



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Murder Case 120 of 2008

REPUBLIC.....PROSECUTOR
VERSUS

SAMSON KARAU NJERI.....1ST ACCUSED

JANE MUTHONI GITAU.....2ND ACCUSED

RULING

The body of the deceased, Joseph Mburu was found dumped in a river with multiple head injuries on 9th November, 2008. According to Dr. Oduor who performed the post-mortem examination, the deceased died as a result of severe head injuries due to sharp force trauma and bleeding. Both Samson Karau Njeri, the 1st accused and Jane Muthoni Gitau, the 2nd accused person are jointly charged with his murder.

At the close of the prosecution case, it is the duty of the court to determine whether the evidence presented by the seven witnesses disclose a *prima facie* case against the accused person?

According to the celebrated case of **Ramanlal Trambaklal Bhatt V. Republic** (1957) EA 332, a *prima facie* case is one on which a reasonable tribunal, properly directing its minds to the law and the evidence could convict if no evidence in rebuttal is called by the defence.

First, what is the evidence against the 1st accused? The 1st accused person's mother, P.W.3, Sophia Njeri told the court that on 21st November, 2008, the police went to her home in Narok looking for the 1st accused and seeking to know if he had a phone.

From the 1st accused person's room, the mother retrieved a phone and handed it to the police. She identified it as exhibit 1, a Nokia 3220 – Serial No.357623/00/856786/70517300. According to her, the 1st accused had told her that the phone belonged to his friend. The other evidence against the 1st accused was given by P.W.5, Cpl. David Wahome to the effect that on 21st November, 2008 a certain lady Mary Karohe, approached him at the police Patrol Base, at Kojonga and reported that the 1st accused person who was being sought by Naivasha Police Station was hiding in the mother's kiosk; that the same day, the 1st accused person's mother brought the mobile phone to the patrol base.

The final evidence implicating the 1st accused is that the investigating officer, P.W.6, P.C. Edward Kiambati learnt that on 8th November, 2008, the day the deceased is alleged to have died, the two accused persons were seen together and that the next day, 9th the 1st accused relocated to Kojonga in Narok from

Kinungi; that the mobile phone in question had numbers for the deceased person's relatives.

There being no eye witness in the matter, the prosecution is relying on the foregoing circumstantial evidence.

It is now established that circumstantial evidence can only be a basis for a conviction if that evidence points irresistibly to the guilt of the accused person and only if there are no co-existing factors or circumstances that would weaken that inference (of guilt). See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715.

It follows from the evidence against the 1st accused that he is linked to the death of the deceased by a mobile phone alleged to belong to the deceased. First, there is material contradiction as to where the phone was found. According to the 1st accused person's mother, she retrieved it from the 1st accused person's room when the police went looking for him. But according to Cpl. Wahome, the mother of the 1st accused person brought the phone to the police patrol base. The chain of possession is not complete.

Secondly it is alleged, without evidence, that the phone belonged to the deceased. The only feature is that there were numbers which belonged to the deceased person's relatives. No specific number and its subscriber were produced. There was no *prima facie* evidence that the phone belonged to the deceased.

The evidence that the 1st accused was hiding in the mother's kiosk is at best hearsay. The source of the information, one by the name Karohe, was not called as a witness. In any case, the evidence of Cpl. Wahome was that he found the 1st accused working in the mother's kiosk – not hiding.

Likewise it can only be hearsay evidence the testimony of P.C. Kiambati that he got information that the two accused persons were seen together on the 8th November, 2008. There is no evidence however, that the deceased was also with them. It follows that without the testimony of the person from whom he got that information, that evidence is of no value.

Turning to the evidence against the 2nd accused person, the only incriminating evidence came from P.W.4, John Macharia, to the effect that the 2nd accused called him and asked him to collect from her a jacket belonging to the deceased. When Macharia went to collect the jacket, the 2nd accused allegedly told him to tell the deceased “.....*that either the deceased or herself would die.*” The witness added that he learnt that the deceased and 2nd accused were friends after the death of the former.

Once more, that is the only evidence against the 2nd accused person. That evidence falls far below the threshold of the **Bhatt** (supra) case and the cases of **Kipkering Arap Koske** (supra) and **Simeon Musoke** (supra). Suspicion, it has been held many times, cannot be a basis of a conviction no matter how strong. Calling upon the accused persons to make their defence would be to seek to fill the gaps in the prosecution case.

Consequently, the charges against the accused persons are dismissed and they are acquitted. They are set free at once unless lawfully held.

Dated, Signed and Delivered at Nakuru this 9th day of October, 2012.

W. OUKO

JUDGE