



CRIMINAL

- Burden on prosecution is to prove a case beyond reasonable doubt
- When will circumstantial evidence be considered in criminal cases.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 44 OF 2007

REPUBLICSTATE

VERSUS

ERASTUS MURITHI.....1ST ACCUSED

JOHN KINYUA.....2ND ACCUSED

ALFRED MUTEMBEI MWANGIRE3RD ACCUSED

JUDGMENT

The three accused persons **Erastus Murithi, John Kinyua and Alfred Mutembei Mwangire** are

charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are:-

“Erastus Murithi, John Kinyua and Alfred Mutembei Mwangire on the night of 31st July, 2007 and 1st August, 2007 at Kiamiringa Village Kakathi Division of Meru North District within the Eastern Province jointly with others not before court murdered George M’Tompara.”

The three accused persons pleaded not guilty to the charges before them. PW1 Sabella Muthoni was selling chang’aa (illicit brew) at her residence on 31st July 2007 at Lakadhi in Meru North. She had customers from 7pm whom she was selling chang’aa to as they sat outside her residence. She said that there was a bright moonlight that night. At 11pm, there were five people present but who had not arrived together. Amongst those people was the deceased and a man identified as Gitonga. She heard the deceased threatening to kill the 1st accused. By then, the 1st accused had not arrived. Later, 1st and 2nd accused arrived at PW1’s place of evidence. These people that were the customers of PW1 were seated outside her house consuming chang’aa. PW1 went into her house to wash some glasses. On entering into her house, she heard commotion. She went outside where she found that the deceased had been killed. The matter was reported at Kanjo Police Station. On being cross examined, PW1 said that she did not see who killed the deceased. She however said that Gitonga who initially was there together with the deceased had a slasher. She saw him stepping on that slasher. She further said that she noted that the deceased body had a single cut on the neck at the back. After the deceased was killed, she only found the deceased body but the other customers had run away. On being re-examined, she stated that she saw Gitonga at times stepping on the slasher and at other times holding it. After the incident she said, she has never seen Gitonga in that area. PW2 Damaris Ntanyari said that on that day at 10pm she was informed by the 1st accused wife that there were screams that were coming from Kathure’s house. When she went to that house, she found the 1st and 2nd accused who at the request of Kathure were removing the deceased who was the husband of Kathure from the house. She said that they were actually pushing the deceased trying to remove him. The deceased was annoyed because of being removed from his wife’s house. The deceased asked for his shoes and clothes but only took away a jacket and left. Kathure that night slept with PW2 in PW2’s house because she said she was afraid. PW3 Joshua Nturibi is a neighbour of PW1. He stated in evidence that the building they occupy with PW1 and others is one but each has their room. Between 8pm to 10pm he said that he heard quarrel between the 1st accused and the deceased outside his own room. He had seen them there drinking alcohol as he entered his room. He heard the deceased threatening to cut the 1st accused. On hearing this, he went outside and he saw the 1st accused and the deceased with each holding a simis. He heard and saw Gitonga telling the deceased to stop quarreling. He then saw Gitonga cut the deceased using the slasher. The incident occurred about 3ft away from him. He said that he was able to see the people that were outside and further that they were people who were known to him. After Gitonga cut the deceased, other people who included the accused person run away. When he was cross examined, he said:-

“I confirm that I saw Gitonga cut the deceased. Gitonga is a person I know very well. We use to stay together. Gitonga is not charged..... Gitonga has not been seen since.”

PW4 John Mithika is husband of PW1. He was inside the house on that night and he recognized the voices of Gitonga and the deceased outside the house. They wanted to be served with alcohol. Later he came to know that the 1st accused also arrived there. At one point, his wife, PW1 entered the house. He then heard the deceased calling out to PW1 to come outside to collect payment for the alcohol he had drunk. Before PW1 went out, he heard somebody falling outside. He heard the deceased saying he was dying. He went outside and saw that the deceased had been cut on the neck. He later reported the matter to the police. PW4 Charles Njoka was working on miraa (khat) farm when the deceased passed him and

