



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO 8 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. JOSEPH KIRIMI KIARA

2. NANCY JOAN KIARA

3. STANLEY MWONGERA KAMBA.....ACCUSED

J U D G M E N T

1. The accused persons herein, **JOSEPH KIRIMI KIARA** (1st Accused), **NANCY JOAN KIARA** (2nd Accused) and **STANLEY MWONGERA KAMBA** (3rd Accused) are charged with *murder* contrary to **sections 203 and 204** of the *Penal Code*. It is alleged in the information dated 05/09/2017 that on 26/08/2017 at Nkando Village, Nturukuma Location of Laikipia-East Division within Laikipia County, with another person not before court, they jointly murdered one JOHN "JOAN" KIARA MUCHUNGE.

2. The accused persons pleaded not guilty to the charge and were tried. A total of 8 prosecution witnesses testified. All three accused gave sworn testimony in their own defence. They did not call any witness.

3. I have considered in its entirety all the evidence placed before court by both the prosecution and the defence. Learned counsels filed written submissions which I have read and considered. Mr. Motende was the prosecution counsel. Mr. Mwenda defended the 1st and 2nd Accused, while Mr. Wambugu defended the 3rd Accused. I thank all three counsels for their able submissions.

4. The 2nd Accused was the Deceased's estranged wife. The 1st accused was a son of the Deceased and the 2nd Accused, while the 3rd Accused was his son-in-law, being married to a daughter of the Deceased and 2nd Accused, one LYDIA NKIROTE.

5. The evidence placed before the court, and which the court accepts, was that the Deceased was a violent man who regularly abused his wife, the 2nd Accused. In their long marriage, the abuse became so bad and rampant that the 2nd Accused was forced to leave the matrimonial home. She first went and lived at her maiden home in Isiolo for some time. Her children then bought a plot of land for her at a trading centre a kilometer or so from her matrimonial home and built for her. She lived and traded there. The Deceased continued to live in the matrimonial home. In the same compound also lived one of his sons called *Kiogora* and his wife, but in their own house separate from the Deceased's house.

6. Apart from the intervention of buying a plot of land and building for their mother to enable her to live away from the Deceased and hence avoid the frequent beatings, there was no evidence tendered at all to show that the children (including the 1st and 3rd Accused) had ever been abusive or violent towards the Deceased on account of his own violence towards their mother, the 2nd Accused.

7. The court accepts the testimony of the 2nd Accused, and it is also common ground between the prosecution and the defence, that in the early morning of 26/08/2017, at about 5.00 a.m., the Deceased found the 2nd Accused as she awaited for transport near her home and immediately and violently attacked her with a rungu, seriously injuring her on the head. He also knocked out two of her teeth and fractured one of her hands. Her screams of distress attracted intervention by neighbours and/or passersby, and the Deceased then escaped and disappeared. One of the good samaritans escorted the 2nd Accused to the home of her aforesaid daughter and 3rd Accused nearby. The 1st Accused also happened to be in that home of his sister and 3rd Accused, where he had lived for about a month. He also saw the condition in which his mother was after the assault by the Deceased.

