death in their house at around 2.30 p.m. The accused told him that the dead person was his brother and his family members. The accused had burns on his face, right hand and right leg. PW15 said he made arrangements and took him to Thika District Hospital. Thereafter he accompanied the accused and the members of the public to the scene.

Upon the arrival of PW15 at the deceased's home he found the house completely razed down. There were remains of five human bodies which were later removed to the City Mortuary Nairobi by police Constable James Wachira (PW12).

On the 20th July, 1999 the same P.C Wachira (PW12) took the deceased's relatives to the City Mortuary Nairobi and, in his presence, they identified the remains of the deceased to DR. ALEX ONZERE KIRASI OLUMBE (PW16) who carried out postmortem examination. Dr. Olumbe examined the body of Peter Mbuthia Mwangi. The deceased was 30 years old and his body was excessively charred, with heat fractures of the skull, limbs and rib-cage. There was also visceration of the abdomen. He noted marked cherry red discoloration of the abdominal muscles. He particularly noted soot in the tracheae. He found the opinion that the cause of the deceased's death was effects of fire. He tendered into evidence the postmortem report form as exhibit No.10.

On the same 20th July, 1999 Dr. Olumbe performed postmortem examination on the body of Pauline Wanjiru Mbuthia. She was aged 28 years. It was an excessively charred whole body with heat fractures of the calvarium, limbs and chest (rig cage). Remnants of the skin on the breasts and upper abdomen were noticed. The trachea was excessively charred but there were remnants of the skeleton tissue of the upper arms and the thighs. The lungs, heart, liver and spleen were all charred. Due to the above exercise burning of the body the immediate cause of death was unascertained. Dr. Olumbe filled the postmortem form and tendered it into evidence as exhibit 11.

On the same date 20th July, 1999 Dr. Olumbe performed a postmortem examination on the body of MARGARET MUGURE MBUTHIA. She was aged 10 years. The body was excessively charred with heat fractures of the whole calvarium, limbs, chest, rib cage and charring of the liver, lungs, spleen and the trachea. Due to the excessive burns, cause of the deceased's death was also unascertained. He tendered into evidence postmortem examination form as exhibit 12. A postmortem examination on the body of Robert Mwangi Mbuthia who was aged seven years (7 years) was performed by Dr. Olumbe on the same 20th July, 1999. His body was also excessively charred with multiple heat fractures of the calvarium, limbs, trachea, liver, and spleen. Cause of his death, due to these extensive burning, was unascertained. A postmortem examination form was tendered into evidence as exhibit No.13.

Catherine Wanjiru Mbuthia, the fifth deceased, was aged 2½ years and Dr. Olumbe carried out a postmortem examination on her body as well. She too had been excessively burnt and the whole of the calvarium, rib-cage, limbs and the trachea were all burnt out, to the extent that the immediate cause of death was unascertained. A postmortem form was tendered into evidence as exhibit 14.

Based on the above findings of Dr. Olumbe, Mr. Mugu submitted that the prosecution has only proved the cause of death of Peter Mbuthia Mwangi and not of the rest of the deceased.

I will, however, accept the evidence of Dr. Olumbe, that inhalation of flames could cause sudden death because the swelling of the upper Larynx due to burns would normally cause air obstruction.

He further stated that, in the case of Peter Mbuthia Mwangi, he was alive at the time of the fire because there was soot in the upper airways of his Larynx, demonstrating the inhalation of carbon monoxide. Dr. Olumbe opined that Peter Mbuthia Mwangi's children were mostly closest to the source of the fire and got burnt so extensively due to their immediate incapacitation. There may be no direct evidence to support that opinion but it certainly is reasonable and acceptable.

The position then is this. Medical evidence has been tendered to establish that Peter Mbuthia Mwangi died from effects of fire. I am, however, prepared to find that the prosecution has established beyond reasonable doubt based on circumstantial evidence that deceased persons 2,3,4 and 5 equally died through an unlawful act in the same house in which Peter Mbuthia Mwangi died.

