



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 107 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL GITONGA GATHANGU.....ACCUSED

JUDGMENT

The accused herein, *Michael Gitonga Gathangu*, [hereinafter referred to as the accused and Michael interchangeably], is charged with the offence of murder contrary to **Section 203** as read together with **Section 204** of the *Penal Code*.

The *particulars* of the offence are that on the 22nd day of September, 2009 at Muthunguchi village in Thika District of the Central Province, murdered Boniface Kambutu Mwangi [hereinafter referred to as the deceased].

The state called 7 witnesses in support of its case.

Simon Karobia Mwangi (PW1), was on his way home when he met Michael Gitonga Gathangu holding a panga. Gathangu ordered both of them to produce their cell-phone. There was full moonlight. When his brother, Boniface Kambutu Mwangi, confronted accused he cut the deceased twice on the neck and the shoulder and on the cheek. The deceased fell down unconscious.

PW1 then rang his other brother, Peter Gichuche Mwangi who came in a pick-up and rushed the deceased to Gatundu Hospital. Unfortunately, the deceased passed on in the course of the night.

He then reported the matter to Gatundu Police Station. A contingent of policemen came to the hospital and moved the body to the Mortuary. The search for the accused then started in earnest.

On 16th November, 2009 PW1 identified the body of the deceased at Gatundu Mortuary for purposes of post-mortem.

He had known the accused who was his neighbour at home for the past 20 years. He knew him physically and also by voice. He recognized the accused on the fateful night and identified him in court as the assailant.

Peter Gichuche (PW2), a brother to the deceased was in bed on 22nd November, 2009 at about 9.00 pm. He heard screams of his nephew Wambui Mwangi. Who told him that the deceased was under attack. In response he ran towards the direction of the screams. On the way he met Ndirangu Thiga in a

pick-up van. Ndirangu was also responding to the distraught call. At the scene he found Ndungu Thiga, Peter Mwangi, Simon Karobia and the deceased. He noticed the deceased had injuries *inter-alia* on the left shoulder and on the face. On the way to Gatundu Hospital the deceased succumbed to his injuries. Simon Kerobia (PW1) divulged at the point in time that he identified the assailant as Michael Gitonga Githangu. He had known the accused since birth. He recognized him on the fateful night and identified him also in the dock.

Robert Nyanjui Kamamo (PW3) received a call from his son Peter Gichuche Mwangi on the effect that accused had been cited at Kitale Town hawking merchandise. That James Wanjama had spotted the accused on the street. He reported the matter to Kitale Police Station. The police swung into action and arrested the accused with the assistance of members of the public. James Wanjama identified the accused to the police at the time of his arrest.

Paul Waweru Kangethe (PW4), a Government Chemist, stationed at Government Laboratory, as an analyst examined various exhibits brought to him by No. 36620 P.C Chris Manda. His findings were as follows:-

1. Blood samples of the deceased was found to be of Group B
2. Trouser marked as item A belonging to the suspect was slightly stained with human blood of Group C
3. Jacket of the suspect marked item B was found to be moderately stained with human blood Group B
4. The underpant belonging to the suspect was slightly stained with human blood of Group B
5. a short marked as item B belonging to the suspect was found to be moderately stained with human blood but several attempts to determine the blood group was unsuccessful because:-
 - i. the blood sample could have been affected by soil which contain humid acid which interferes with blood grouping process.
6. Sample – item E indicated as belonging to the deceased. This could have come from the deceased after the injury.

He compiled a report on 6th day of October, 2011 which he duly signed and produced the same as exhibit 5.

Dr. Daniel Simba Nthakyo (PW5), Medical Officer of Health attached to Kenyatta National Hospital performed a post-mortem examination on the body of the deceased at Gatundu District Hospital Mortuary.

As a result of his examination he formed the opinion that death was occasioned by cardiac-respiratory failure due to massive external and internal bleeding following serious cuts. He dated and signed the P3 form which he tendered in evidence as Exhibit 6.