8. The 3rd Accused and his wife took the 2nd Accused to hospital (*Nanyuki Teaching and Referral Hospital*) after reporting the matter at *Nanyuki Police Station*. After initial treatment (including the taking of X-rays, and scans) the 2nd Accused was taken back to her home.
9. In the meantime, neighbours of the Deceased PW1 (JACINTA WANJIRU MIANO) and PW2 (NANCY KINANU MWORIA) were attracted to the home of the Deceased by a son of PW2, a boy of about 15 years in age who was never called to testify. They proceeded there and saw the body of the Deceased lying face down a few meters from his house. It was then about 9.00 a.m.
10. Later, PW4 (MOSES KITHINJI KIARA), a son of the Deceased and the 2nd Accused, came to the homestead and saw his father's dead body. He went into the Deceased's house and came out with a blanket with which he covered the body. He had earlier heard about the assault of his mother by his father while at his house in Meru Town. He had travelled to the hospital at Nanyuki to see his mother, and then went to his father's home with the intention of inquiring why he had so badly assaulted the 2nd Accused. PW4 then went and reported the matter at Nanyuki Police Station. He accompanied police officers back to his father's compound.
11. PW7 (IP FRANCIS KAIRO) was in the team of police officers who visited the homestead of the Deceased after the murder was reported and removed the body of the Deceased to the mortuary. He was also in the team that arrested the 1st and 3rd Accused.
12. PW6 (CI ISAAC KITUI) was a *Scenes of Crime* officer who took photographs of the Deceased's body and surroundings. He produced them in evidence (*Exhibit P4a-h*) together with the necessary certificate (*Exhibit P5*).
13. PW8 (SGT PETER NZEMYA) was the investigating officer of the case. He was among police officers who visited the scene at the Deceased's homestead. There he interviewed potential witnesses, including PW1 and PW2. He learnt of a family dispute involving land between the Deceased and his wife (2nd Accused), a possible motive for the murder. He also learnt of a possible suspect, the son of the Deceased called Kiogora who lived in the Deceased's compound. He and others were not able to trace and arrest him.
14. PW8 also considered the 2nd Accused a suspect for the murder of the Deceased on account of his assault of her earlier the same morning. He had her eventually charged. The names of the 1st and 3rd Accused were also given to him as suspects. He did not state who gave him the names, or why they were considered suspects. He and other officers arrested them the following day.
15. PW8 also recovered what appeared to be the murder weapon, a one-piece metal spear, from the house of the aforesaid Kiogora after a second search (the first search the previous day had not yielded anything of interest). He submitted the spear and other exhibits (including a sample of the blood of the Deceased) to the *Government Chemist* for forensic analysis. He produced the spear in evidence as Exhibit P6.
16. PW5 (ELIZABETH WAITHERA ONYIEGO) was a Government Analyst at the Government Chemist, Nairobi. She processed and analysed the spear and the Deceased's blood sample. Her report, which she produced in evidence as *Exhibit P3*, was that the spear (Exhibit P6) was stained with the Deceased's blood.
17. PW3 (DR VICTORIA WAIRIMU GITHENYA) conducted a post mortem examination of the body of the Deceased. She produced the postmortem report in evidence as *Exhibit P1*. The Deceased had a penetrating wound through the heart. The doctor formed the opinion that the cause of death was -

“massive blood loss with bilateral haemothorax, haemopericordium and penetrating sharp injury through the heart secondary to a stab wound.”

18. As set out in the learned prosecution counsel's submissions, the prosecution, to quote him:

“...believes that the three accused persons had common intention and motive to kill the Deceased due to the differences that existed between him and his estranged wife, the 2nd Accused.”

Learned counsel also stated in his submissions that:

“...On that material day, 26th August 2017 the deceased had assaulted the 2nd accused person and left her seriously injured, which we believe is the motive behind the murder...”

19. Well, belief or suspicion, is not evidence. Contrary to what both the learned prosecution and defence counsels opine, the prosecution case herein is not founded on circumstantial evidence at all, but on mere suspicion. That suspicion was founded upon the only common and well-established fact, that the Deceased badly assaulted the 2nd Accused at about 5.00 a.m. on the day that he met his death. When passersby or neighbours intervened, the Deceased escaped and disappeared, only to turn up dead, in his own compound outside his house at about 9.00 a.m.

20. There is no evidence at all that the 1st and 3rd Accused were at the scene where the Deceased assaulted the 2nd Accused, or that they followed the Deceased after he escaped from the scene. There is no evidence at all that they were seen anywhere near the homestead of the Deceased in the morning that he died. There is no evidence at all that they were connected in any way to what was clearly the murder weapon, the spear Exhibit P6 which was recovered from the house of another son of the Deceased, Kiogora, in the same compound of the Deceased. That son is a major suspect in the murder of his father, and he is still at large.

21. The available evidence, which the court accepts, is that after she was assaulted, the 2nd Accused was taken to the home of her daughter

and her husband (3rd Accused) who immediately made arrangements and took her to hospital. They were with her at the hospital until well after the Deceased had been found dead in his compound. The 1st Accused had been left in the house of the 3rd Accused taking care of the animals as his sister and the 3rd accused took their mother to hospital. There is absolutely evidence that he left that house and went out looking for his father (the Deceased) to assault or kill him for assaulting his mother. No evidence has placed him anywhere near his father's compound within the time-frame when he could have been killed – sometime between 5.0 a.m. and 9.00 a.m.

22. So, where is the circumstantial evidence that tends to connect the three accused persons to the murder of the Deceased? There is none. The three were charged and prosecuted on mere suspicion that because of the Deceased's assault of the 2nd Accused, they formed the common intention to go out and do him grievous harm or kill him, and that somehow they went out and executed that common intention. Unfortunately, there is not a scintilla of evidence to back up that theory. It bears to repeat: suspicion, no matter how strong, is not evidence.

23. These three accused persons should not have been charged and prosecuted upon mere suspicion without more. The prosecution has not discharged its heavy burden of proving their guilt beyond reasonable doubt. They are hereby acquitted of the charge, it is so ordered.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF MARCH 2022

H P G WAWERU

JUDGE