



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 67 of 2004

REPUBLIC PROSECUTOR

VERSUS

GEORGE MWANGI GACHUKI

PETERSON MAKAU KIMELI ACCUSED

JUDGMENT

The Accused person herein was initially jointly charged with another accused person who was found not guilty vide my ruling of 1st March, 2005 under the provisions of Section 306 of Criminal Procedure Code.

The Accused is alleged to have murdered Anthony Njue Mwaniki at Lenana Forest Karen, Nairobi between 5th December 2004 and 18th March, 2004.

It is sufficiently established from the evidence, that as from night of 5th December 2002 the named deceased has not been seen by the family members and admittedly he was with the accused along with another friend on the night of the said date. I advisedly used the word 'admittedly' because the accused in his unsworn statement stated that he was with the accused at a bar and at around 12 p.m. he drove his vehicle and dropped him at his home indicating to return his vehicle the next day. The named deceased has not been found since that day.

In any murder case, first and foremost the Prosecution has an obligation to prove that the deceased named in the charge-sheet has actually died. In short the *actus reus* has to be proved beyond any reasonable doubt.

The prosecution has shown evidence that in Lenana Forest some clothes and documents showing names of the deceased were found by police with a skull lying at a distance of about 5 to 6 feet from those items. The prosecution tried to prove that the skull found belonged to the named deceased. They called three witnesses. First was Dr. Joyce Nyathae Karugu (PW.5) a dentist who had treated the named deceased. She described the treatment she had given to the deceased and produced his medical record (Ex.11). She gave an opinion, when shown an X-ray of a skull, that the X-ray was that of her client, the named deceased. I must note however, that there is no evidence how and when and by whom this X-ray was taken. Moreover, no explanation was given by the prosecution as to a date appearing on the X-ray which was shown to be 11th January, 1921.

It was further shown by production of post mortem report prepared by Dr. Wasike that the skull was that

of a human being but she recommended a DNA test to establish whether it belonged to the named deceased.

Rose Nyabwana Shikuku (PW.7) a Government Analyst was instructed to generate DNA profile from clothings of the named deceased and blood samples of his parents. On examinations she did not find any blood stains on the clothings and her attempts to generate DNA profile from bone from the skull were unsuccessful. Thus the prosecution is unable to show beyond reasonable doubt that the skull found by police was that of the named deceased.

The prosecution also tried to show that the named deceased was killed two years earlier by calling two witnesses namely Hillary Mwaniki Gachohi and Stephen Kagaro (PW.1 and PW.2).

PW.1 testified that in month of November, 2002, while he was playing cards with PW.2 and other friends in the forest, another young man informed them that he found a dead body in the forest near a tree which he described as 'a dead tree'. He and PW.2 went at the place and did not find anything. But on 17th November, 2002 he was informed by PW.2 again that he had found some clothings in the forest. They went back to the forest and found a pair of jeans, (EX.5), pair of shoes (Ex.6A and 6B) a wallet, watch, his Identity card, employment card, Internet Cyber card and membership card of a marketing society (Ex.1 to 4) which bore his names. I may state here that those items were identified also to be of the named deceased by brothers of the named deceased (PW.3 and PW.4)

Later on PW.1 was again informed by PW.2 that he found a skull in the forest when he was cutting rafters. They went to the place and he saw a human skull. However, he did not mention that they saw it near the items mentioned earlier. He was scared to inform this discovery to the police until March, 2004 when in an issue of Nation Daily Newspaper an article was published containing story of missing persons. From the name stated in the article, he was reminded of the items – documents he found in the forest. He then decided to inform the Nation Reporter which he did. Police was informed and he led them to the place where the items found by him in November, 2002 were still there but tattered due to lapse of time.

PW.2 reported almost the same story as testified by PW.1. But I have to note that instead of November 2002 he specifically mentioned that it was around 5th or 6th December, 2002 that they were informed by a young man about the items. He also stated that he removed Shs.600 which were in the wallet on the scene.

None of them had seen a body except a skull after some time, and that too, not near the place where items were found by them earlier.

PW.3 Robert N. Mwaninki, an elder brother to the named deceased testified as to how, after getting information from the accused that the named deceased was not at his home, the family mounted a fruitless and frustrating search to locate the missing brother. They were then asked by the police in March, 2004 that some clothings were found and he identified the same as belonging to his missing brother.

PW.4 Peter Mwaniki, another brother of the deceased was called by the accused that the named deceased was not at his place when the Accused went to drop his missing brother's vehicle. The Accused made two attempts to go back to the house of the missing brother and when he failed to find him, the accused decided to call him. PW.4 gave further evidence that when he went to the house of his missing brother his watchman told him that he did not see his brother being dropped that night by any one on his vehicle. However, the said watchman has not been called by the Prosecution to confirm this

testimony and it will be unsafe to accept this part of his evidence.

PW.4 knew the accused as his brother's colleague and a friend with whom the named deceased used to meet socially. He also agreed that his brother used to drink but not so much as to be unable to drive. He further agreed that at the time of his disappearance he was employed by a company in Kigali, Rwanda and that his brother went to Kigali for a month to get training. However, no details of this company are before the court.

Other Police officers except for stating how they went to the scene and found the items mentioned earlier did not shed much light on the case.

As against this evidence, the accused in his unsworn statement detailed the events of 5th December, 2002 up to 12 p.m. He stated that he was invited by the named deceased to have drinks. He went there with a friend and they drank upto 12 p.m. At the request of the named deceased, he drove his vehicle and dropped him home, then dropped the friend Mr. Kimeu who was with them and went home. Next day he went to drop the vehicle but found the house open. He went again in the afternoon but found the same thing. He locked the house and took a mobile which was on a table and informed (the named deceased's) brother. Then he further stated how he was initially arrested and released on Police bond. He denied having murdered the named deceased.

This case basically rests on circumstantial evidence. I have already observed earlier that the death of the named deceased has not been sufficiently proved and the prosecution has not discharged its onus on that issue.

Even otherwise, considering very carefully the evidence and submissions made, I cannot state that the Prosecution has shown a cogent link of the accused with the disappearance of the named deceased. I have outlined contradictions in the evidence of PW.1 and PW.2 as well as the important fact that skull found by them was far from the place where they found clothings. It is also very difficult to accept the fact that after a lapse of two years, the items produced were found on the same place. Be that as it may, stretching the evidence to the utmost, anything that the Prosecution could be said to have shown is suspicion, and nothing more.

It is trite law that the conviction cannot be sustained on suspicion alone but only on facts on record.

In the case of *Okethi Okale and Others –v- R. (1965) EACA 555 at 557, the Court of Appeal* observed and I shall quote:

“ for in every criminal trial a conviction can only be based on the weight of evidence adduced and not on any fanciful theories or attractive reasoning.”

Recently, in the case *Joan Chebichii Sawe –Versus- Republic Criminal Appeal No.2 of 2002 (Unreported)* Court of Appeal relying on the case of Mary *Wanjiku Gichira –V- Republic (Cr. Appeal 17 of 1998 Unreported)* reiterated very emphatically that **“Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”**

Without much ado I can safely say that there is no evidence adduced in this case, which can point an irreversible guilty finger at the accused person before me.

In view thereof, I have to find which I hereby do find, that the accused is not guilty of the charge leveled against him and I acquit him accordingly. I also direct that he be released forthwith unless held

otherwise as per law.

Finally, I add that the assessors were also of the same view.

Dated at Nairobi this 26th day of April, 2005.

K.H. RAWAL

JUDGE

24.6.2005



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