



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 6 OF 2009

REPUBLIC

VERSUS

NGUGI MWANGI

JUDGMENT

On the morning of 15th of January, 2009, the mutilated body of Henry Ndungu (herein “the deceased”) was found at Kamahuha village in the then Murang’a South District. Earlier, at about 1 AM on the same date, screams had been heard in the neighbourhood apparently because robbers had invaded people’s homes and stolen goats. One of the homes that had been attacked was that of Kinya where the accused person worked as a farmhand.

The accused person was suspected to have killed the deceased at the time of the robbery; he was therefore charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code cap 63**. According to the charge and information filed in this Court on 28th January, 2009, the accused person murdered the deceased on 15th of January 2009 at Kamahuha in Murang’a South District within the then central province,

The state called twelve witnesses seven of whom gave more or less a similar narrative of what transpired at 1 AM on 15th of January, 2009. They all hailed from the same village as the accused person and in the neighbourhood of Kinya’s home. According to their evidence, they heard screams and they immediately responded by going to where the screams were heard from. Apart from the screams, **John Njogu (PW1)** in particular heard somebody say that some goats had been stolen; in fact, he realised when he ventured outside that his own goats had also been stolen. He testified that the neighbours who responded were many; they found a goat outside Kinya’s home which they returned to his home apparently because they thought it was his. According to this witness, people returned to their respective homes after about half an hour. In the morning after dawn, he heard that somebody had been murdered.

Jeremiah Ndungu(PW2) testified that they went to Kinya’s home where the robbery had taken place; he met other neighbours there. According to him, after about half an hour people went back to their homes and it is only in the morning he heard that somebody had been murdered.

Josphat Muchoki Chomba (PW3) and **Joel Karanja(PW6)** heard the accused person in particular scream saying that he had been attacked and the thieves had stolen his employer’s goats. **Ruth Wangare Nduati (PW7)** on the other hand, testified that in fact the accused person went to her home screaming that he had been attacked.

Prior to his murder, more particularly on 14th January, 2009 at about 11 pm the deceased had been seen

drinking at Unique bar at Kamahuha. **Raphael Macharia (PW8)** testified that he had seen him in that bar at the material time. He left the deceased drinking at about 11:15 PM. Shortly after he left he heard screams from Kinya's home. It is in the morning that they learnt that somebody had been murdered.

The government chemist, **Stephen Matinde Joel (PW9)**, testified that he analysed the deceased's blood sample and the traces of blood found on the accused person's clothing. According to him the blood on the accused person's clothing was of the same group as that of the deceased. He was, however, of the view that the accused person's blood ought to have been analysed too.

The investigations officer, **Emmanuel Kipkorir (PW10)**, visited the scene of crime and collected the deceased body on 15th of January, 2009. The officer in charge of the police station directed him to arrest 6 people including the accused person. Except for the accused person, the rest of the persons who were arrested were released and subsequently testified as state witnesses.

Dr Sila Kisingo (PW11) attached to Kenya Defence Force Memorial Hospital did the post-mortem on the deceased's body. He established that the deceased had 3 deep penetrating cut wounds on the left side of the head. He also had cuts on the right upper arm; cuts on the right fore arm; and fractures on the left side of the arms and multiple cuts on the left-hand fingers. There were three deep cuts on the head with the brain tissue exposed. In his opinion the deceased died of severe fatal head injury and damage to the brain.

Finally, **Dr James Mbugua Mburu (PW12)** confirmed that he had examined the accused person and established that he had no current or past mental disorder; in his opinion the accused person was capable of following legal proceedings in court and therefore he was mentally fit to stand trial.

When he was put on his defence the accused person gave sworn testimony and stated that indeed he was employed at Kinya's home as a farmhand. On 14th January, 2009 he was attacked by robbers and when he ventured outside the house, he found his employer's goats scattered. While there, someone, apparently one of the robbers, flashed a torch at his face. He screamed for help and the neighbours responded and came to his rescue. The robbers escaped and after sometime those who came to assist him left back to their homes. He too went back to sleep.

Just like everybody else, the accused person learned of the deceased's murder the following day. He testified that the deceased's body was found one and a half kilometers away from where he lived. He denied having anything to do with the murder. He also denied that any of his clothing was taken for laboratory analysis.

This is all there is in terms of the evidence before court; it has to be weighed against **section 203** of the **Penal Code** which defines the offence of murder; it states as follows: -

203. Murder

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

The burden on the prosecution is to establish beyond reasonable doubt that first, death of a person; second, that the death was caused by unlawful act or omission of another; and third, that it was premeditated.

The pathologist certified not only the deceased's death but also that the death was not natural; as noted, he opined that the deceased died of severe fatal head injury and damage to the brain. The deep cut wounds on the head that exposed the deceased's brain tissue must have been caused by another person. It is therefore not in dispute that, in the absence of any contrary evidence, the deceased's death was as a result of an unlawful act of another person.

The logical question that follows is whether there is sufficient evidence that the accused person

perpetrated this crime.

It is apparent from the available evidence, and as rightly admitted by the counsel for the state in his submissions, that the evidence against the accused persons is wholly circumstantial; in other words, none of the prosecution witnesses gave an eye witness account of the deceased's murder.

Circumstantial evidence is no less important merely because it is indirect; it is just as important as direct evidence and subject to certain precautions, a trial court can properly convict on the basis of this evidence. As a matter of fact, the Court of Appeal in **Ndurya versus Republic (2008) KLR 135** held this sort of evidence to be the best evidence; the court stated as follows:

Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition.

