



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 47 OF 2010**

**REPUBLIC**

**VERSUS**

**PETER MAINA GICHURI.....1<sup>ST</sup> ACCUSED**

**JAMES GICHUKI MWANGI.....2<sup>ND</sup> ACCUSED**

**SIMON GIKONYO.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

The accused were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. According to the information, on 14 November 2010 at Mucharage village within Nyeri (County) jointly with others not before court, they murdered Peter Waweru Kirera.

The accused pleaded not guilty after the psychiatrist, Dr. Richu Mwenda (PW11) examined them and was satisfied that they were mentally fit to take plea and stand trial.

Apart from Dr. Mwenda whose role was limited to examining the accused's mental status, the state called ten other witnesses to mount its case against the accused.

**Christopher Kibe (PW1)** testified that on 14 November 2010, he was at a bar called Honey Pot, at Mucharage shopping centre together with Simon Mwangi (PW2), Stephen Mbau Gakuna (PW6) and the deceased. The three accused came to the same bar and asked the deceased to buy them beer. The deceased told them that he did not have money. Kibe walked out of the bar and when he returned he found the deceased bleeding from the nose. The deceased told him he had been hit by the 1<sup>st</sup> accused. The bar owner told them to get out.

As they left to go home, between 8. P.M. and 9 P.M., they were confronted by seven people. Among them were the accused and one Gathenya. The accused together with those people they were with beat them with crude weapons. As they ran away the deceased fell down. He attempted to rescue the deceased but Gathenya hit him with a metal bar. He managed to escape but left the deceased behind.

Kibe testified further that there was some light from the bar and from a school. After he escaped from the unruly mob, he went home and told his brother Stephen Mbau Majara (PW5). They went back to the scene and found the deceased's body lying on the ground. According to him, the deceased was already dead. The assailants had left the scene. They called the police and after they came, he led them to the homes of the accused. Their homes were about 2 kilometres from his home. Since they hailed from the same village as Kibe, the accused were familiar to him. The body of the deceased was taken to Mukurweini mortuary.

Kibe also testified that the incident could have happened at 10. P.M. but he was not certain of the exact time it happened because he did not check his watch. It was his evidence that they were attacked about 100 metres from the bar and he could identify the attackers because there was sufficient electricity light.

**Simon Mwangi Wambui (PW2)** testified that he was with the deceased and his brother on 14 November 2010 drinking at Honey Pot bar. There were some exchanges between the 1<sup>st</sup> accused and the deceased. They end up fighting as a result of which the owner of the bar ejected them from the bar.

He was with the deceased when they were attacked by the accused and other people. He was able to recognise the accused

because of the light from the bar. He managed to run away but on the following day he learnt that the deceased died.

**Evanson Mugweni Wahuri (PW3)** operated a motorcycle transport business and that while he was travelling home on the material night he saw someone whom he recognised to be the deceased lying on the road, about 80 metres from Honey Pot bar. He went to the deceased's home and informed his father. Together with the deceased's father and one Wachira who had led him to the deceased's home, they went to the scene. They found the deceased dead. He testified too that he went and brought the chief to the scene. The police came later and were led to the accused's homes by the deceased's brothers.

The deceased's father, **John Kirira Gakira (PW4)** testified that he was in his house sleeping on 14 November 2010 when at about 11.30 P.M. Mugweni (PW3) and Wachira woke him up. He accompanied them to the scene where his son was found dead. He informed the chief who in turn informed the police. They took the body to the mortuary. He said the scene was lit as there were lights from apparently a nearby school.

**Stephen Mbau Majara (PW5)** testified that on 14 November 2010, between 7.30 P.M. and 8 P.M. Kibe (PW1) told him that he (Kibe) and the deceased had been attacked. He went to the scene and found their father and the area chief had already arrived. He accompanied the police as they arrested the accused. He also went to the mortuary on 16 November 2010 to identify the deceased's body during the post mortem.

**Stephen Mabua Gakuna (PW6)** testified that he was present at a bar at Mucharage when the 1<sup>st</sup> accused and the deceased were quarrelling. This was on 14 November 2010 at about 9 P.M. He separated the two because, according to his evidence, they were his friends. He then left accompanied by the deceased and the deceased's brother to go home. On their way home they met a group of what he described as 'young men'. They were about 10 meters from the bar. They started attacking them with runguns. They ran back to the bar. However, he could not recognise any of the young men.

The chief of Chinga Northwest location, where the deceased hailed from was one John Kimani Kiragu (PW10). He testified that on 14 November 2010 at about 11 P.M. he was informed of the deceased's body lying by the road side. He proceeded to the scene with an elder and found the deceased's body there. He informed the officer commanding Chinga police station who responded by sending scenes of crime officers. The deceased's brother, Kibe (PW1) is the person who identified the accused as the people who had attacked the deceased and it is as a result of this information that the accused were rounded up the same night and arrested (PW1). He also testified that there was sufficient light at the scene.

