



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL CASE NO. 29 OF 2012**

**[FORMERLY NYERI HCCR 8 OF 2010]**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON KARIUKI MWANGI.....ACCUSED**

**JUDGMENT**

1. On the night of 5<sup>th</sup> June 2009, *Joseph Ngeita* and his wife *Keziah Muthoni* (hereafter *the deceased*) were in their house in the company of their grand-daughter (PW1). Their peace was shattered by thugs who forced their way into the kitchen. They attacked the trio with pangas and cut them multiple times. *Keziah* died almost immediately while her husband died in hospital about two weeks later.

2. The Republic brought *Information* to the High Court charging the accused with *two counts of murder* contrary to section 203 as read with section 204 of the **Penal Code**.

3. The particulars of the 1<sup>st</sup> count are that on 5<sup>th</sup> June 2009 at Chui Sub-Location, Gitugi Location within Murang'a District of the former Central Province, jointly with others not before the court, they murdered *Keziah Muthoni Ngeita*. The particulars of the 2<sup>nd</sup> count are that on the same date and place, they also jointly murdered *Joseph Ngeita*.

4. The accused pleaded *not guilty*. The prosecution summoned eleven witnesses. The first was Ruth Nyambura (PW1). She testified that two assailants forced the kitchen door open. The intruders were armed with pangas and asked them to lie down. Her grandfather grabbed a panga to defend them. When PW1 screamed, she was cut on her hands and shoulder. They then cut her grandparents.

5. When the attackers left, PW1 sought help from Rose Maina (PW2) who was a neighbour. Their distress calls attracted more people to the compound. The Chief also came and summoned the police. *Keziah's* body was taken to the mortuary. PW1 and *Joseph Ngeita* were taken to Murang'a Hospital. PW1 was admitted there for a month. Her grandfather was transferred to Kenyatta national Hospital where he died on 20<sup>th</sup> June 2009.

6. Regarding identification, she said as follows-

*I knew one of the two people who attacked us. He was called Simon Kariuki. He is the one who is in court. I knew him before and there was light. He has also been photographed together with my cousin. There was light from the lamp in the kitchen.*

7. Under cross examination, she conceded that she did not tell PW2 that the accused attacked them. But she told her aunt, Njeri, the following day when she visited her at the hospital. She said that she also gave the information to the police.

8. Upon further cross examination, she said-

*I wrote my statement on 24/9/2009. I cannot remember whether the police came to interrogate me at the hospital. But Anthony Karega came. I never told Karega about the accused or his name. The accused is from Chui village. It is about 5 km from grandparents home; that is where the accused lived. I never talked to the accused when I saw him before the incident. I saw him at the shopping centre where I had gone to buy things.*

9. The witness said she did not identify the accomplice as he was wearing a hat. She said there was a tin lamp at the door of the

kitchen where she was facing. The accused was wearing a black jacket and had not covered his head.

10. PW2 corroborated the evidence of PW1. However, she did not go to the house of the deceased but concentrated on giving first aid to PW1.

11. PW3 was Lucy Wanjiru Irungu, the area chief. She went to the scene in the morning. Like I stated, she notified the police at Nyakianga Police Station about the incident. She, PW4, PW5 and PW8 helped to take PW1 and her grandfather to hospital.

12. PW6 is a son of the deceased. He was away in Laikipia. He suspected the accused because his father told him that he “*met the accused at the hospital when he had gone to visit his grandson called John Mwangi Kamande. The accused said something which my father did not like.....*”

13. PW7 was Chief Inspector Jokata Sora. He conducted an identification parade on 1<sup>st</sup> December 2009 in a room at G. K. Prison Murang’a. He said that the prison arranged for 8 members of the public of the same sex and characteristics as the accused. He said the accused did not raise any objection and opted to stand between the 4<sup>th</sup> and 5<sup>th</sup> members. The witness said that the investigating officer sat at a corner and did not take part in arranging the parade. The witness told PW1 that the suspect may or may not be in the line-up. He said that PW1 touched the accused after walking around themembers for about 5 minutes.

14. When he asked the accused if he was satisfied with conduct of the parade, his answer was negative because he thought that PW1 might have seen him earlier as he was being escorted to the room. The original parade form was produced as exhibit 1A.