My holding that death can be proved through circumstantial evidence is based on several reported cases. The most notable one is WAHIIH & ANOTHER vs UGANDA 1968 E.A. 278 where the facts were these. The decomposed body of the deceased had been found buried fully clothed, enclosed in a sack,

with a strip of elastic would tightly round the neck and the hands tied behind the back. The main evidence against the two appellants consisted of confessions made to a police officer by them. In addition there was evidence that the first appellant had been heard to say, about a month before, that he intended to kill the deceased, and that the second appellant had been seen, about a week after the murder, with some of the deceased's property in his possession. The medical evidence about the cause of death was unsatisfactory and did not exclude the possibility of death from natural causes. The learned trial judge held, notwithstanding the medical evidence, that the circumstantial evidence established beyond reasonable doubt that the deceased had been killed unlawfully by strangulation by means of the elastic. Dismissing the appeal against conviction, SPRJ J.A.(as he then was) had this to say in the Judgement.

“Mr. Kakooza’s first submission was that the learned Judge had not given sufficient weight to the medical evidence and he argued that the appellants should not have been convicted in the absence of medical as to the cause of death. It may be added that, for the same reason Mr. Deobhakta who appeared for the Republic, was not disposed to support the conviction.

Of course, such evidence is always desirable and usually essential, but there are exceptions. There have, for example, been general cases in East Africa where persons have been convicted of murder, although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained. We think this is such an exceptional case.

The condition in which the body was found buried, with the elastic tightly round the neck and the hands tied behind the back, with the other evidence in the case, points irresistibly to an unlawful killing. We think any other supposition would be quite unreal.”

In the present case before me, there is direct evidence of an assault upon the deceased persons, the burning down of the house in which they were sleeping, that the fire could not but have caused their immediate death. Even on the second limb of that test, this is an exceptional case because the bodies of the deceased were found extensively burnt in the same burnt-down house. When taken with other evidence, points irresistibly to an unlawful killing having taken place.

Even in more difficult cases where the body of a deceased person may not have been recovered, proof of death can be established through circumstantial evidence. It all depends on the quality and extent of that evidence. Where, for instance, a deceased person was kidnapped and taken to a forest where he was said to have been shot dead but the evidence of that eye witness was found to be contradictory and false and the deceased's body was never recovered, that circumstantial evidence was found to be unsatisfactory, for the deceased may have escaped from his abductors. (see KELLA V. R. 1967 EA 809).

In a third decided case KIMWERI V REPUBLIC (1968) EA 452 it was held that, although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead. SIR CHARLES NEWBOLD , then President of the Court of Appeal, had this to say on page 453 letter 1 and page 454 letters A, B:

“While death may be proved by circumstantial evidence, without evidence as to the production of the body of the allegedly dead person, and without any evidence of a person who saw the body of dead person, and without a confession by a person accused that he caused the death, yet where a court is asked to find in a murder charge that a person is dead in the circumstances which we have stated, the evidence on which the court is asked to infer the death must be such as to compel the inference of death, and must be such as to

be inconsistent with any reasonable theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead”.

Applying these principles of law to this case it is my holding that the 2nd, 3rd, 4th and 5th deceased are dead and they were unlawfully burnt to death in their house during the night of 9th and 10th July 1999. To hold otherwise would be unreal.

The prosecution then set out to prove that the accused is the person who set the deceased person's house on fire. Reliance is again placed on circumstantial evidence and the retracted confession made by the accused. I will review first the circumstantial evidence which the prosecution seeks to rely on.

First and foremost, it is trite law that in cases dependant on circumstantial evidence the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, all the facts so established should be consistent only with the hypothesis of the guilt of the accused, and the circumstances should be of a conclusive nature and tendency and should be such as to exclude every hypothesis but the one proposed to be proved.

Circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence. (SARKAR ON EVIDENCE pp. 32 – 33). The way to deal with circumstantial evidence was stated in TOPER V. R. (1952) A.C. at Page 489 as follows:- “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence.”

I have applied these legal principles to this case. The accused, at the material time of this incident, was the 1st deceased's elder brother. They lived on 1¼ acre farm in Githunguri Ranching Company known as Gitambaa. The title deed of the said farm was originally in their deceased mother's names: it is in the joint names of the accused and the 1st deceased.