The investigation officer Inspector **Hannington Mwazonga (PW7)** testified that on 14 November 2020 at about 9.50 P.M. he received a call from the chief, Kimani Kiragu, who informed him that there was a fight at Mucharage centre and that somebody had been beaten to death. He went to the scene with police constable Benson Kasaine and police constable Stephen Njoka. It was his evidence that at the time they arrived at the scene, the deceased was still breathing though unconscious and that blood was oozing from his mouth and nose.

He got the names of the accused from village elder and members of the public. He arrested the accused but one other suspect ran away. According to him the deceased's body was about 250 meters from the bar. However, the scene was lit with electricity light.

**Police constable Benson Kasaine (PW8)** confirmed in his testimony that indeed they visited the scene of crime where they found the deceased's body. The deceased had an injury on the neck and he was bleeding from the mouth. He also testified that the scene of crime personnel came and photographed the scene. He testified also that there was a security light at the market and therefore the scene was lit. He was among the officers who arrested the accused. One other suspect whom he named as Wagathanya escaped. It was also his evidence that the body of the deceased was about 30 to 40 meters from Wazee Hukumbuka bar.

The scenes of crime officer, **Corporal Henry Wilson Masake (PW11)** testified that he proceeded to the scene at about 1 A.M. He went to the scene and took six photographs of the body from different angles. He presented the photographs in court as exhibits together with his report of the crime scene.

**Dr. Kimathi Paul (PW9)** produced a post-mortem report prepared by Dr. Migwi. According to this report, the deceased was a male African of about 25 years old. He was well built and of good nutrition. During the autopsy, it was observed that the deceased had sustained bruises on the left temporal region and left thoracic region of his body. The left lung was compressed by haemothorax. There was also massive haemopericardium. In the doctor's opinion, the cause of death was 'cardiac tamponade secondary to an injury to the heart (haemopericardium)'. The heart was compressed in its cavity.

The three accused opted to give sworn statements when they were put on their defence.

The 1<sup>st</sup> accused admitted that he was at Mucharage shopping center on the material date and that he had been drinking at Wazee bar at the centre till 9 P.M. when he left to go home. He was arrested by the police at 2 A.M. The police did not tell him why he was being arrested. They took him to Kariko centre where they brought what he described as "something covered in a blanket" in the police vehicle. At 6. A.M. he was brought to Chinga police station where he was informed that he and others had murdered the deceased. He confirmed that indeed there was electricity light at the shopping centre. He denied having been involved in the deceased's murder.

On cross-examination, he said Wazee bar was near Honey Pot bar. He also admitted seeing the deceased at Honey Pot bar. The deceased was seated with his brother Kibe (PW1) and Simon Mwangi (PW2). He admitted talking to the deceased. There was a disagreement between him and the deceased because the latter wanted him to buy him beer yet he did not have money. When

they physically confronted each other, they were ejected from the bar. The deceased was with his brothers. He admitted that there was a fight but that he was not involved in the fight. It was his evidence that when he left Honey Pot bar he went home where he arrived at 9 P.M.

The 2<sup>nd</sup> accused testified that on 14 November 2010, he had been at Kariko shopping centre but left for his home at 11. A.M. He was at home for the rest of the day. He never went to Mucharage shopping centre on the material day. He denied knowing the deceased or his co-accused. However, during cross-examination, he admitted that he knew the deceased but that they were not friends.

Similarly, the 3<sup>rd</sup> accused denied having gone to Mucharage on the material day. The police came for him at 3 A.M. He was told that he was involved in the murder of the deceased. It was his evidence that he was not at Mucharage on the material day and therefore he could not have been involved in the deceased's murder or in any fight.

And that is as far as the evidence went.

The accused, as noted, have been charged under section 203 of the Penal Code as read with 204 of the same Code. These two provisions of the law read as follows:

**Section 203. Murder**

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

**204. Punishment of murder**

***Any person convicted of murder shall be sentenced to death***

Section 204 has since been declared to be unconstitutional because, first, its application renders mitigation upon conviction futile; secondly, it purports to deprive the trial court of its discretion to mete out what would be an appropriate sentence depending on the circumstances of each particular case; and, finally it is discriminatory in nature. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Following the decision in **Francis Karioko Muruatetu** case Section 203 remains the pertinent provision in murder charges.

According to this section, this offence of murder is established when, first, death of a person is proved; secondly, it must also be proved that the death was as a result of an act or omission of another person; thirdly, there has to be proof that the act or omission was unlawful; and, finally, it must be proved that the person who did the unlawful act or omitted to act had malice aforethought.

It is not in dispute that the deceased died on 14 November 2010. His body was positively identified at the scene of crime and the scene of crimes officer produced photographs, taken from different angles, of the deceased lying dead at the scene of crime.

The body of the deceased was also positively identified at the mortuary and a certificate of his death was admitted before this Honourable Court in proof of the fact of death. The nature and extent of the injuries as alluded to by the doctor who conducted an autopsy on the deceased's body and the post-mortem report which again was admitted in evidence go to show that the deceased died as a result of an act of another person. Considering that there was no justifiable reason or excuse for that act, it can be concluded that the act was unlawful.