15. When cross examined, he denied that he drove into the prison in the company of PW1. He said the parade was conducted in an office measuring about 20 x 12 feet. He said he selected the members of the parade from a group of 15 persons presented by the prison officers and that he did not see the suspect before he was brought to the parade.

16. PW9 was Chief Inspector Mutua. He and PW10 went to the scene on the morning of 5<sup>th</sup> June 2009. He said in cross examination that by the time he got there the injured persons had been taken to hospital. He said that “*the scene had been trodden upon by rescuers*”. He conceded that the police did not dust the scene. When he spoke to PW1 at the hospital she was still in shock and “*did not tell [him] anything useful*”. When asked whether she had identified any attackers, her answer was negative.

17. PW10 was CPL Jonathan Musembi. On 11<sup>th</sup> June 2009 he witnessed the post mortem of the body of Keziah Muthoni. The autopsy was performed by Dr. Nguyo Maina. Upon cross examination, he said that up to the point he surrendered the investigation file to the CID, PW1 had not told the police who the attackers were.

18. PW11 produced the two Post Mortem Forms (exhibits 3 & 4 dated 11<sup>th</sup> June 2009 in respect of Keziah Muthoni and 2<sup>nd</sup> July 2009 for Joseph Geita Gathige. The latter was performed by Dr. Ndungu. The reports were produced by consent under section 77 of the **Evidence Act**.

19. When the accused was placed on his defence, he denied committing the double murders. He discredited the police parade or the testimony of PW1. He also raised an alibi. The material part of his testimony went as follows-

*Before I was charged I used to be a matatu conductor since 2008 on the Othaya - Nairobi route. I was arrested on 1/9/2009 at Murang’a stage by plain clothes officers for assaulting Maina Kamau at a bar. I was detained at Murang’a station. I was charged and jailed for one year.*

*On 1/12/2009 while still in prison at Murang’a. The O/C Prison escorted me to his office. There were two people pointing at me inside the CID car. One was a lady who seemed to be hiding her face.*

*I was taken to a parade. There were 8 people, I say the eight did not look like me in appearance or size. From the parking section of the prison to where office was, was less than 50 metres. The CID vehicle was parked along the way. It was only a few metres from me as I passed it.*

*I was picked from the parade by a lady. Nobody else identified me. I complained to the OCS because she had seen me earlier as I left jail. I indicated in the parade form that I was dissatisfied. The form is before the court. The lady who identified me was Ruth Nyambura. I got the name at the parade and when she testified. I did not know her before. I saw her first at the parade and later in court. I don’t know her residence. I do not know Gathera area. My home is in Gitugi more that 6 kilometres away.*

*Her evidence was untrue. I know the 2 deceased persons. They hail from my location. I was told during the parade about their death.*

*On 5/6/2009. I was doing my matatu duties at Othaya. Choi sub location is my home. It is more than 70 kilometres away. I did not kill the deceased.*

20. Upon cross-examination, the accused said that on the date of the offence, he was a conductor on the Othaya - Murang’a route. The matatu was KBC 027S metallic gray driven by Mwangi Mutero. He said he was unable to call the witness or any other witnesses as he had been in remand for a long time.

