



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 85 OF 2014**

**REPUBLIC.....DPP**

**VERSUS**

**M'MBUI MUIZHANE.....1<sup>ST</sup> ACCUSED**

**ALICE KATHAMBI.....2<sup>ND</sup> ACCUSED**

**PETER MUGAMBI.....3<sup>RD</sup> ACCUSED**

**JAPHET KINYUA MUKENA.....4<sup>TH</sup> ACCUSED**

**GITONGA KIMATHI ALIAS MUNYUMBO.....5<sup>TH</sup> ACCUSED**

**JUDGEMENT**

M'Mbui Muithane, Alice Kathambi, Peter Mugambi, Japhet Kinyua Mukena and Gitonga Kimathi alias Munyumbo were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that the accused persons on the 1<sup>st</sup> day of November 2014 at Kalule village Kathelwa Sublocation, Laare Division in Igembe North subcounty within Meru County jointly murdered Johana Mureithi.

PW1 Ayub Meme testified that on 31.10.2014 he left his home at 11.00 pm to go for a clan meeting. He said the meeting ended at 3.00 am and he decided to go home. He said that 20 metres ahead of him he heard people talking in Kimeru and one of the asked them " Have you finished him"

That he had a torch which he shone on the people who were talking and recognized M'Mbuia, A1, who had a panga. He also saw Kimathi, A5 and Japheth A4. He said Kimathi and Japheth also had pangas which he saw them use to cut the deceased. He said when he shone torch on them, the 3 ran into different directions. He approached the deceased lying on his abdomen and he had a cut on the right hand with the thumb and index fingers cut off. He said there were cuts at the back of the head and neck.

That he rushed home to go and call his brother Kilemi and on return at the scene he found the deceased had died. The matter was reported by Sub- Area at Kathelwa AP Post.

That members of public came to scene and proceeded to A1's home. That when he was found his clothes, shoes and hands were all blood stained. That the torch and panga belonging to the deceased was also found at A1's home. That A1 was arrested, tied and taken to the scene of murder. That on interrogation he told PW1 and the other members of Public to go and get A4 and A5 Japheth and Kimathi. That when Japheth saw them he ran into the hills.

That A1 also instructed them to go and get Alice and Peter, A2 and A3. A2 and A3 were found sleeping and they were apprehended, tied and taken to scene. PW1 said they were with a big group of people when they went to A2 and A3. PW1 said that Police came from Laare and collected the deceased persons body and escorted to Meru Teaching and Referral Hospital mortuary where PM was conducted.

He said the panga and A1s blood stained clothes were taken by Police as exhibits. He said A1 was married to their sister and had 5 children. PW1 said A1 said he could not go to jail alone.

PW1 said the reason why A1 killed the deceased was because the deceased allegedly made him sell his land. He said A2, A3, A4 and A5 are their neighbours. PW1 said that the deceased was a stammerer and he recognized his voice and he also recognized the voices of those who were with the deceased ahead of him. He said the people who were ahead of him were drunk and were talking loudly. PW1 said A1

mentioned and directed them to A4 and A5 as well as Trufosa whom he said were with him at the scene of murder and later when they didn't find them he mentioned A2 and A3 saying A3 had escaped with his wife.

He said A4 and A5 escaped one was found in Limiru, PW1 said he was 20 meters away when he heard A1 ask if they had finished him and when he shone light he confirmed their identity.

PW2 Moses Kiremia testified that on 31.10.2014 he was in his hotel when A1 called the deceased who was taking tea and told him they should go where they had agreed. That A1 produce Kshs 1000/= and gave to the deceased. He said that Trufosa Karangu was outside the hotel. He said that the time was 9.00 pm. He said that A3 paid for the tea that the deceased and Koronya were taking tea at the hotel. He said A3 paid for A1's tea as well.

He said after the tea had been paid for A1, A4 and Trufosa left with the deceased. He said he didn't know what direction they took. That the following day he heard screams and gunshots and when he went out he found A3 and A1 were tied together and mob wanted to lynch them and police fired gunshots to scare them. He said chief made phone call to police who came and suspects and deceased body were taken to police and he later recorded statement. He said he didn't know where A1 went with the deceased. He said that A1 and A3 went to the hotel at 7.50 pm. He said A2 and A5 remained outside the hotel.

