



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 92 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MURERI KARUGU.....1ST ACCUSED

DAVID MUGAMBI KAILANYA.....2ND ACCUSED

ROBERT MWITI MIRITL.....3RD ACCUSED

R U L I N G

1. On 24/2/2015, **Titus Kimathi Karugu, James Mureri Karugu, David Mugambi Kailanya and Robert Mwiti (“the accused”)** were arraigned before this Court with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code*.
2. According to the information laid before Court, it was alleged that on 31/8/2014 at Muugu Village, Githu sub-location in Tigania East District within Meru County, jointly with another not before Court, the accused murdered **Jackson Murungi Kalichu Alias Karugu Kalisu**.
3. The accused denied the charge and the prosecution paraded 6 witnesses to prove its case. However, by the time the trial commenced in May, 2019, **Titus Kimathi Karugu (“Kimathi”)** had passed on and the trial only proceeded against the remaining 3 accused.
4. **James Kobia Nabea (PW1)** was the owner of some bar in Githu. He was in his bar on the material day with patrons who numbered between 25 and 30 when at about 8 pm **Kimathi** and his brother, the 1st accused entered the bar carrying pangas. They called the deceased outside and they went with him. The following day, he heard from **Julius Michubu** that the two had killed the deceased.
5. **Julius Kithure (PW3)** was in the bar at the material time. He saw the 2nd and 3rd accused enter the bar and call the deceased. They went with the deceased through the back door. At that time **Kimathi** and 1st accused were waiting outside. He then saw the accused tie the deceased with a rope and lead him to **William Karugu’s** miraa farm some 1 km away. They hanged the deceased on a macadamia tree and cut his leg. All the while **PW3** was following them. When they saw him, they chased after him but he hid next to a river. When they could not find him, they returned to where they had left the deceased. The following morning, he heard from **Geoffrey Mutiga (PW4)** that the deceased had died.
6. On the material day at about 9 pm, **Geoffrey Mutiga (PW4)** was in the company of his wife going home when they stumbled on a body lying next to their gate. On flashing his torch, he discovered that it was that of the deceased who was his neighbor. He called the area assistant chief who called the police who came and removed the body.
7. **Grace Gaiti (PW6)** recalled that on the material day at about 8 pm, her son **Newton Mwirigi**, then aged 14 years returned home from Kibuitu Market. He told her that he had found his father (her husband) lying on the road with serious injuries. That the accused and one **Bundi** had assaulted the deceased. She rushed to the scene and found the deceased writhing in pain. The deceased told her to take care of him. She then rushed to the home of the deceased’s brother **PW3** and told him of the fact. When they came back, they found that the deceased had passed on.
8. **PC. Victor Owando (PW5)** investigated the case. He recalled that on the material day at about 2 pm, one **William Karugu** and the 3rd accused came to Mikinduri Police Station with a report that they had accosted the deceased and others stealing **Karugu’s** Miraa. That the deceased and his accomplices had however run away.
9. Later that night at about 10 pm, another report of the murder of the deceased was made at the station. That he commenced investigations by recording statements from witnesses. He established that on the material day at about 7 pm, the accused took the deceased from **PW1’s** bar and went with him to **Karugu’s** miraa farm where they killed him. The police visited the scene that night and removed the body to the mortuary where postmortem was carried out.

10. **Dr. James Kisilu (PW2)** produced the postmortem report. It revealed that the body had deep cut wounds on the frontal bone and the right lower limb was severed above the ankle. The cause of death was opined to be severe traumatic brain injury secondary to deep cuts on the head.

11. At the close of the prosecution case, **Mr. Namiti** Learned Prosecutor relied on the evidence on record. On his part, **Mr. Carlpeters Mbaabu**, Learned Counsel for the accused submitted that the prosecution had not established a *prima facie* case against the accused. That the prosecution evidence was inconsistent and contradictory. That crucial witnesses had not been called. The cases of **Said Awadh Mubarak v Republic [2014] eKLR**, **Joseph Ateka Kinanga v. Republic [2016] eKLR** and **Samuel Mwangi Kamau v. Republic [2005] eKLR** were cited in support of those submissions.

