



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO 24 OF 1988**

**BETWEEN**

**REPUBLIC..... APPELLANT**

**VERSUS**

**KABI GALGALO MUGAWA .....1<sup>ST</sup> ACCUSED**

**ISMAIL GALGALO MUGAWA.....2<sup>ND</sup> ACCUSED**

**GALGALO MUGAWA .....3<sup>RD</sup> ACCUSED)**

**JUDGMENT**

September 1989, **Bosire J** delivered the following Judgment.

The charge is murder. The deceased person is Abdallah Kaliani. He died on the night of 24th and 25th September, 1987, at Hurara village, Laini Sub-Location, Galole Division of Tana River District.

The three accused persons, Kabi Galgalo Mugawa (1st accused); Ismail Galgalo Mugawa (2nd accused) and Galgalo Mugawa (3rd accused) were charged for the murder of the deceased. The 1st and 2nd accused were sons of the 3rd accused. All the accused, like the deceased hailed from Hurara village.

This matter started this way. The deceased was the paramour of Sofia Achora Omar (PW 2). PW 2 was the wife of Omar Mugawa (PW 1), a brother of the 1st and 2nd accused, and therefore the son of the 3rd accused.

On at least two occasions the deceased went to the house of PW 1 at night time and there had sexual intercourse with PW 2. During those occasions PW 1 was away at his place of work, at Bura. That was in or about September 1987.

On the material night, viz. 24th / 25th September, 1987, although PW 2 stated that it was in the month of August, the deceased went to visit PW 2 at her house. She was in the house alone with her two children, one aged six and the other 4 years 2 months, respectively. The time was about 2 am. They had sexual intercourse to their satisfaction. As the deceased put on his clothes and left.

What happened after he left is not clear from the evidence. Only PW 2 testified in that regard but she gave two different and conflicting versions of what happened.

In her first version PW 2 stated that after the deceased left, she shortly later heard him shout, in arabic, words which were in the form of a prayer.

She went out to see. She stood at her door step and looked outside. She saw the three accused. The first accused was armed with a club but the others were unarmed. She saw the 1st accused land several blows on the deceased using the club. The other accused persons were punching him with their fists. The deceased fell down dead. They then took his body and dragged it to a nearby bush where they abandoned it and from where the police retrieved it.

The second version was that when she went out to see what was happening she saw the three accused. The 3rd accused ordered her to return into the house, which she did. She did not come out therefore until day-break when she learnt of the deceased's death.

There is one common feature in both versions. PW 2 saw the persons who attacked the deceased, beat him up as a result of which he died. It was her evidence that it was a dark night on the material date, but that she was able to identify the three accused because she knew them well before.

She described the clothes each of them had on. 1st accused had a pair of shorts on, green in colour, and a vest of the same colour. The second accused had a red pair of shorts on with a vest of similar colour. The 3rd accused, she said, had a spotted piece of cloth as his covering.

PW 2 also testified that she observed each accused but was not able to see clearly what each accused had in his possession. She testified that she could not do so because it was fairly dark. She was, however, positive that the 1st accused was armed with a club.

The deceased's body was found in a bush about 50 yards from PW 2's house. He did not have any cut wounds, but he had swellings on the back of the neck and head. PW 2 testified that she went to see 3rd accused about the death of the deceased. The 3rd accused allegedly told her that he was afraid to report the death to the relevant authorities because 1st accused had prohibited him from doing so. 3rd accused later denied PW 2 ever went to see him in that regard.

There is other evidence on record, however, to the effect that the 3rd accused is one who reported to Said Maro Godhana (PW 3) about the presence of a dead body of a person on his land. PW 3 came to the scene with two or so other people. He questioned PW 2 about it. PW 2 is alleged to have denied she had any information as to who was responsible for the deceased's death.

PW 3 called the police. They came to the scene. They also questioned PW 2 about the deceased, but she denied having had any knowledge as to who was responsible for his death, although she admitted she had dragged his body from outside her house to the nearby bush. It is not clear why she did not mention the names of the accused persons.

The police suspected PW 2 and arrested her as a suspect in the murder of the deceased. She was detained over night at Hola police station, along with her husband. It was while in police custody that she made a statement implicating the three accused persons. She was then released, and so was her husband. The accused persons were then arrested and later charged with the present offence.

Each of the three accused denied the offence. They explained, in their respective unsworn statements, where they were on the material night. Each of them raised an alibi.

The crux of this case is identification. The prosecution case is principally based on the testimony of PW 2. All the defence counsels, Mr Wahome for 1st accused, Mr Swaleh for the second, and Mr Obonyo for the 3rd accused, attacked PW 2 as a witness. It was their submission that she was an unreliable witness and therefore her evidence should be treated with circumspection. They pointed out contradictions in her evidence and aspects of it in which she had shifted her position on material particulars.