PW3 Richard Muriri testified that on 31.11.2014 he was guarding miraa farm in Kathelwa along Kangeta- Laare road. He said he was with A1, A2 together with Japheth and Kimathi as well as Trufosa. He said they were also with Murithi the deceased herein. He said he met the 6 people who were in company of A1. That the deceased asked if they could go home together but he told him he was on duty guarding miraa farm. He said he met the deceased and accused persons at 11.00pm. The following morning when he met the deceased persons brothers they told him the deceased had been killed. Later when he went to scene he found A1 had been arrested and the deceased had his fingers cut and cut at the back of the head.

PW3 said he didn't know who killed the deceased. He said A3 was not related to him and didn't come from his village. He said he met A1, A2 Trufosa and Japheth and they told him they had come from Kathelwa market. He said he met them at 11.00 pm and not 2.13 am. He said there was moonlight and the deceased spoke to him 1<sup>st</sup>.

PW4 Dr. Ruingu produced postmortem Report filed by Dr. Guantai who examined the body of the deceased on 12.11.2014 – ExP1 – and was of the opinion death was caused by severe traumatic brain injury secondary to assault with a sharp object.

PW5 Isaka Muringi said that on 1.11.2014 at 2.00 a.m he heard 2 people passing along the road saying in Kimeru “ Today we are lucky the person we wanted we have finished with him”. He said he saw it was M'mbuia who uttered those words. PW5 said it is true that he met A1, A4 and A5 and also saw the deceased lying down. He said he also saw A2 but he didn't see Trufosa. He said when he saw the deceased who was his friend lying dead he reported to his relatives and he found they already got the information. He said the deceased and the accused persons had gone drinking together.

In Cross examination PW5 said that he didn't see A3, A4 and A5. He said he heard the voices of A1 and A2 which he recognized as they had grown up together in the same village. He said he saw the body of the deceased the following day. He said during the day e saw A1 and A2 in company of the deceased and they went drinking together. He said A1 and A2 were drunk until the following morning. He said there was moonlight that enable him see A1 and A2.

PW6 P.C. Hillary Kiprono was the Investigating Officer. He testified that on 1.11.2014 he was at Laare Police Station when Chief of Kathelwa made a phone call to report a dead body had been found besides the road. On going to scene they were informed that they were 3 suspects who had been arrested by members of public and were about to be burnt.

In Liason with Administration police they rushed to scene to rescue the suspects who had sticks heaped on them and had been assaulted by all manner of weapons. He said at scene of murder they found the body of Murithi which had deep cuts on the head and hands. He took photographs of the body and body was taken to Meru hospital mortuary. He produced the photographs – Exp2(a)(b) and (c).

The photographs of the suspects was also taken – Exp2(d)(e) and (f). The 3 suspects were booked and taken to hospital . he said 2 other suspects Japheth and Trifosa managed to escape.

PW6 said that at close of investigations he preferred charge of murder against the 3 suspects and 2 others had not been arrested. he said that it is Japheth and Trifosa who were at large by the time he went on transfer and he doesn't know if they were arrested. He said it is Japheth Mukira he was looking for. He said he was not aware A1 mentioned A2 and A3 because they had an affair. He said that witnesses mentioned suspects were at scene of murder. He said A1 led to arrest of A2 and A3.

When accused persons were placed on their defence, A1 gave sworn statement and said the deceased was his friend and a brother in law as he married the sister known as Eunice Karambu. He said that on 31.10.2014 he met the deceased at Kathelwa Market and the deceased sold to him miraa worth Kshs 500/- and left. He said he went to Laare Market to sell the miraa he had bought from Kathelwa and returned home at 7.00 pm and didn't leave the house until on 1.11.2014 at 6.00 am when Ayub meme and other people went to his home and told him to accompany them to where Johana had been killed.

