



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Murder Case 112 of 2007**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**JOHN NDUNGU NJOKI.....1<sup>ST</sup> ACCUSED**  
**BENARD MWANIKI GAGIRI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

By an information dated 28/11/2007, John Ndungu Njoki and Benard Mwaniki Gagiri were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They are alleged to have murdered Simon Ngunyi Macharia on 16/6/07 along Kanu Street in Nakuru Town. The accused denied the offence. The prosecution called a total of six (6) witnesses in support of the charge. The accused persons opted to make sworn statements in their defence.

PW1, Purity Ngunyi, is the wife of the deceased. She recalled that on 16/6/2007, she had talked to her husband at about 10.00 p.m. when she told him to bring home medicine for their child. The deceased did not arrive home that night. On 17/6/07, about 6.00 a.m. she was called and informed that her husband had been beaten near Joes Inn on Kanu Street. In company of her father, PW2, Macharia Gichuhi, they went to the scene, found the deceased was still alive but unconscious. They did not find the deceased's hat, shoes, phone and wallet. They reported to Bondeni Police Station, then took him to Hospital where he died on the same day. PW1, identified the deceased mobile phone (PEx.1) and also produced the box in which it was bought (PEx.2).

PW2, Macharia Gichuhi, recalled that on 20/6/07, he identified the deceased's body to the pathologist before the post mortem was done.

PW3, Philip Cheruiyot Rono, an employee at Rift Valley Institute recalled that on 24/10/07, he was at work when three police officers went there with his workmate, Fredrick Maina and he was asked if the phone he had was his and he took them to the owner, who was Philip Sigei (PW4). It was a Motorola C118V. PW4 admitted having given the phone to PW3.

PW5, Dr. Daniel Wainaina of Eldroet East District Hospital produced the post mortem report on behalf of Dr. Kamau who performed the post mortem on the deceased on 20/6/07. Dr. Kamau found the deceased had sustained cut wounds on the head, a large bruise on the upper side of the head with a large depressed fracture which caused bleeding into the cranium. He formed the opinion that the cause of death was due to a head injury caused by a blunt object (PEx.4). PW5 examined both accused and found them to be mentally fit to stand trial – the reports are PEx.5 & 6.

PW6, PC Andrew Kimutai of Bondeni Police Station was the Investigating Officer. The first report was made to PW6 by PW1. PW1 gave him the box in which the deceased's mobile phone was bought (PEX.2). From there he started investigations by getting in touch with Safaricom which directed him where the deceased's phone was in use. They got in touch with the person (Philip Cheruiyot) who had a Motorola who led them to where the Nokia mobile was. He said that Safaricom gave him a number that the person with Nokia 110 was communicating with (a Motorola phone). He said that Philip Sigei led him to the person with the Nokia 110. Philip took him to Shabab and Lakeview, where Dominic who was in possession of the Nokia phone led them to John Ndungu, 1<sup>st</sup> accused and in turn John Ndungu led them to Benard (2<sup>nd</sup> accused) who was already in custody for another offence. He compared the phone with the serial number given by PW1 and they tallied. He retained it as an exhibit and the besides the accused did. In cross examination, PW6 told the court that one Simon Kamau led him to 1<sup>st</sup> accused as the person who sold to him the Nokia phone and in turn 1<sup>st</sup> accused led him to 2<sup>nd</sup> accused as the seller but 2<sup>nd</sup> accused denied having had the phone.

In his sworn statement, 1<sup>st</sup> accused denied having known the deceased or murdering him. He was arrested on 2/10/2007 and taken to the police station. He said that he had a Nokia phone but it was left at home and he never had the deceased's phone.

The 2<sup>nd</sup> accused also denied killing the deceased and was arrested on 4/10/2007 when a girl alleged he had stolen her phone.

Having considered all the evidence before me, it is not in doubt that there is no eye witness to the murder. This case turns on circumstantial evidence. The law is settled as to when the court can base a conviction on circumstantial evidence. In the famous case of **Rep. v Kipkering Arap Koske & Another (1949) 16 EA CA 135, at pg 16**, the court said as follows of circumstantial evidence:-

**“(i) That in order to justify on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and 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 always on the prosecution and never shifts to the accused.”**

The above principle was expanded in the case of **Simon Musoke v Rep (1958) EA 715** when it quoted the case of **Tepex R V R (2)(1952) EA 480 at pg 489**, where the court said:-

**“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 could weaken or destroy the inference.”**

The Court of Appeal has re-affirmed the above position in the recent case of **Peter Moate Obero & Gideon Kamau Mburu v Republic, Criminal Appeal No.177 of 2008 (Mombasa)**, when the court said:-

**“It is the essence of circumstantial evidence that, in order to justify an 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 guilt. It is also necessary before drawing the inference of the accused's guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference...with those safeguards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact.”**

In the instant case, the link between the death of the deceased and the accused is the recovery of the deceased's Nokia phone which was stolen during the robbery or murder. The question is whether the said phone was not found in the possession of the two accused.

PW6 first said that he found Dominic in possession of the Nokia phone and he led him to 1<sup>st</sup> accused. Later, in cross examination PW6, said that it is Simon who led him to 1<sup>st</sup> accused. Neither Dominic nor Simon Kamau were called as witnesses to explain how they came by the said phone or how they knew 1<sup>st</sup> accused had the phone.

PW1 also told the court that Philip Sigei (PW4) who was the owner of the Motorola phone led them where the Nokia Phone was found. Nowhere in PW4's testimony did he say that he led the police to the person who had the deceased's Nokia phone.

PW6 told the court that he did not procure any print out from Safaricom to confirm that calls from the deceased phone Nokia, were received on PW4's Motorola. No witness was called from Safaricom. The link between PW4 to the recovery of the Nokia phone is very weak. There is no evidence to corroborate the allegation.

The 1<sup>st</sup> accused denied having ever had the deceased's phone in his possession or giving it to 2<sup>nd</sup> accused. The 2<sup>nd</sup> accused too denied ever having had the said phone in his possession. Without the evidence of Dominic or Simon Kamau, there is a disconnect in the chain of events that led to the recovery of the Nokia phone and therefore to the guilt of the accused persons. The evidence on record does not irresistibly point to the guilt of the two accused persons as the people who took away the phone from the deceased and therefore the people who caused his death.

Further to the above, the deceased met his death on the night of 16<sup>th</sup> and 17<sup>th</sup> June 2007. The accused persons were arrested in October 2007, over 3 months later. An item like a phone is likely to have changed many hands within that period. There being no other independent evidence, to link the accused persons to the murder of the deceased, I find the evidence falls far too short of the threshold required in a criminal case, that is to prove its case beyond any reasonable doubt. The evidence does not point to the two accused to the exclusion of others.

I have considered the accused's defences, though they are mere denials, yet the burden of proof is upon the prosecution to prove its case beyond any doubt. In this case, the prosecution has totally failed to link the accused persons to the murder of the deceased. Both accused are hereby acquitted of the charge of murder under **Section 322(1)** of the **Criminal Procedure Code**. They are set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 7<sup>th</sup> day of November, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Wanjiru for the accused  
Mr. Omutelema for the State  
Kennedy – Court Clerk