The court, however, cautioned that before it can be accepted as the basis for a conviction, circumstantial evidence must be narrowly examined; an inference of guilt can only be drawn from this evidence once the trial court is satisfied that there are no other coexisting circumstances which weaken or destroy that inference. This same position had previously been stated in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal of East Africa held that:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

The Privy Council in **Teper versus Republic (1952) AC 480** was of the same view; it reiterated that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt. At page 489 of its decision the court held that:-

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 inference.

If the evidence on record is considered from this perspective, two possible circumstances from which an inference of guilt can possibly be drawn are, first, the robbery that occurred at Kamahuha village and in particular at the home of Kinya either on the night of 14th January, 2009 or on the morning of 15th January, 2009. Secondly, the government chemist's findings on the items that were forwarded to the government laboratory for analysis. If I understood the submissions by counsel for the state correctly, it is only this latter aspect of evidence on which he relied for the proposition that since the stains of blood found on the accused person's clothing were of the same blood group as the deceased person's blood, a presumption of fact arose that the accused person must have murdered the deceased.

It is necessary to consider these two aspects of evidence in detail and determine whether they bear sufficient weight from which an inference of guilt on the part of the accused person can be drawn. On the question of robbery, the accused person's neighbours were consistent that they heard screams of someone shouting that he had been attacked. In fact, one of the witnesses **Ruth Wangare Nduati (PW7)** testified that she not only heard the screams but the accused person himself ran to her home screaming that he had been attacked. **John Njogu (PW1)** testified that he discovered that his own goats had also been stolen when he was awoken by the noise. The neighbours who responded proceeded to the direction the screams were heard from and ended up at the accused person's home. They found a goat outside the home which they thought it belonged to the accused person's employer and which they returned to his home. The accused person himself, testified that the goats were scattered apparently after the robbers invaded his home and therefore it is possible that this particular goat was one of those that had been scattered.

This evidence points to an irresistible conclusion that there may have been a robbery incident not only at the accused person's employer's home but also in his neighbourhood at the material time.

Besides the theft of **John Njogu's (PW1's)** and a goat they found outside the accused person's employer's home, the neighbours who responded to his cry for help did not find anything unusual. They were all consistent that they stayed for about half an hour before they went back to their respective homes. For all that time, they never noticed anything out of the ordinary and that it was not until the following morning that they learnt of the deceased's murder.

The question is, would one draw an inference of guilt on the part of the accused person merely because he was attacked by robbers and all he did was to raise an alarm for help? Would he be suspected of the murder when there is nothing in the evidence to suggest that the deceased could possibly have been murdered during the robbery? In my view, an inference of guilt cannot be drawn from these circumstances. The accused person cannot be deemed to be culpable of this crime simply because he was a victim of an attack and more importantly, when it has not been established beyond doubt that the deceased was murdered during this robbery incident.

It must be noted that the accused himself testified that the deceased's body was found one and half kilometres away from his home. The prosecution did not adduce any evidence to the contrary and therefore I have no reason not to believe him. If the deceased's body was found at a such distance away from the accused person's home, it would be implausible to link him to the murder by virtue of the proximity of the spot where the body was recovered from the accused person's home particularly if it is the prosecution case, as it appears to be, that the deceased was murdered during the robbery at the accused person's home.

The only other aspect evidence of circumstantial evidence against the accused person worth of consideration is the evidence of the government chemist. This officer testified that he received the blood sample of the deceased together with a blue jeans jacket and a pair of jeans long trousers belonging to the accused person. He analysed these items and established that the deceased's blood sample was of the same group as the traces of blood found on the accused person's clothing. He, however, indicated in his report that the blood sample of the accused person should have been submitted for examination.

I understand the government chemist's caution to have arisen from the fact that the accused person's blood may also have possibly been of the same group as the deceased's and therefore his report could not be taken as a conclusive proof that the blood stains on the accused person's clothing were the deceased's.

It is also noted that the accused person himself denied that any of his clothing was ever taken for analysis. Police Constable Emmanuel Korir who is indicated in the government analyst's report as the officer who forwarded the items for analysis neither made any reference to these items nor the exhibit memo he allegedly prepared and the report in response thereto when he testified. It is simply not apparent from the prosecution evidence where and how the items taken for government analysts were obtained. There is therefore doubt, and in this regard I agree with the accused person, that the accused person's clothing were taken for analysis.

In the in the face of this uncertainty, and taking into account the caution which the government analyst himself raised, there is no sufficient basis to link the accused person with the deceased's murder on the basis that traces of the deceased's blood were found on the accused person's clothing. There is simply no evidence to support of this proposition. Accordingly, no presumption arises as the learned counsel for the state submitted, that the accused person murdered the deceased based on the evidence of the government analyst.

In conclusion, I am persuaded that the circumstantial evidence the basis upon which the accused person was charged is too weak to justify any sort of inference of the accused person's guilt. Whatever has been presented as constituting inculpatory facts is cast in doubt and uncertain; those facts are open to various explanations or hypotheses that are remotely connected to the accused person guilt, if at all. In a nutshell, they are not the kind of facts that can be said to be incompatible with the innocence of the accused. To the

contrary, they prominently reveal co-existing circumstances that weaken or destroy what would otherwise have been an inference of guilt.

For the foregoing reasons, I am satisfied that the state has not proved its case beyond all reasonable doubt; accordingly, I acquit the accused person of the charge of murder under **section 215** of the **Criminal Procedure Code**. The accused person is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 13th January, 2017

Ngaah Jairus

JUDGE