21. Learned counsel for the accused, Mr. Gichuki Waiganjo, made some brief oral submissions. In a synopsis, he was of the view that the defence mounted was credible; and, that neither of the two counts was proved beyond reasonable doubt.
22. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*
23. The prosecution must *prove beyond reasonable doubt* three elements. Firstly, the *death* of the deceased and its *cause*. Secondly, that the accused *committed* the unlawful act; and, thirdly, that the accused was *of malice aforethought* which is to say the *mens rea* or the *intention* to kill the deceased.
24. The deaths here are proved by the two pathologist's reports (exhibit 3 & 4). The cause of death for Keziah Muthoni was "*severe haemorrhage and respiratory failure secondary to multiple injuries by a sharp object*". The death of Joseph Ngeita resulted from head injury due to "*sharp object trauma (multiple cut wounds)*". I thus readily find that the two deaths were unlawful.
25. The key question is whether the accused and his accomplice cut up the two deceased persons leading to their early deaths. The answer is closely intertwined with *identification* of the accused. We are dealing here with the evidence of a *single identifying witness*.
26. In **Maitanyi v Republic** [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-
- It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?*
27. The police did not dust the scene. A lot turns on the *eye-witness* account of PW1. She was directly facing the kitchen door when the assailants stormed in. I find that there was sufficient light from a tin lamp in front of her.
28. She could not identify one of the attackers because he was wearing a hat. But she *knew* the accused, and he had not covered his head. She said he was wearing a black jacket. However the witness did not give the name of his attacker to PW2 who gave her first aid. It is also unclear at what point she gave the police his description. For instance, Chief Inspector Mutua (PW9) testified that when he spoke to PW1 at the hospital she was still in shock and "*did not tell [him] anything useful*". When asked whether she had identified any attackers, her answer was negative. PW10 on the other hand said that up to the point he surrendered the investigation file to the CID, PW1 had not told the police who the attackers were.
29. In all this I have kept in mind that PW1 had suffered serious injuries that kept her hospitalized for a month. I have also considered that PW1 identified the accused for a *second time* at the police identification parade conducted on 1<sup>st</sup> December 2009. The accused has challenged the fairness of the parade.
30. Was the parade in accordance with the *Force Standing Orders*? I find that PW1 was properly advised that the suspect *may* or *may not* be one of the people in the parade. There were at least *eight members* selected from a group of 15 persons arranged by the prison. The reason was that the accused was serving another sentence. I note that the accused in his defence said that the eight persons did not look like him. That may be so, but the requirement is to provide members, as far as practicable, of similar height, age, general appearance and class of life of the suspect. See Rule 6(iv)(d).
31. When the accused was asked at the beginning if he had an objection to the parade, his answer was negative. He chose to stand between the 4<sup>th</sup> and 5<sup>th</sup> members. The Report shows that he was informed of his right to call a friend to the parade. He said he had none. The investigating officer sat at a corner and did not participate in the parade. The *Force Standing Orders* allow the police officer in charge of the case to be present but not conduct the parade. The parade here was conducted by a different officer, Chief Inspector Jokata Sora (PW7). I am also satisfied that the parade was conducted in private 20 x 12 room which was out of the view of the public.
32. The officer recorded that the accused was not satisfied with the parade. The accused said that PW1 may have seen him earlier as he was being escorted to the room. But according to PW7, he did not drive into the prison with PW1. He did not also see the accused before the parade. There was insufficient evidence to show that PW1 was the woman the accused thought he saw earlier in a car at the parking lot. I must add that the Report states that PW1 was in the DCIO's car "*far from Deputy O/C Prison Office where parade was conducted*".
33. Finally, and which is material, the witness identified the accused by touching him after 5 minutes. She never picked any one else. The entire parade may not have been perfect. But given the location of the parade and the way PW7 conducted it, I cannot say that the procedures adopted completely violated the *Force Standing Orders*.
34. I have reached the conclusion that the accused was positively identified at two points by PW1: Firstly, when he attacked her and the two deceased persons; and, as reinforced at the police identification parade,
35. A key plank of the defence is that the accused was not at the scene at the material time. This *alibi* was being set up well after the close of the prosecution's case. But that did *not* shift the burden of proof to the accused. See **Republic v Johnson** [1961] 3 ALL E.R. 969, **Saidi**

36. Although the accused lived a distance from the home of the deceased, he conceded that he *knew them and that “they hail from my location. I was told during the parade about their death”*. He claimed that on the material night, he was doing “*matatu duties at Othaya*”. When I weigh his evidence against that of the prosecution, I did not believe him. Considering the time the offences happened, he had an opportunity. He had no evidence to back up his claims. I also studied his demeanour closely as he testified. He was shifty clearly less than candid.

37. The accused and his accomplice attacked the deceased with pangas. They cut them *multiple times* as disclosed in the postmortem reports. Both deceased persons died from those injuries. By using those sharp objects to cut the deceased numerous times, the accused *knew or ought to have known* that it was likely to cause grievous harm or death. He thus had *malice aforethought* as defined in section 206 (b) of the **Penal Code**.

38. The entire body of direct and circumstantial evidence points *exclusively* to the guilt of the accused. I find *no* defence or hypothesis that exonerates him.

39. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. The accused, *of malice aforethought* caused the death of both deceased persons by an *unlawful* act. I accordingly enter a finding of *guilty* on each of the *two* counts and *convict* the accused accordingly.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2021.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

The accused.

No appearance by counsel for the accused.

Ms. A. Gakumu for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.