12. At the close of the prosecution case, the Court is always called upon to rule whether a *prima facie* case has been established against an accused to warrant his being called upon to offer a rejoinder by way of a defence. In **Rammanlal Trambaklal Bhatt v. R [1957] EA 332**, the Court held that a *prima facie* case is one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

13. This is a murder case. The prosecution must prove four ingredients beyond any reasonable doubt. These are; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought.

14. No doubt the prosecution have been able to prove the fact and cause of death to the required standard. It was established that the deceased's body was found at the gate of **PW4** on the night of 31/8/2014 and that the cause of death was severe traumatic brain injury secondary to deep cuts on the head.

15. Were the accused involved in the said death? The evidence of **PW1** was that on the material day at 8 pm, the deceased was taken away from his (**PW1's**) bar by **Kimathi** and the 1st accused. That he heard the following day that the deceased had been killed.

16. The only alleged eye witness was **PW3 Julius Kithure**, a brother to the deceased. He told the Court that he was in **PW1's** bar at the material time when he saw the 2nd and 3rd accused take away the deceased from that bar and lead him away. They allegedly tied the deceased and led him to the miraa farm where they assaulted him.

17. The evidence of this witness contradicted that of **PW1**. Whilst **PW1** told the Court that it was **Kimathi** and the 1st accused who took the deceased from his bar, **PW3** stated that it was the 2nd and 3rd accused. **PW1** stated that at the material time, there were about 25 to 30 patrons in his bar the majority of whom had pangas, **PW3** stated that there were about 10 people in that bar and none was having a panga. To him, only the 2nd and 3rd accused were armed with pangas when they entered the bar.

18. **PW3** testified that he saw the accused assault the deceased on the material night but did not report it to anyone. That he only came to learn the following day at 10 am that his brother, the deceased had died. However, **PW4** told the Court that after he discovered the body of the deceased that night, some of the relatives of the deceased who came to the scene were the deceased's wife (**PW6**) and his brother (**PW3**).

19. The testimony of the deceased's wife (**PW6**) completely established that **PW3** was an untruthful witness. She told the Court that she is the one who informed **PW3** that the deceased had been assaulted. They both rushed to the scene where they found the deceased had already died. As at that time, **PW3** had not heard about the assault of his brother, the deceased from anyone else. This is contrary to what he had told the Court that he had followed the accused and the deceased from Githu to the scene of the murder.

20. To the Court's mind, the evidence of the prosecution was not only contradictory, but was also inconsistent and doubtful. It is not clear how someone will witness his brother being badly assaulted (to the extent that his limb is severed) yet he goes home to sleep soundly and never report it to anyone. With such contradictions, it is doubtful if the accused were the ones involved in the murder of the deceased.

21. There was the allegation that the deceased's son one **Newton Mwirigi** then aged 14 years mentioned the accused as the people who had assaulted the deceased. The said witness was never called to testify. It was not clear whether he saw them assault the accused or how he know that they were involved. On the authority of **Bukenya v. Uganda [1972] EA 549**, this Court is entitled to infer that if the said **Newton Mwirigi** was called, his evidence would have been adverse to the prosecution.

22. With the foregoing inconsistencies, contradictions and doubts, there is no need to call upon the accused to offer any explanation. Doing so will be calling upon them to fill in the gaps in the prosecution.

23. Accordingly, I resolve the doubt in favour of the accused and hold that the prosecution has not established any *prima facie* case against the accused. I acquit the accused of the charge of murder under **section 322 of the CPC**.

Signed at Meru

A. MABEYA

JUDGE

DATED AND DELIVERED AT MERU THIS 23RD DAY OF JANUARY, 2020.

A. ONG'INJO

JUDGE