Catherine Wanjiru Mwangi owned other properties. By the time of her death in 1987 she had not transferred any of them to her children. She had only managed to show the accused and the 1st deceased the Gitambaa farm and where they should settle. Both of them built their houses on that farm. There is evidence to the effect that the distances between their houses was a mere thirty paces.

According to the evidence of Margaret Wairimu Kinyanjui (PW1) their sister, all title documents to most of the properties of their mother, were kept by the accused, as their eldest brother. They, however, came to learn that the accused was selling these properties without informing them. It is the evidence of PW1 that they filed a caution in the Land's Office against any dealing with the Ruiru Town plots and they informed their uncle FRANCIS WAWERU GICHUKU about it. Mr. Gichuku took no action but told them to wait until the subdivision of this farms in the month of July 1999. It was during the same month of July 1999 when the deceased persons perished in their house.

PW1 confirmed that there was a time when the accused kept these titles in his house. But when the accused was arrested and kept in custody for another offence, his house was burgled into. Fortunately the title deeds were not stolen. It was then that the 1st deceased decided to take charge of those title deeds and to keep them in his custody. When the accused was released from custody he began to demand the return of these titles to him but the 1st deceased refused to do so.

While under cross-examination, PW1 conceded that the accused was trusted very much by their mother, to the extent that she gave to him titles of several properties to keep. The accused was by then an artisan in Thika Town and was doing very well. But when the business collapsed, he moved to Ruiru

Town where he carried out the same business.

After the death of their mother in 1987, the accused petitioned the court for grant of Letters of Administration. PW1 does not know, however, if the accused was granted the letters to administer their mother's estate.

PW1 also confirmed that their uncle Francis Waweru lives in Shamata Village, Nyahururu. After the death of their mother the only help they received from their uncle was in the form of advice. The accused used to complain that their uncle had formed a habit of demanding money from him and that the accused was not happy about it. She also confirmed that this is the same uncle who was intending to come and subdivide their properties in July 1999 and that his intention was to subdivide the said properties between the 1st deceased, accused and all their married sisters, a fact which accused resisted as, under Kikuyu Customary Law, married daughters are not entitled to inherit any of their parents' properties.

The accused gave his version of events relating to these properties. This explanation is contained in his unsworn statement.

He said that he lived with the 1st deceased for thirty years without disagreement. He recalled the year 1988 when he transferred one plot from their mother's names to his names, and in turn, the 1st deceased transferred other plots to him. He said the 1st deceased and him obtained a grant of Letters of Administration in the matter of the estate of their mother and that any subdivision of her properties had been sanctioned by the court. He then sold out the plots in 1990 which had been transferred to him. He therefore does not understand how that sale of his plots in 1990 could have been the motive in this case.

The prosecution's case in this respect is that the accused had initially been given title deeds of various properties to keep. But when his house was burgled into, the 1st deceased took possession of them, and refused to return to them to the accused upon demand. The accused has not said anything about this in his unsworn statement. The 1st deceased's refusal to hand over the titles to the accused was a matter which the accused was not happy about, I so hold.

The issue of their uncle intending to subdivide the estate of their mother in the month of July 1999 did not also please the accused. In fact, from the evidence placed before the court, I find that the accused was not happy with his uncle's activities which tended to favour the 1st deceased and their sisters. This was another matter the accused was not happy about. There is no reference to it in his unsworn statement.

The events of the night of 9th/10th July 1999 have been narrated by several witnesses. MARGARET WAIRIMU KINYANJUI (PW1) was woken up at about 3.00 a.m. by Mama Grace and told that the 1st deceased's house was on fire. She rushed there and found people standing outside the fence watching as the fire was fierce. On being told that the five deceased persons were inside the burning house, she collapsed and fainted. Upon meeting the accused later, accused was asked where he was when the fire started. Accused told her that he had been at the burning house trying to rescue those who were inside but because the fire was fierce he was unsuccessful. PW1 noted the accused limping and walking with the aid of a walking stick. He had injuries on the legs, hand and face. She also said she was furious with the accused for not shouting for help. People were demanding for buckets to collect water but the accused did not give them.

