



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HC.CR NO.17 OF 2011

LESIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

PETER MUGAMBI.....ACCUSED

JUDGMENT

1. The Accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 22nd day of March, 2011 at Kirindara Sub Location Ntunene Location Igembe District, within Eastern Province murdered Ibrahim Mutembei Kubai.
2. The prosecution called 6 witnesses. The evidence of the prosecution was that the deceased was a brother of PW3. PW3 had employed the deceased, the accused and PW1 as guards of his miraa plants in different shambas. The deceased and the accused worked together to guard the same at Atheru shamba, while PW1 worked elsewhere alone.
3. The facts are that the deceased person disappeared around the 18th March, when he took the key to the gate of the Atheru shamba, where he guarded with the accused, to PW1. PW1 testified that the deceased gave him the key to that gate and asked PW1 to hand it over to PW3 because he was not going to work there again since the accused person had threatened him. PW1 testified that on the 21st March 2011, he received a telephone call from the accused person at 11.30 am, and that the accused told him that he met with the deceased coming from Kamiruru to buy goats.
4. PW2, Rose Ngina testified that on the evening 18th March, 2011 he was escorting one Caroline Nkirote when they met the accused person standing with two others. PW2 testified that she recognized the voice of the accused and also his facial features, as she had known him for 4 years. PW2 testified that she heard the accused telling the two other people with him that if he met Ibrahim Mutembei, he would either cut off his hand or kill him. PW2 testified that she went to one Reuben, a great friend of the deceased Ibrahim Mutembei, and told him to warn Ibrahim in regard to the information she had heard.
5. PW3 the brother of the deceased said that the deceased was his youngest brother and that he had brought him up since their father died when he was ten years old. At the time of the incident PW3 testified that he had employed the accused and the deceased to guard his miraa shamba at Atheru.

6. Pw3 testified that on the 19th March, 2011 the accused person told him that he had met with the deceased, and that the deceased had told him that he had noted two people, Josphat and Kalinga, were following him; and that he was afraid they might kill him.
7. PW3 testified that on 20th March 2011 the accused person found him in another farm and told him that the miraa in the Atheru shamba he was guarding was ready for plucking. PW3 stated that he told the accused person that the miraa could not have been ready because it was hardly a month since it was plucked. PW3 testified that the accused person then told him to be aware that he, the accused was only guarding half the Atheru shamba, but that he did not elaborate. PW3 testified that the accused person left but returned after 2 hours to insist that he must go to Athiru farm where the accused was guarding. PW3 stated that he promised the accused that he would go to Athiru farm the following morning but he did not do so.
8. PW3 testified that on 21st March, 2011 the accused found him in yet another farm where he was buying miraa, at around 11.30 am. The accused then told him that he had just met the deceased at Kamiruru.
9. PW3 testified that he was with PW1 on the 22nd March, 2011 when one, Isaiya Aloice called him and told him to go to his Atheru shamba. PW3 then informed the Area Chief and reported the matter to the police, and then he started looking for the accused that had the keys to the gates at Atheru Farm. He said that he was able to get the accused at 2 pm and that when the gate was opened; they went inside the farm and found a dead body. The left arm was amputated at the wrist joint. The legs had several cuts and the face had no skin. The body was decomposing. He said that he identified that body as that of his deceased brother. He said that he identified the body by the leather brown shoes, the black jacket and the brown trousers it was clothed in, saying that he had just bought the clothes and shoes for the deceased.
10. PW4 Ntuanina Karimi told the court that on 19th March 2011 at 4 pm, the accused person who was a neighbor, went to her home. The accused reported to PW4 that on the night before (18th) he had cut a person and that he did not know whether the person was dead or alive. PW4 testified that before she could make any enquiry from the accused, her mother came home and that is how the conversation ended. PW4 stated that she did not tell anyone about that information the accused had given to her until the body of the deceased was found.
11. PW5 was Dr. Koome. He produced the postmortem report that was prepared by Dr. Musomba on the 30th March, 2011. According to the report the body had putrefaction, i.e. was rotten. It had no skin on the face. It also had a deep cut on the head and multiple cuts on the left arm. There was left hypochondrium up to left ilium region with intestines protruding. Internally there was injury to jugular and carotid vessels leading to severe blood loss. The cause of death was severe injury to the neck to the jugular and carotid vessels, causing massive hemorrhage. The report was P.exhibit 1.
12. PW5 was the Investigating Officer. He stated that he received the report of the decomposing body from the brother of the deceased PW3, and the Area Assistant Chief. PW5 stated that he accompanied the OCS and the reportee to the scene where the body was. He said that he noted a stab on the stomach, and cut on the left thigh and missing flesh on the face. He produced 3 photographs of the scene which were taken by the police driver using his phone. The photographs a skin less face, amputated left wrist and an injured stomach also swollen. The body had clothing and shoes.
13. The accused person gave a sworn defence. He admits he was employed by PW3 to guard his miraa at Atheru Farm. He also admits that the deceased in this case worked with him in the same farm and in the same capacity. He said both of them guarded at night.
14. The accused stated that on 15th March, 2011 at 6 am he visited PW3 and informed him that the miraa was ready for plucking. The accused stated that on 18th March, 2011, he met the deceased at Kirindara, near his (accused) home and that he informed him that he feared two people, one Josphat and one Kalinga. Accused said that the deceased did not tell him why he feared them.

