



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE NO.1 OF 2017**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**AGNES MUROCHIA KAMUNYA.....1<sup>ST</sup>ACCUSED**

**JEREMIAH KAILIKIA KAMUNYA.....3<sup>RD</sup>ACCUSED**

**PHINEAS KINYUA KAOME.....4<sup>TH</sup> ACCUSED**

**DAVID KINYUA MUGAMBI.....5<sup>TH</sup>ACCUSED**

**DOMICIANO KOBIA KITIBO.....7<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Accused persons herein are jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that:

**On the night of 24<sup>th</sup> and 25<sup>th</sup> December, 2016 at Kianjai Market, Kianjai Location, in Tigania West Sub-County within Meru County murdered LEONARD MWITI MUGAMBI alias Mbotela.**

**Background**

2. Leonard Mwiti Mugambi alias Mbotela was married to Agnes Murochia Kamunya (Accused 1) but they had separated as at the material time that is the subject of this case. The said Leonard Mwiti Mugambi alias Mbotela died out of injuries he suffered on the night of 24<sup>th</sup> and 25<sup>th</sup> December, 2016, Accused 1, her siblings, Accused 2 who absconded during the trial, Accused 3 and Accused 6 (now deceased), together with Accused 4 and 7 were all arrested and charged with the murder of the said Leonard Mwiti Mugambi alias Mbotela (**Mwiti**).

3. The prosecution called a total of 9 witnesses. **PW1 Richard KalumaIkiao** who was neighbor to Accused 1 stated that he knew Leonard as Accused 1's husband. He stated that on the material night at about 10,00pm, he arrived home and on a corridor outside their houses which was lit with electric lighting found Accused 1, Accused 3 and Accused 7 jointly assaulting Mwiti. That Accused 1 saw police that were on patrol and she closed the door to the corridor as the witness went to a hotel for supper. That when he returned a few minutes later, he saw immediately thereafter. Police officers who were on patrol all the Accused persons carrying Mwiti whom they abandoned outside the plot as Accused 6 cleaned the bloodstains on the corridor. The witness stated that Accused 1 to 6 went to Accused 1's house from where they were arrested as Accused 7 went away. The witness reported the incident to Mwiti's brother Mutwiri who went to the scene and escorted Mwiti to hospital where he was pronounced dead.

4. **PW2 EnockMuriithi** who was Accused 1's neighbor was in his house on the material night. He stated that someone knocked on his window and when he went out to the corridor armed with a torch saw Accused 1, 2, 3, 4, and 5. That he returned to his house and shortly thereafter heard someone pleading not to be killed. That he went out and saw a crowd gathered next to their plot and they scampered for safety when they saw a police patrol car. That he returned to the plot to find Mwiti who was bleeding from the head lying on the corridor and

was taken away by police as Accused persons locked themselves in Accused 1's house. That police subdued them and managed to arrest Accused 1 to 6 from Accused 1's house. That Accused 4 and 5 were dead drunk at the time of their arrest. **PW4 Franklin Bundi** was drinking alcohol with his friend Mwiti on the night material night until 10.00 pm when they parted ways. The following day, eh received information that his friend Mwiti had been murdered. **PW5 BG**, a minor stated that Accused 1 and Mwiti were parents. She recalled that on the material night, she was at home with her mother, Accused 2, Accused 3, her Aunt Accused 6 and two others that she did not know. She stated that her father came and knocked on the gate demanding to enter their house by force. That her mother went out and she followed her to the corridor where there was electric lighting. That a quarrel ensued between parents and it was then that her mother stabbed her father with a knife. That her father fell near the gate and her Aunt Accused 6 wiped the knife that was used to stab her father.