That he told them he didn't know what happened but he was beaten. Upon Ayub meme and his companion send they should go and look for the others. He said he was beaten using stones and Assistant chief came to scene and called police and he was taken to hospital. He said he was with A2 and A3 when they were beaten. A1 said he was not with the deceased on the night he was killed. He said he had no reason to injure the deceased. He said he had an affair with A2 for long before he got married. He said Ayub Meme in company of Murugu Kobia and Kiremia went to his house. He said Kobia didn't testify. He said Ayub Meme had a boundary dispute and the dispute was in court. he said that Muiruri refused to refund his 300/-. He also said Kirema doesn't own a hotel at home and he had to say he was in the hotel in the

evening. He said the witnesses who testified were paid by Ayub to testify against him. He said that on the material day he was with Kaburu at home at 6.00 p.m. He said his wife Eunice Karambu had spent the night away from home and didn't know where. He said his wife Karambu had mental incapacity. He said his children were at his mother's house 500m away from his house. He said he had an affair with A2 upto 2012 even after he got married. He said A3 was son to his uncle and he had known him for over 20 years. He said he had known A4 for over 30 years as they come from same village. He said he was not related to A5 but he has known him for 10 years. He said if police didn't rescue them they would have been killed.

A2 Alice Kathambi also gave sworn statement and said that on 31.10.2014 when she woke up at 6.00 am she went to Mama Dorcas in Kiwanja Area to have her hair plaited. That her hair was done upto 10.00 am after which she went with Kathure to do some casual work upto 5.30 pm. She said after Kathure had given her water to wash her legs, Kathure also gave her 3 glasses of chang'aa which she took then decided to go back to her rental house where she slept for sometime before she was invited by Kimani to go for a drink.

That she went back to her house by 8.00 pm. She said she didn't see Johana the deceased at the club.

She said she didn't see any of the accused persons at the club. She said the following day at 6.00 am Peter Mugambi, A3 herein went to her house to ask if she was fine. That when A3 went to her house she warmed the meat she had cooked the previous day so they could take its soup. That before they could take the soup he saw about 40 people led by Ayub and Kilemi approach their house. She said she was still up and when she asked what the problem was she was pulled and she fell down and they started beating her on the head and all over the body with sticks. She bled from the head. She said A3 was also arrested. She said Ayub kicked her in the left abdomen and she was unable to walk. She said they were tied and dragged on the ground.

That they met with Mwithalia who was also tied with a rope on the hands. That they were taken to chief's camp where leaves were thrown at them ready to be set on fire but police arrived and rescued them. That when she boarded police vehicle they found a dead body. They were taken to Laare police station. At 12.00 pm she was taken to Mutuati hospital where she was treated and admitted for one week. She said she remained in custody for 20 days and was charged with offence of murder jointly with A1 and A3. She said she was not with A1 and A3 or even A4 and A5 on the material night. She said she had not differed with the deceased. She said Isaack Maore's evidence that she was with A1 and Trifosa was not true. She said she didn't see any of the accused persons on 31.11.2014. She said A1's house was near the house of Dorcas who plaited her hair as 31.11.2014 but they use different gates.

She said she stays alone and by the time she arrived home her neighbor who was also her landlord had slept. A3 also testified that on 31.10.2014 he left to go and guard miraa farm in the evening as one side had been stolen. That at 7.00 pm he went to buy tea and also play games at Kirema's hotel at seven market. He said mzee kubein, mzee Koronya, Kirinya and Johana Murithi were at Kiremas hotel and he paid for their tea before he went back to guard the miraa about 2km from the hotel.

That when he left the miraa farm at 5.30 am he proceeded to A2's house and A2 warmed some soup for him to take before he slept as he was tired. That at 6.00 am he was woken up by a crowd of about 100 people and he was able to identify among them Ayub Meme and Muruiru. He said Ayub Meme left jail in 2009. That Muiruru told them to leave him alone but the crowd insisted he should also accompany them.

That when he resisted being arrested and tied, he was cut all over the body, head and hands. They were taken where deceased body was lying and they also found A1 at scene and he had been beaten thoroughly and was bleeding. He said the crowds wanted to lynch them. When Administration police arrived and rescued them and they were taken to the camp but members of public stood on the way and pelted them with stones. He said the Administration police escaped and they were made to lie down and firewood put on them. He said it is police from Mutuati who came and rescued them. He said they found the body of the deceased in the police and they were taken to Laare Police Station and Later to Mutuati hospital where his head and right hand were bandaged and his right thumb which had a cut was dressed.