15. The accused stated that he told his employer, PW3 the story the deceased had given him. He said PW3 was also the brother of the deceased in addition to being his employer. He stated that PW3 promised to take action.

16. The accused stated that on the 22nd March he received a call from Daniel Matundu. Upon receiving the call, the accused said he boarded a motor bike and proceeded to Atheru, to PW3's shamba. He said that he found a large number of people including the OCS, Police Officers and relatives of the deceased. He said that he also saw a body at the scene. The accused said he was eventually charged.

17. The accused denied saying he would cut or kill the deceased as Rose alleged in her evidence that she had heard him saying. The accused argued that Caroline who was with Rose ought to have been called as a witness to confirm her story. The accused also said he had never quarreled with the deceased. Accused said that Rose (PW2) and PW3 were cousins. He also said that Rose's sibling had married his (accused) sibling and that therefore both of them knew each other very well.

18. I have carefully considered the evidence adduced by the prosecution and the accused defence which was on oath. I have also considered the submissions by both counsels. I will be considering the submissions at length.

19. The accused faces murder contrary to section 203 of the Penal Code. That section provides:

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

20. Malice aforethought is an important ingredient for the offence of murder. The same is defined under section 206 of the Penal Code as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

21. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to show that the accused person caused the deceased the injury which led to his death; and that at the time he inflicted the injury, he had formed an intention to cause death or grievous harm to the deceased. The Prosecution case relies on circumstantial evidence as there is no direct evidence of any eye witness account of how the deceased met his death.

22. Ms Nelima for the accused urged that the evidence against the accused was circumstantial, and that it did not meet the requirements to connect the accused with the death of the deceased. Counsel urged that it was negligent on investigators part to fail to investigate threats made by one Josphat and one Kalinga against the accused.

23. Mr. Mulochi for the prosecution submitted that the circumstantial evidence adduced by the prosecution met the required threshold. Counsel urged that the only threats to deceased were by the

accused as narrated by the deceased to PW1. Mr. Mulochi submitted that PW2 heard accused saying he would chop off deceased hand or kill him if he met him. Counsel urged that deceased was later found dead with one hand chopped off.

24. Ms Nelima cast doubt in evidence of PW2 that she heard the accused threaten to kill the deceased. Counsel urged that according to PW2's evidence she did not have a chance to see the face of the one whose voice she heard threatening the deceased.

25. Ms. Nelima relied on the case of Republic vs James Mwaura, Nakuru Criminal Case No. 73 of 2010 where Wendoh, J. observed:

For circumstantial evidence to found a conviction, it must meet the threshold set out in the case of Peter V. Republic [1952] AL 489 where Lord Marned said

'circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to case suspicion on another. It is also necessary before drawing the inference of the accused' guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

26. My learned sister, in the same cited case of Republic Vs Mwaura, supra, proceeded to examine other cases on the same issue. She then quoted Peter Mbate Obiero and Gideon Kamau Mburu v. Republic Criminal Appeal No. 177 of 2008 (Mombasa) where the court restated the safe guards to be applied when receiving circumstantial evidence and added that if the safeguards considered in the cited case Obiero & Mburu vs Republic, supra, are taken into account:-

"Circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact."