greeted him. A short while later, he heard the deceased wife Kathure screaming. The deceased was saying that he would not go away because it was night and because he had paid dowry for Kathure. The deceased later said he would collect his personal items the next day during the day in the presence of witnesses. PW4 said that he could tell that there were other people who were present with the deceased and Kathure. He recognized 1st accused through his voice. He said he had known the 1st accused since their youth. He also recognized the voice of the 2nd accused in that house who he also knew well and knew him by his alias name “Kila Jesu.” PW4 saw the 1st and 2nd accused escort the deceased from Kathure’s house to the road. PW4 saw 1st and 2nd accused return to Kathure’s house and they told Kathure that they had ejected the deceased. PW10 was Doctor C.K. Mwirabua. He carried out the postmortem of the body of the deceased. He found that the deceased has been cut from the back of the neck severing all the neck blood vessels which left the head supported by a piece of skin and esophagus. The spine had been severed. The cause of death was severe hemorrhage and the severing of the spinal cord. PW11 Cpl. Paul Chebet was the one who recovered the deceased body. He saw that the deceased had been cut on the neck from the back and that it was only the throat that was holding the head to the rest of the body. He drew a sketch map which indicated that the deceased body lay nearest to PW1’s house. From his investigation, he learnt that there was a quarrel that took place between the three accused persons Gitonga and the deceased. He found that the deceased was asking the 1st and 2nd accused why they chased him away from his wife’s house. PW11 in his investigation found out that PW1 when she realized there was a quarrel between her customers she locked herself inside her house. PW1 informed him that she then heard someone being chased around her house. Later she heard somebody fall down. 1st accused in his defence stated that on the day in question, he had spent his day at his farm. At 10.30pm, he passed by PW1’s house and requested for chang’aa. PW1 told him that there was none. He left the place and went home. He denied that he committed murder as charged and denied that he was there as stated by the prosecutions witnesses. 2nd accused also denied having committed the offence. He said that he spent the night in question at Ngumbani. He said that on the following day, he went to a shop in Kiamariga where he met people who demanded to know who he was. When he told them the people said that he was one of the aliens who were spoiling the area. He was arrested and taken to Kanjoo Police Station and charged with the present offence. He said that he was new to that area and did not even know the deceased. The 3rd accused said that on 31st July 2007 he was at the land’s office at Athiru in Maua. He had earlier on purchased land at Kiamariga but the vendors had failed to carry out the transfer of that land into his name. It was that issue that had taken him to the lands office. He said that one of the vendors was a brother to PW1. That brother told him to make any report over the transaction to PW1. He confirmed that on the night in question, he went to PW1’s home and took one glass of chang’aa at the cost of Kshs. 20/=. He denied the offence he faces and said that he was arrested at the instigation of the vendors who wanted to renege from the transaction of the sale of the land. The prosecution is required in a criminal case to provide evidence which prove the case against the accused persons beyond reasonable doubt. The evidence adduced by the prosecution’s witnesses does not show that the 1st, 2nd or 3rd accused killed the deceased. The evidence of PW3 was very clear that the deceased was killed by Gitonga who is still at large. PW3 was clear that on hearing a quarrel outside his house he looked outside and he saw Gitonga strike the deceased with a slasher. PW1 had confirmed in evidence that Gitonga had that slasher which at times he was stepping on and that on other times he was handling it. There is no circumstantial evidence pointing to the accused as the killers of the deceased. In a case decided by the Court of Appeal of East Africa, **Rex Vs. Kipkering Arap Koske & another** [1949] 16 E.A.C.A. 135 on circumstantial evidence, the court stated:-

“As stated in Wills on ‘Circumstantial Evidence’ 6th edition p. 311 “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.”

There can be no inference of guilt of the accused in this case. Although the accused were at the scene of crime, and although in particular the 1st accused was heard quarreling with the deceased, there was no

evidence that any of the accused persons killed the deceased. The only clear evidence is that of PW3 when he saw Gitonga kill the deceased. The prosecution has failed to prove a case against the three accused persons and I therefore acquit the three accused persons **Erastus Murithi, John Kinyua and Alfred Mutembei Mwangire** of the charge of murder. I order that they be set free unless they are otherwise lawfully held.

Dated, signed and delivered at Meru this 3rd day of March 2011.

MARY KASANGO
JUDGE