He said they were taken to Maua court and remanded at Laare police station upto 17.12.2014 when they were arraigned in court. He said he saw Johana in the hotel on 31.10.2014 at 8.00 pm. He said he was not with any of the other accused persons except with A2 on 1.11.2014. He said it is true he was in the hotel of Moses Kirema with the deceased – Johana Koronya Kiringa, Kubai and Kirema. He said he went to guard miraa alone. He said that about 100 people went for him and A2 from A2's house and when they arrived at scene there were even more people. He said Japheth Kinyua is brother to A2. He said Gitonga Kimathi was known to him. He said on 31.10.2014 he met A1 buying miraa while he was on the way to his employers place. He said he never used to talk to A1 because of A2.

A4 gave sworn testimony and said that on 31.10.2014 he went to Kathelwa market where he entered. Mzee Kimunyus hotel and together with Muchubu and Kinyua were taking tea and chewing miraa. That at 7.30 pm he proceeded home and on arrival at 8.00 pm he slept until the following morning. He said he was with his children and wife. That on 1.11.2014 he heard gunshots and learnt that M'Mbuia had been arrested together with Alice and Peter Mugambi. That he left to go to Kathelwa market to work. That on the way to work he met his neighbor Kimathi Koronya who told him that he heard a mob was looking for him. That when he met Koronya's brother known as Boyi who told him the same thing, he decided to go back home.

That while at home he saw Ayub Meme and Kilemia the deceased persons brothers together with Nduku the sub-area and Shadrack. That they started pushing him and he escaped into the farm. That when they left he went back home and stayed for about one month before he was arrested by 3 police officers from Kathelwa. He said A2 was his sister. He said the deceased was his neighbor and had no difference with him. He said he was not with the deceased on 31.10.2014. He said he was not with any of the accused persons on 31.10.2014, he and Muchubu and "wasiwasi" were hired to pick miraa from Mzee Mutiga. He said Ayub Meme used to hire them to pick miraa but when he refused to pay balance of Ksh. 200/- he stopped working for him.

A5 in his sworn testimony said that the deceased was known to him and that they went to same market. He said that on 31.10.2014 at 4.00 pm he went to Kathurima Market and he and Kamure started chewing miraa. That when Kamure left he went to play pool. That while playing pool the deceased came by and greeted him and left.

That he played upto 7.00 pm then went to Muchubu Mbinus club to take some alcohol. That at 8.00 pm he went to his friend Kamburu's

place and because he was drunk he spent the night there. That the following day he left on a motorbike to go to work and he worked for 2 weeks. That after 2 weeks when he met Jason he learnt that Johana had been killed. That he had been sent by his employer when 6 police officers and one civilian arrested him in Ndumburo. He said he was not with his co-accused on the night that Johana was killed. He said he used to see his co-accused at the market place.

He said his employer was Gitonga and he was being paid Kshs 3000/= per month. He said from his employer to deceased persons home is 15 Km. he said that the co-accused came with him from same area and they used to meet at the market. He said he left the market on the material day at 7.00 pm.

He said his friend Kamuri stayed in Kiwanya area. He said he differed with Ayub over his late fathers property when he started staying with his mother after the father's death. He said he was very young when the father died and that he was now 22 years old. He said Ayub could beat him whenever he found him at his father's miraa farm. He said his father's land doesn't have title.

DW6 Paulina Kinya wife to A4 testified that on 31.10.2014, A4 returned home at 8.00 pm and didn't leave the house the entire night. That on 1.11.2014 A4 remained at home and that in December 2014 he was arrested from home by 2 police officers.

She said the deceased was known to her and that A2 was her husbands sister. She said it was true accused persons were almost being lynched. She said scene of lynching was about 2 KM from her home. She said she went to scene and found firewood had been heaped on A2 and A3 as they were suspected to have been involved in the murder of deceased. She said she got married to A4 in 2004. She said her home to Johana, the deceased home is ½ KM. she said A4 didn't leave the house on the material night. She said when she found lynching going on she went to her parents place and returned home later in the evening. She said that when she returned in the evening her husband was at home.

From evidence on record for the prosecution and defence this court is to determine whether the prosecution has established beyond all reasonable doubt the fact of death, the cause of death, whether death was caused by unlawful act or omission. Whether the unlawful act or omission was committed by the accused persons herein and whether that malice aforethought has been established.