BENSON KYENGO MATHEA (PW2) lived near the accused and deceased. During the night of 9th July 1999 he heard a bang on the door of the 1st deceased's house. He then heard a woman's scream. He rushed out of his house with Mr. Kamau and Mr. Ndungu and they saw the deceased's house on fire. They all rushed there to assist but the fire was very fierce and they just watched it helplessly. When they arrived at the scene they did not find anybody around. They were the first people to arrive at the scene. After staying around for 15 minutes, the accused also showed up. Accused told them to leave the fire alone because he had also been there earlier and he was unable to extinguish it. Accused showed them the right part of his head, right leg and right hand which had been burnt. PW2 said they had not found the accused putting off the fire and they also noted that the black trouser and black coat which accused was putting on, were not burnt. Thereupon the accused returned to his house to charge those clothes. He

removed the black trouser and put on a white one. He gave no explanation for this action.

While under cross examination PW2 said that from the burnt house to his house was 100 feet. When he arrived at the scene he did not find anybody there. He did not know whether the accused had been there and had gone back to his house, some 30 paces away.

Similar evidence was given by Onesmus Mwenda Ngugi (PW3) John Gatu Kinyanjui (PW5) Lucia Ndaria Matheka (PW6) Virginia Wangare Njoroge (PW7) Joseph Mwaura Kamau (PW8) Mary Njeri Munga (PW9) and James Kamau Gitau (PW10).

The totality of their evidence is that they did not find the accused at the deceased's house trying to put out the fire or trying to rescue the deceased despite the fact the accused's was a mere 30 paces away from the burning house. The accused showed up after 15 minutes and claimed that he had tried to rescue the deceased, but the fire was fierce and he gave up. The accused also claimed to have been burnt on the right side of his head, right hand and right leg but his clothes were not seen to have been burnt. Finally, that the accused, for unexplained reason, returned to his house, changed into other clothes and went back to the scene, from where they went to report to the police, in the company of other people Stanley Kinyanjui Gatu (PW 18).

The accused gave an explanation in his unsworn statement of what he did during that night of 9th July, 1999. He said he was awakened at 2 a.m. or 3.00 a.m. by dogs barking on the road adjacent to his house. He went out of his house to find out why dogs were barking. It was then that he saw his brother's house on fire. He ran towards it. His brother's wife was screaming from inside. Upon arrival he kicked the door but it did not open. By then the fire had caught the iron sheets and it became fierce. Fire flames fell on him and he retreated and left the house burning. He and the people who had come just stood by the roadside and watched helplessly. He said because he had been burnt, he was taken to Ruiru Police Station and then to Thika District Hospital.

The above evidence must be taken together with the evidence of **TITUS NJENGA NDUNGU alias CEASER** (Pw4). It is his evidence that he started the business of selling petrol and diesel in jerricans in 1996. Sometimes early July 1999 the accused bought 20 litres of petrol from him for Shs.450/=. He knew that the accused had no motor vehicle, so he asked him where he was taking 20 litres of petrol to. The accused told him that he had a customer to whom he could sell it for a profit. Thereupon PW4 said he carried the 20 litres of petrol in a jerrican on his bicycle and took it to the accused's house in Gitambaa. It was on 10th July 1999 that he learnt the deceased's house had been burnt.

PW4 explained how on the 5th August, 1999 the police who were investigating this case arrested him and took him to his house from where a jerry can and hose-pipe were removed. He was taken to Ruiru Police Station and placed in the cells. He was then taken to CID Thika and interrogated for 8 days about how he had sold the accused petrol in early July 1999. He denied to have participated in the killing of the deceased.

When the accused elected to make unsworn statement in his defence, he made reference to the evidence of PW4 and to the 20 litres of petrol which he had bought from him.

PW4 did say in his evidence that the deceased Peter Mbutia Mwangi used to buy petrol from him for his matatu vehicle. But there is evidence from Margaret Wairimu Kinyanjui (PW1) said that at the time of the deceased's death he was not in the matatu business, which had had ran for only a few months. The 1st deceased was in the business of selling shoes.

Accepting the evidence of PW1 on this aspect of the case, I hold that the deceased did not buy any petrol from PW4 at the time of his death, as his matatu business had collapsed.

I accept, also, the evidence of Titus Njenga Ndungu alias Caesar (PW4) that he sold 20 litres of petrol to the accused or Kshs.450/= in the early July, 1999, which petrol he took up to the accused's home at Gitaamba at the accused's request.