27. The cited case restates the threshold that must be met and the safeguards to be applied before circumstantial evidence can be considered sufficient to found a conviction. The cited case is good law and I agree to be persuaded by it.

28. The circumstantial evidence in this case is found in the evidence of witnesses and in particular PW1, 2, 3 and 4. Ms. Nelima for the accused has referred and submitted on the circumstantial evidence adduced in the evidence of PW2. The learned defense counsel urged that the evidence of PW2 did not irresistibly point to the accused guilt as PW2 did not see the face of the man she claims was the accused.

29. Ms Nelima submitted that Police failed to investigate the two people who according to her submissions, PW3, the investigating officer and the accused said had threatened the deceased, and that consequently that omission weakened the circumstantial evidence against the accused.

30. The alleged threats against the deceased by one Josphat and one Kalinga, were a creation of the accused himself. The accused told PW3 that the deceased had told him that the two men were stalking him and that he was afraid for his life. That information was given to PW3 by the accused on the 19th March, 2011. That was 3 days before deceased was found dead, and on the same day that the accused confessed to PW4 that he had injured someone, and was doubtful if he was alive.

31. I want to lay out the circumstantial evidence against the accused in order to enable an evaluation and analysis, and the application of a test to determine whether it was sufficient to found a conviction. The best way to test the circumstantial evidence adduced in this case is as was set out in ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) at page 5, where the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

30. The circumstantial evidence relied upon in sequence is as follows; On 18th March, 2011, the deceased went to PW1 and gave him the key to the gate of Atheru Farm, and asked him to return it to PW3 because the deceased was afraid of working with the accused because he had threatened his life. That was the last time PW1 saw the deceased alive.

31. On the same evening of 18th March, 2011, PW2 claims to have heard the accused threaten to chop off deceased hand or kill him, if he met with him.

32. On 19th March, 2011 the accused informed PW3 that he met the deceased and that he had told him that Josphat and Kalinga were staking him (the deceased).

33. At 4 pm on 19th March 2011, the accused visited PW4's home and confided in her to the effect that he, accused, had cut a person during the previous night, and that he did not know whether the person was dead or alive.

34. On 20th March, 2011 PW3 testified that the accused went to him and told him that the Atheru Farm he was guarding was ready for miraa plucking. PW3 stated that he told the accused it was not possible that the land was ready for harvest as it had just been harvested. PW3 stated that the accused left for 2 hours, then returned to inform PW3 that he should know that he, the accused was only guarding half the Atheru farm.

35. On 21st March, 2011, PW1 testified that the accused called him on the phone and told him that he had met the deceased at Kamiruru where he had gone to buy goats.

36. PW3 stated that on 21st March, 2011, at 11.30 am, while in another farm where he had gone to purchase miraa, the accused went to him and informed him that he met the deceased at Kamiruru.

37. On 22nd March, 2011 PW1 and 3 were together when the news of a dead body found lying at PW3's Atheru Farm was broken to them. The Atheru Farm gates were both locked, there was no breakage, and the person with the key was the accused. Indeed accused was the one who opened for them in order to access the farm to view the body.

38. That was the circumstantial evidence the prosecution relied upon. Does this evidence meet the test that the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established?

39. PW1, 2, 3 and 4 were independent of each other and the only connection was the one between PW1 and 3 of servant and master. The relationship alleged between PW2 and 3 of relatives came from the accused, and the two did not mention it in their evidence. The defence did not question them about it either. The fact is that what each of these witnesses testimony was different from the one another, and in that sense independent. I find that the circumstances from which an inference of guilt was sought to be drawn was cogently and firmly established in the evidence of the four witnesses.

40. Were the circumstances of a definite tendency unerringly pointing towards guilt of the accused; and did the circumstances taken cumulatively, form a chain so complete that there is no escape from the

conclusion that within all human probability, the crime was committed by the accused and none else?