5. **PW6 TyfanyKinya** who was in Accused 1's house on the material night stated that Accused returned home at about 10.00 pm in company of Accused 4 and 5. That Mwiti knocked on the door and Accused 1 insulted him, That Accused 1 took a knife that was being used to cut ugali and went out with it and shortly thereafter, she heard Mwitiscreeam that Accused 1 had stabbed him. That thereafter, Accused 1, Accused 2, 3, 4 and 5 set upon Mwiti beating him to a pulp. That later Accused 1 called Accused 7 to come with an axe but she didn't see where Accused 7 hit Mwiti. That Accused 1 and 5 removed Mwiti from the corridor from where he was picked by police. It was her evidence that all the Accused persons were known to her before the material night. **PW7 David Nabea** arrived at the scene long after the incident

6. **PW9 Sgt Thomas Mbuvi** visited the scene of crime the morning after the incident and long after Accused persons had been arrested. He stated he recovered an axe and blood stained clothes but did not disclose exactly where he found them. He prepared an exhibit memo form **PEXH. 2 (b)** and escorted a jacket, trouser, axe and Mwiti's blood to the government chemists for analysis. **PW5** examined the exhibits and tendered a report **PEXH. 2 (a)** that all the exhibits generated similar DNA profile.

7. An autopsy was conducted on the body of Mwiti on 28<sup>th</sup> December, 2016 **PW4 Dr. Mohammed Nuri** on 16<sup>th</sup> December, 2018. The body had a 2 by 4 cm stab wound on the back of head, 3 by 10 cm deep cut on left elbow, 2 by 6 cm deep cut on posterior gluteal region and bruises on neck. An opinion was formed that the deceased died of excessive bleeding due to blunt trauma to the head and multiple stab wounds as shown on the postmortem form **PEXH1**.

### DEFENCE CASE

8. Accused 1 **Agnes Murochia Kamunyain** hersworn statement denied the offence. She stated that on the material night, she was returning home from a bar when she met her ex-husband Mwiti who was armed with a knife and he slapped her and threatened to kill her if she didn't go back to his home. That he stabbed her in self defence and pushed her away and he fell on his back near a trench where there were metal bars. That when she noticed he was bleeding, she called police who took Mwiti to hospital. That on the same night, she was arrested from her house together with her siblings Accused 2 (who absconded during the trial), Accused 3 and Accused 6 (now deceased). She also confirmed that Accused 4 and 5 were arrested from her house while Accused 7 was arrested 3 days later and they were subsequently jointly charged.

9. Accused 3 who is Accused 1's brother arrived at Accused 1's house at about 07.00 pm to find Accused 6 and two children in the house. He was joined by his brother Accused 2 about 07.20 pm and by Accused 1 at about 09.30 pm. That about 10.30 pm, Accused 4 and 5 who were running from police on patrol went to hide in Accused 1's house and all of them were later arrested by police for allegedly committing murder.

10. Accused 4 and 5 stated that they were on the material night arrested from Accused 1's house where they had gone to seek refuge for fear of arrest by police who were on patrol. Accused 7 stated he was arrested on 27<sup>th</sup> December, 2016 and charged with an offence that he knew nothing about.

### ANALYSIS AND DETERMINATION

11. I have considered the evidence on record and the issue for determination is whether the Prosecution has proved the case to the required standard.

12. Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that Accused persons committed the murder and that they were actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

#### **(a) The death of the deceased**

13. That **LEONARD MWITI MUGAMBI alias Mboteladi** was confirmed by all the prosecution witnesses and the Accused persons. The evidence of death was corroborated by the evidence of the doctor contained in the postmortem form tendered as **PEXH. 1** which reveals that Mwiti body had a 2 by 4 cm stab wound on the back of head, 3 by 10 cm deep cut on left elbow, 2 by 6 cm deep cut on posterior gluteal region and bruises on neck and had died of excessive bleeding due to blunt trauma to the head and multiple stab wounds.

#### **(b) Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased**

14. **Section 203 and 204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

**204. Any person who is convicted of murder shall be sentenced to death.”**

15. **PW5 BG**, a minor daughter to Accused 1 and Mwiti stated that it was her mother that stabbed her mother with a knife. Her evidence was corroborated by the evidence of **PW6 TyfanyKinya** who was at the scene of crime who stated that no sooner that Mwiti had knocked on the door, Accused 1 armed herself with a knife and went out and immediately thereafter she heard Mwiti scream that Accused 1 had stabbed her. Accused 1 took a knife that was being used to cut ugali and went out with it and shortly thereafter, she heard Mwiti shout that Accused 1 had stabbed him.