The accused did not say in his unsworn statement what work he was doing in July 1999 for him to need petrol. It is the evidence of his sister PW1 that the accused was an artisan in Thika Town but when that business collapsed he moved to Ruiru town where he started the same business. In his statement under inquiry (exhibit 8) he said he is a blacksmith but by then he was unemployed.

There is then the evidence from the police officers who carried out investigations and collected various exhibits. P.C James Wachira (PW12) is the one who visited the burnt home of the deceased, collected the remains of the deceased's bodies from the scene and escorted them to the city mortuary and he removed fire debris from where those bodies were lying and took them to the Government Chemist Department. He handed them over to Paul Waweru Kangethe (PW17) a Government Analyst on the 21st July, 1999. After due analysis of the same Mr. Kangethe found remains of lead and bronine in the fire debris, which was indicative of petrol residues. Hence he formed an opinion that petrol was a possible accelerant for the fire. His Government Analyst report dated 10th August, 1999 is exhibit 15.

The prosecution then relied on an inquiry statement recorded from the accused by IP Jafred Makeche (PW 14) on the 6th August, 1999. The accused objected to the production of this statement on the grounds that he was tortured and forced to sign only blank papers. I conducted a trial within trial to determine the admissibility of this statement into evidence and ruled that the statement was recorded from him by IP Mateche according to the Judge's Rules. I admitted it into evidence as exhibit No.8.

In his unsworn statement the accused has again repeated the same allegations of torture to which he was subjected to.

I am satisfied that there is nothing placed on the record to show that indeed the accused was tortured and forced to sign blank papers by IP Mateche. I am fortified in this holding by the fact that in a charge and cautionary statement recorded by Chief Inspector Geoffrey Mitu Etale (PW11) from the accused on 9th August, 1999 which the accused did not object to be tendered into evidence as Ex.1 the accused had stated voluntarily:

"I Michael, have nothing to say other than what I said in the previous statement".

In his charge and cautionary statement exhibit No.1 therefore, the accused accepted what he had said in the previous statement recorded from him under inquiry on the 6th August, 1999. If he had merely signed blank papers, how would he have known what was later recorded therein, for him to be accepting the same three days later (9th August, 1999).

I know that the accused has repudiated his inquiry statement. But the way to deal with it is stated in a recent judgement of the Court of Appeal delivered on 3rd August, 2001 in the case of STEPHEN MUNGAI MACHARIA vs R. CR. APPEAL NO.1 OF 1994 thus:

"In this appeal the appellant's conviction was to a large extent based on his own confessions which he later repudiated during his trial. The law relating to retracted and repudiated confessions was stated by the Court of Appeal for East Africa in TUWAMOI vs UGANDA (1967) E.A. 84 at page 91 as follows: We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such confession be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that to confession cannot but be true."

The accused has confessed to have set the deceased's house on fire. He gave the reason for this. He said their uncle Francis had been demanding money from him, when he refused to say the uncle cursed him. Following that curse his family became unstable, with both his wives deserting him. There was also the intended subdivision of the property which the uncle had said he would do in the same month of July

1999, which had to be stopped.

The accused then explained how he bought 20 litres of petrol at Kshs.450/= from Caesar on 5th July 1999, kept in his house until the wee hours of 10th July 1999. He then went on to explain how set that house on fire after pouring petrol through the main door. Injuries which he sustained were as a result of the backward spil of petrol on his body.

This statement is detailed and could only have been made by a person endowed with special knowledge of those facts. I am satisfied that it is true.

If corroboration is required this is provided in the evidence on record, of the conflict between him and the 1st deceased over their mother's property, his disapproval of their uncle's role in the management of the said property, his buying petrol from Titus Njenga Ndungu alias Caesar and taking the same to his house, the fact of injuries on his body which he could not have sustained during an alleged attempt to rescue the deceaseds from the burning house.

In agreement with the unanimous decision of my assessors, I find that the prosecution has proved its case against the accused beyond reasonable doubt. I find Michael Mucheru Gatu guilty of murder and convict him accordingly.

It is so ordered.

Dated at Nairobi this 22nd August 2002.

A.G.A. ETYANG

JUDGE