I am satisfied that the elements of death of a person and that the death was as a result of an act of another person have been proved to the required standard. I am also persuaded that the element of unlawfulness of the act causing the death has also been proved.

As to the question whether the accused are the persons behind the deceased's murder, I find the state evidence against them to have been both direct and indirect or circumstantial.

The eye witness' account of the circumstances leading to the deceased's death was given by, among others, the deceased's brother Christopher Kibe (PW1). He was with the deceased at Honey Pot bar, drinking when a physical confrontation ensued between the 1<sup>st</sup> accused and the deceased.

At some point Kibe went out of the bar and when he returned, the deceased was bleeding from the nose. The deceased told him that he had been assaulted by the 1<sup>st</sup> accused. And while they were on their way home, they were confronted by seven people four of whom were the accused and the one Gathenya. They attacked the deceased and his brothers. Kibe managed to escape but the deceased fell and was overpowered.

Kibe went home and came back to the scene with his brother Stephen Mbau(PW5). They found their brother lying on the ground, apparently dead.

Kibe was able to recognise the accused not only because he knew them (the 1<sup>st</sup> and 3<sup>rd</sup> accused hailed from the same village

as Kibe) but also because there was sufficient electricity light at the scene.

Stephen Mbau Majara (PW5) corroborated his brother's evidence that on the night of 14 November 2011, Kibe told him and that they had been attacked. Together they went to the scene of the attack and found the deceased lying beside the road.

I find the testimony of Stephen Gakuru (PW6) to be another piece of corroborative evidence on who murdered the deceased. He confirmed that he was in the company of Kibe (PW1) and the deceased when they were attacked although he could not identify the attackers. He, however, admitted that before they left Honey Pot bar, the 1<sup>st</sup> accused and the deceased had physically confronted each other and indeed it was him who separated them. It was his evidence that the deceased died after the attack.

On his part, Simon Mwangi (PW1) confirmed that immediately prior to the attack that led to the deceased's death, the 1<sup>st</sup> accused and the deceased had fought at Honey Pot bar before the owner of the bar ejected them from his bar.

When they were attacked outside the bar Simon was able to identify four assailants three of whom were the accused and one Gathenya.

The evidence of these witnesses puts the 1<sup>st</sup> accused at the scene of crime and directly links him to the murder of the deceased. This evidence was not controverted. As matter of fact, the 1<sup>st</sup> accused himself admitted that he had had a physical confrontation with the deceased moments before the deceased and his companions who included his brothers were attacked.

I am satisfied that when the evidence is considered in its entirety, it leaves no doubt that the 1<sup>st</sup> accused was the person behind the deceased's murder.

It is possible that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were also involved in the murder but the evidence of their involvement is more of a probability or, to a certain degree, circumstantial. Not that the court cannot convict on circumstantial evidence but it has been held that where the court has to base a conviction on such evidence, it must be certain that there are no other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused. This was so stated in the English decision of **Teper versus R (1952) A.C.** which was cited with approval in **Tumuheire versus Uganda (1967) E.A.** At page 489 of the English decision, it was held that:

*“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...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 would weaken or destroy the inference”.*

There is room for co-existing circumstances which would weaken or the destroy the inference of guilt on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> accused.

Not so with the 1<sup>st</sup> accused. The evidence against him was direct and where circumstantial evidence comes into play, the inculpatory facts are, in my humble view, incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (See **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135 and Simon Musoke versus Republic (1958) EA 715**).

Having come to the conclusion that the 1<sup>st</sup> accused murdered the deceased, the next question is whether there was in existence malice aforethought. To begin with, malice aforethought is the mental element of the offence of murder and it may be express or implied. (See **Woolmington v DPP [1935] AC 462**). It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

It has been codified in Section 206 of the **Penal Code**; that section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

**206. Malice aforethought**

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has*

*committed or attempted to commit a felony.*

The post-mortem report was consistent with the evidence that the injuries which the deceased sustained were intended to cause the death of the deceased or were meant to do him grievous harm. As it turned out the deceased actually died. It can also be concluded that in attacking the deceased the 1<sup>st</sup> accused either by himself or with the help of other people, knew that the assault which eventually caused the deceased's death would probably cause the death or cause him grievous harm. It does not matter that the accused could have been indifferent that death or grievous bodily harm would result.

Ultimately, I am satisfied that the malice aforethought was established and therefore all the necessary ingredients of the offence of murder have been proved against the 1<sup>st</sup> accused. I therefore find him guilty as charged and he is convicted accordingly.

For the reasons I have given, the 2<sup>nd</sup> and 3<sup>rd</sup> accused are acquitted of the offence of murder and are set at liberty unless they are lawfully held.

**Signed, dated and delivered via videolink on 25<sup>th</sup> February 2022**

**Ngaah Jairus**

**JUDGE**