16. Accused has admitted that she stabbed Mwiti in self defence thereby raising the defence of provocation.

17. Section 207 of the Penal Code provides for provocation as follows: -

**When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”**

18. In the case of **Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR**, the Court of Appeal cited with approval **ROBERT KINUTHIA MUNGAI v REPUBLIC (1982 – 88) 1 KAR 611**, and delivered itself thus:

**“... we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in PALMER v R is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered.”**

19. And in the case of **MUNGAI V. REP [1984] KLR 85** at page 98, KNELLER, HANCOX JJA and NYARANGI Ag. J.A. held:

**“However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see R v Ngoilale (supra) and R v. Shaushi [1951] 18 EACA 198, the latter of which was cited with approval in Hau s/o Akonaay v R [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs:-**

**“In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in R v Ngoilale and R v. Shaushi s/o Miya [1951] 18 EACA 164 and 198, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200): -**

20. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.

21. There is evidence that Accused 1 and Mwiti who were husband and wife had separated for about 4 months and that Mwiti had even burnt Accused 1's clothes and damaged her property. There is further evidence that Mwiti who was drunk on the material night came knocking on Accused 1's door demanding to enter the house by force.

22. From the circumstances of this case, I find that Mwiti's act of demanding to enter into Accused 1's house by force in the night, after they had had an acrimonious separation was a provocative act. I find that the provocation acted on Accused 1's mind causing her to stab Mwiti in the heat of passion and however unreasonable the perception of the threat by Mwiti, Accused 1 cannot be considered to have formed the necessary malice aforethought to commit murder.

23. I have considered whether the evidence on record discloses a common intention on the part of Accused persons to kill Mwiti. **PW5 BG** did not implicate any of Accused 2 to 7. **PW1 Richard Kalumalkiao** stated that he saw Accused 1, Accused 3 and Accused 7 jointly assaulting Mwiti whereas **PW6 TyfanyKinya** stated that after Accused 1 stabbed Mwiti, Accused 2, 3, 4 and 5 set upon Mwiti beating him to a pulp after which Accused 1 and 5 removed Mwiti from the corridor from where he was picked by police.

24. Whereas Accused 3, 4, 5 and 6 have conceded having been in Accused 1's house on the material night, Accused 7 presence is doubtful.

25. Section 21 of the Penal Code Section provides that common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the (See **Dickson Mwangi Munene & Another v Republic [2014] eKLR**).

26. In **Solomon Mungai v. Republic [1965] E.A. 363**, the predecessor of the Court of Appeal held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

27. In **Njoroge v Republic, [1983] KLR 197 at p. 204**, the Court of Appeal stated that:

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all**

**who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”**

28. Common intention may also be inferred from the presence, the actions and the omission of either of the suspects to disassociate themselves from the offence (See R v Tabulayenka s/o Kirya (1943) EACA 51).

29. In this case, there is evidence that each of the Accused 2, 3, 4, 5 took part in assaulting the Mwititi. This is borne from the fact that whereas Accused 1 admitted stabbing the Mwititi once as evidenced by the postmortem, the same report shows that Mwititi had other injuries comprising of wounds on the back of head, 3 by 10 cm deep cut on left elbow, 2 by 6 cm deep cut on posterior gluteal region and bruises on neck.

30. In this case, there is evidence that each of the Accused 1, 2, 3, 4 and 5 took part in assaulting Mwititi as a result of which he died.

31. From the foregoing analysis, I find that no case has been made out against Accused 7 and he is found not guilty of murder and acquitted.

32. On the other hand, it can safely be inferred that the act of assaulting Mwititi by Accused 1, 2, 3, 4 and 5 was not premeditated. The evidence as adduced by the prosecution established beyond reasonable doubt the act of unlawful killing Mwititi by the Accused 1, 2, 3, 4 and 5 herein without malice aforethought.

33. Sections 179 of the Criminal Procedure Code stipulates:

**(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

34. From the foregoing analysis, I find Accused Accused 1, 2 in (absentia), 3, 4 and 5 guilty of a lesser charge of manslaughter contrary to Section 202 (1) of the Penal Code as read with Section 205 of the Penal Code each one of them is convicted accordingly.

**DELIVERED AT MERU THIS 17<sup>th</sup> DAY OF February 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**Accused 1 - Present**

**Accused 2 - Absent**

**Accused 3 - Present**

**Accused 4 - Present**

**Accused 5 - Present**

**Accused 7 - Present**

**For the Accused persons - Mr. Kaimenyi Advocate**

**For the State - Ms. Mwaniki**