41. I find that the evidence adduced by the prosecution shows that on the 18th March, 2011, the accused had threatened the deceased, and that was why he returned the keys to the gates of his work place to PW1. On the same evening of 18th March, 2011, PW2 heard the accused threaten to chop off deceased hand or kill him, if he met with him. PW2 is a relative of the accused, according to the accused. The deceased also said that they were in good relationship and that they knew each other very well. PW2 said she heard the voice and the words spoken and recognized the accused voice. Furthermore, she was not depending solely on facial appearance.

42. In the case of **CHOGE -VS- REPUBLIC [1985] KLR 1** it was thus held;

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it”.

43. The circumstances under which PW2 heard the accused threatening harm to the deceased are clear. She was escorting a cousin's wife. It was evening and definitely just after dusk. She was approaching the place the accused was standing with two other people. She was relaxed and she explains that she walked upto place the accused was as he uttered those words and then passed him. The words PW2 claims she heard, which she also uttered in court, is a whole sentence. I have no doubt in my mind that this witness knew the accused well, could recognize his voice, and that the words uttered were many and therefore sufficient to enable PW2 hear and recognize the voice.

44. Issue was made as to why the other lady Caroline was not called to testify. That would be speculative as there is no evidence whether this person knew the accused well enough to recognize his voice. The evidence of PW2 was admissible and can be weighed as any other evidence adduced. I do not agree that corroboration of PW2's evidence through Caroline was necessary.

45. The other circumstances are accused claims that he met with the deceased on 19th. This he told to PW1 and later PW3. On 19th March, 2011 the accused informed PW3 that he met the deceased and that he had told him that Josphat and Kalinga were staking him (the deceased). In my view the allegations that the deceased had told him that two people were stalking him was an attempt by the accused to remove attention from him.

46. The most telling circumstantial evidence was accused confession to PW4. At 4 pm on 19th March 2011, the accused visited PW4's home and confided in her that he had cut a person during the previous night, and that he did not know whether the person was dead or alive. The accused specifically denied the evidence of PW2. However that of PW4, he made no reference to it. Interestingly enough, Ms. Nelima did not make any submissions touching on this evidence either.

47. I have tested the evidence of PW4 against the rest of the evidence. It is clear that the deceased was last seen alive by PW1, and that was on 18th, a day before the accused confession to PW4. Further, it was on 18th, at 7pm or so that PW2 heard the accused utter the threats on deceased life. These circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

48. That was not all. There are the many visits that the accused paid to PW3, deceased brother. The information the accused gave PW3 clearly shows a person desperate to have PW3 visit his Atheru Farm. On 20th March, 2011 PW3 testified that the accused went to him and told him that the Atheru Farm he was guarding was ready for miraa plucking. When PW3 told the accused it was not possible that the land was ready for harvest as it had just been harvested, the accused left for 2 hours, then returned to inform PW3 that he should know that he, the accused was only guarding half the Atheru farm. The accused was

trying to create a reason for PW3 to go to Atheru. His claim that he was only guarding half the land was an attempt to exonerate himself from blame when the deceased body was discovered. The accused conduct to PW3 was that of a person who knew something but did not want to disclose to PW3. It was also the conduct of a person with a guilty mind.

49. The evidence of PW3 establishes that the accused was on duty continuously at Atheru shamba between 18th and 22nd March, 2011. That was from the day the deceased was last seen alive and the day his body was found.

50. PW3 stated that both accused and deceased had a place to sleep in the same farm and that the dead body was found 20 meters from the sleeping quarters of the two of them. Under section 111(1) and 119 of the Evidence Act, rebuttable presumption is created. The two sections provide

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

51. Going by the two sections herein above the accused person had a statutory burden to explain how the deceased who was found dead at the accused persons place of work, and where he (accused) also slept, and into which compound he had the only key, and the compound had not been broken into; the accused had a statutory burden in those circumstances to explain how the deceased met his death.

52. The accused did make an explanation and it was that from 18th when he told PW3 that the miraa was ready for harvest, he did not go back there to Atheru as there was nothing to guard. That has been proved to be a lie as there miraa was not ready for plucking. In any event as PW3's servant, he could not have given himself off until he saw the miraa being harvested. The evidence we have is that no miraa was harvested at the time in question. The accused explanation was therefore not acceptable.