Raphael Karano Kamere (PW6), a qualified psychiatrist cum-Nursing Officer based at Gatundu District Hospital recalled the events of 7th December, 2009. He was brought one Michael Gitonga Gathangu. Upon examination he formed the opinion that he was mentally sound to stand his trial. He did not, however, assess his age as he was not requested to do so. Subsequently he filled the P3 form which he produced in evidence as Exhibit No. 7. **No. 36620 P.C Chris Manda, PW7**, was stationed at Gatundu Police Station as between 2007 – 2011. He received a report of the incident from the brother of the deceased. He sent his Deputy Ag. Inspector Gulicha to Gatundu District Hospital where the deceased had been rushed to. He observed injuries to the head and the neck. He asked the eye-witness (PW1) to report occurrence to the police station.

On 23rd November, 2011 his brother aforesaid took the police team to the scene. At the scene, they came across a pool of blood. On the Muthunguchi - Mwiri Marrum Road, they came across a pool of blood. PW1, who was an eye-witness, mentioned the accused as the assailant. Members of the public then took

them to the home of the suspect. They did not find him, but they managed to gain access to his house, facilitated by members of his family. Inside the accused house they found blood-stained clothes which they took along as potential exhibits. He produced the said clothes in evidence in the manner following:-

1. A green jacket marked MFI – 1A as exhibit 1 a,
2. A blood-stain brown jeans as exhibit 1 (b)
3. One striped black/white checked shirt as exhibit 1 (c)
4. Green underpant as exhibit to 1 (d).

He later escorted the above indicated exhibits to the Government Chemist for analysis. In addition thereto he also took blood samples of the accused, upon arrest, to the Government Chemist for analysis.

On 1st December, 2009 the accused was arrested at Kitale Town. On 3rd December, 2009 he collected the accused from Kitale Police Station and escorted him to Gatundu Police Station. Upon completion of investigations the accused was charged with the offence of murder.

At the close of the prosecution's case, having carefully analyzed the evidence tendered, I came to the conclusion that a *prima-facie* case had been made out by the prosecution thereby warranting the court to put the accused on his defence which I did after duly complying with the provisions of **Section 306 (2)** of the **Criminal Procedure Code**.

In his sworn statement the accused acknowledged that he knew the deceased. He further testified that at all material times he stayed at Kitale Town. The year 2009 he was engaged as a hawker in the said town. In the course of his duties three policemen arrested and detained him at Kitale Police Station. Three (3) days later he was transferred to Gatundu Police Station. In addition thereto he put forward an **ALIBI** that on the day he is alledged to have killed the deceased he was in Kitale as opposed to Gatundu.

On the available evidence, it is clear to me that Simon Karobia (PW1) was on his way home, in the company of the deceased on the night of 22nd September, 2009. There was full moon. Hence visibility was not a problem. The accused person herein, who was known to him and the deceased, ordered them to surrender their cell-phones. When they declined the orders the accused person herein cut the deceased, *inter-alia*, on the neck and shoulder. The accused fell down instantly. PW1 escaped and in the process rang his other brother Peter Gichuche (PW2), who collected and rushed the deceased to Gatundu District Hospital. However, the deceased succumbed to his injuries the same night.

Accused in his sworn statement raised an *alibi* that in the year 2009 and particularly the fateful night he was in Kitale town operating as a hawker.

I have carefully weighed the evidence of the accused as against that of the prosecution witnesses. I have particularly taken into due consideration the demeanour of the accused and that of the only eye-witness – PW1. Accused person appeared to me to be economical with the truth, while PW1 appeared to me to be a witness of truth. I make this findings in conformity with **Section 199** of the **Evidence Act**.

Against that backdrop of evidence, particularly of PW1, who had known the accused since birth, I find as a matter of fact that it is the accused who cut and severely injured the deceased who eventually succumbed to his injuries the same night. In he premises, I reject the *alibi* of the accused *in toto*. It was displaced by evidence of PW1. It has no ring of truth. The incident happened when there was full moon hence visibility was not in doubt.

Having done so, I accordingly find and hold, as a matter of law, that the accused herein, with *malice aforethought*, caused the death of the deceased by cutting him with a panga on the neck and shoulder on the night of 22nd September, 2009 along Muthunguchi-Mwiri Marrum road. I convict the accused of the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**.

Having taken into consideration all the mitigating circumstances of this case, as presented to me by learned counsel for the accused, I sentence the accused to suffer death as prescribed by the appropriate

law.

The accused has a right of appeal within 14 days from the date hereof.

Dated and ***delivered*** at ***Nairobi*** this 12th day of March **2015**.

N. R. O. OMBIJA

JUDGE