The law on witnesses is clear. A witness may be believed in one aspect and yet be disbelieved in another.

There may be contradictions in the testimony of a witness, yet the court believe him or her in some other material particular. (*Kater Singh Bharji & Another v R* (1953) Vol 20 EACA 134). It does not therefore, necessarily follow that since PW 2 contradicted herself in some particulars, then she is wholly an unreliable witness. Her evidence has to be considered in light of the existing circumstances, and together with other evidence on record.

The prosecution's case was substantially based on evidence of identification at night time by a single witness, PW 2. A trite law that where such is the case the evidence must be tested with greatest care (*Abdulla Bin Wendo & Another v R* (1953) 20 EACA. 166). Lord Widgery L CJ, in the English case of *R. v Turnbull* [1976] 3 WLR 445, laid down the test in dealing with such evidence. He said:-

“How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a procession of people? Had the witness ever seen the accused before? How Often? If only occasionally, had he any special reason for remembering the accused?.....”

In the instant case there is no doubt that the offence was committed at night time. PW 2 testified that there was inadequate light. She had difficulty observing what each accused had in his possession. She said so. Her mind was hazy as to whether or not any of the accused spoke. It is, therefore, correct to say that she identified the accused persons by visual identification alone.

It was PW 2's evidence that the deceased after finishing having sexual intercourse with her, stood up and left. For one reason or another she followed him. She saw him being beaten up. She testified that she was standing at her door-step, 4 paces away from the accused persons, and was able to clearly identify them. They are people she knew well before, so she said, and was able to recognize them.

Whether or not to act on PW 2's evidence largely depends on her conduct after the material night. She woke up, went to a dispensary with her child who was unwell and who needed treatment, and returned home at about 4 pm before notifying anybody about the deceased's death. She thereafter gave contradictory accounts of what she knew did happen to the deceased.

To PW 3 she denied any knowledge of who killed the deceased. She is alleged to have told administrative policemen in PW 3's presence that the deceased died because of “*Tego*”, a form of witchcraft which catches illicit sexual partners when they go to the residences of their paramours. To the police she at first denied she had any knowledge of who killed the deceased, but later after being arrested she changed her story and named the three accused.

Sir Henry Webb CJ in the case of *R v Mohamed Bin Allui* (1942) 9 EACA 72, made remarks to the effect that the report which an identifying witness first gives to the police is significant in testing the identification of the accused by the witness in subsequent legal proceedings. PW 2 was a prime suspect in the murder of the deceased. The deceased was killed at her house. She had every reason to feel apprehensive that she would be charged for the deceased's murder. It is possible she implicated the accused persons to save her skin. From her conduct in the witness box it was clear to me that there was something which she was withholding from the court. That coupled with the fact that her evidence of identification of the three accused is a bit jumbled up, I am disinclined to act on it *per se* to found a conviction. Corroborative evidence is necessary. Mr Metho in his submission did not think such corroborative evidence is necessary considering the witness's background; i.e., being a simple country woman, and the fact that the death of the deceased may have terrified her. Also the fact that she was unfamiliar with the court atmosphere when she testified on the first day during the hearing of this case.

The accused persons face a capital charge. Evidence must be clear before a court can find an accused facing such a charge guilty of the offence. PW 2 may have been terrified as Mr Metho alleged. She may have been nervous during her first appearance in court, as she stated, as to have given conflicting accounts on some material particulars. Those to my mind are circumstances which render it absolutely necessary to look for and find corroborative evidence before her evidence can be acted upon to found a conviction against the accused persons.

There is no other independent and direct or circumstantial evidence which connects or tend to connect the accused persons to the offence. They were arrested because PW 2 named them. To my mind it will be unsafe to rely on solely the evidence of PW 2 with regard to the identification of the accused persons to hold that the accused persons or any of them assaulted the deceased as a result of which he died. They may have and possibly did assault the deceased as PW 2 stated. However, considering the seriousness of the charge much weightier and more reliable evidence is necessary. PW 2's is not such evidence.

In the foregoing circumstances I am not satisfied that the three accused persons were positively identified as the deceased's assailants. I find that the evidence falls short of that required to sustain a conviction for the offence charged or any other offence. Consequently I agree with the both assessors that the three accused must be acquitted of the offence charged.

I accordingly acquit the three accused of murder contrary to section 204 of the Penal Code. I find no basis for finding them guilty of any lesser charge, with the result that they must be set at liberty forthwith unless held under other lawful warrant.

**Dated and Delivered at Mombasa on September 1989**

**S.EO BOSIRE**

**JUDGE**