53. Ms Nelima urged that there was no evidence adduced to show the motive accused may have had to cause deceased death. PW3 testified that early in March 2011, on a date he could not recall, the deceased went to him in the morning and reported that he had found the accused plucking miraa at Atheru Farm; that when the accused realized he had been seen he told the deceased to also pluck his own miraa and the two of them kept it a secret between them.

54. In regard to the issue of motive the prosecution is not required to prove the motive in a murder trial, but such evidence if available would constitute circumstantial evidence. In **Chogo vs Republic (1985) KLR1**, the court of appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory

which it was not."

55. I find that the fact the deceased caught the accused stealing from his brother and accused employer could be a motive for ill feeling against the deceased and the reason for this offence. I find that even if the motive accused may have had to injure the deceased was not clear, from evidence of PW1, 2, and 3 it existed. The evidence adduced is sufficient circumstantial evidence which when considered alongside the rest of the evidence establishes the required degree of culpability against the accused.

56. Ms Nelima raised issue with PW1's evidence that the deceased had told him that the accused had threatened him. Counsel urged that the statement did not amount to a dying declaration. That is correct. It was not a dying declaration. It was evidence to show that the accused had threatened the life of the deceased and circumstantial evidence of motive to commit the offence. That statement is consistent with PW2's evidence that she heard the accused threaten to kill or injure the deceased whenever and wherever he found him.

57. The accused threat to cause injury of death to the deceased is also consistent with PW4's evidence that the accused confessed to have cut someone on the night before 19th March, 2011 and wondered whether he was alive or dead. PW4's evidence is proof that the accused executed the threats he had uttered against the deceased. The threats were made on 18th March according to PW1 and 2 and on 19th morning one day later accused confessed to the execution of the threats.

58. Ms. Nelima was concerned that Carolyn, PW2's company when she said she heard the accused threaten deceased life, was not called as a witness. In **BUKENYA & OTHERS** 1972 EA 549 LUTTA Ag. VICE PRESIDENT held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

59. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case failure to call Carolyn is not fatal to the prosecution case.

60. Regarding failure to investigate Josphat and Kalinga. As I observed earlier, the two people were introduced in PW3's mind by the accused. PW3's did not find it necessary to have them investigated both before and after the incident. PW3 explained that the reason for that decision was because the two persons are friends to the deceased.

61. The other issue is in regard to identity of the dead body as that of the deceased. Ms Nelima expressed doubt regarding PW1 and 3's ability to identify the body as that of the deceased. The first reason for that is fact the face of the deceased had been skinned off. So there was no face on the body. The second reason advanced by the defence counsel is the contradiction in evidence of PW1 and 3 in regard to the deceased clothing.

62. P. exh. 2a to c are photographs of the deceased body. They clearly show that the skin of the face of the deceased had peeled off. PW3 on the other hand was clear that he did not identify the body by the face or facial appearance. PW3 was clear that he identified the dead body as the body of his brother Ibrahim Mutembei by the clothes and shoes he wore. He said the body was wearing brown leather shoes, black jacket, and brown trouser. He said that he had just bought the clothing and shoes for the deceased.

63. PW1 on his part said he identified the body as that of the deceased by the clothing and shoes. Pw1 said that deceased wore dark tan or tony red leather shoes, jeans jacket and trouser.

64. Ms. Nelima submitted that the evidence of what the deceased was wearing last as given in the

evidence of PW1 and 3 did not match the clothing in the photo. The photo shows that the deceased was wearing brown or tony red leather shoes, brown trousers and black jacket. The description given by PW3 tallies with the clothing and shoes the deceased was wearing as per the photo. PW1's description is only correct in regard to the shoes only.

65. I have carefully considered the evidence adduced by the prosecution and the defence. I find that the circumstantial evidence adduced against the accused was strong, and that it was the circumstances of a definite tendency unerringly pointing towards the guilt of the accused; and that the circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

66. I find the accused defence did not create any doubt in the prosecution case. I reject the accused defence.

67. I find the accused guilty of the offence charged of murder contrary to section 203 of the Penal Code and do convict him under section 322 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF JULY, 2014

LESIT, J.

JUDGE