That the deceased Johana Murithi died is not in dispute. His body was found lying dead at Kalule on 1.11.2014 at 03.00 hrs. when post mortem was conducted on 12.11.2014 Ayub Meme and Richard Kilemi identified the body as belonging to Johana Murithi their brother.

On the cause of death Dr Guantai observed that death was caused by severe traumatic brain injury secondary to assault with sharp object. The injuries observed by Dr. Guantai in the post mortem Report are obviously ones that could only have been inflicted unlawfully and with malice aforethought as they are multiple cuts as the head, hands and nervous system. These are injuries that were intended to cause grievous harm and/or death and the assailants achieved the later as the deceased succumbed to the injuries inflicted on him.

Whether the fatal injuries were inflicted by the accused persons herein. The offence was committed at night and the issue of identification of the suspects is key.

According to PW1, he was on his way home at 3.00 am when he heard people talking loudly about 20m ahead of him and he recognized the voices as that of Accused 1, accused 4 and accused 5. He said he also recognized the voice of the deceased who was his brother and was a stammerer. He said he heard the A1 ask in Kimeru "Have you finished him" with the aid of his torch he was able to identify that it was A1, A4 and A5 who had cut the deceased with the pangas they were armed with. That he shone his torch on them they ran in different directions. He approached the scene and found that indeed it was his brother who had been cut severally. He said he went to call his brother Kilemia and on return to the scene found the brother had died. PW1 said members of the public were mobilized and they proceeded to A1's home where they found his clothes, shoes and hands were blood stained and a torch and panga belonging to the deceased were also recovered. PW1 testified that A1 mentioned the 4<sup>th</sup> and 5<sup>th</sup> Accused persons but when they went looking for them they escaped and A1 said he could not go to jail alone and again directed them to the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons.

According to PW6 the investigating officer by the time he was going on transfer the suspects who were wanted and were still at large were Japheth and Trifosa .

Pw2 said that A1 lured the deceased out of his hotel by giving him Ksh. 1000/- and urged him that they should go where they had agreed and together with A4 and one Trifosa they left with the deceased. PW2 said that by then the 2<sup>nd</sup> and the 5<sup>th</sup> Accused persons were outside the hotel when the A1 called the deceased.

PW3 Richard Mururu said he met A1, A2, A5, Trifosa and the deceased at 11.00 pm .

PW5 testified that on 1<sup>st</sup> November 2014 he met A1, A2, A4 and A5 and that the deceased was lying dead on the ground. He said he went to report to the relatives of the deceased and he found that they had already got the information. PW5 said that A1 and A2 had gone drinking with deceased during the day and that A1 and A2 were still drunk until the following morning.

From the evidence on record A1 was said to have married the sister of the deceased and PW1 and that the A2 was the sister of A4. It was also the evidence of the prosecution that the accused persons and the prosecution witnesses as well as the deceased came from the same neighborhood and knew each other very well. The evidence of PW1 that he recognized the voices of the people who were talking loudly ahead of him and physically identified by the use of his torch is corroborated by the evidence of PW3 and PW5 that they met them with the deceased and that they murdered the deceased person. PW5 testified that A1 and 2 had gone drinking with the deceased during the day and PW2 confirmed that when the 1<sup>st</sup> accused got the deceased from his hotel A2 and A5 were waiting outside the hotel. It is not clear what A2 and Trifosa did in the causation of the murder but it has strongly come out that A1, A4 and A5 participated actively in the commission of the unlawful act that led to the deceased person's death.

PW2's evidence corroborates the evidence of the A3 that he was at the hotel and paid for the tea that was taken by some 2 old men as well as the deceased before A1 left with the deceased but apart from that there is no evidence that places him at the scene of the offence. A3 said he was guarding miraa at night and in the morning he went to A2's house and that is where he was found and arrested together with A2. According to PW1 it was after they failed to trace A4 and A5 that A1 said he could not go to jail alone and referred them to A2 and A3 saying that A3 had escaped with his wife. There is therefore, no sufficient evidence to find A2 and A3 guilty of the offence of murder. They are acquitted under section 322 (1) of Criminal Procedure Code. On the other hand, this court finds there is overwhelming evidence against A1, A4 and A5 and they are found guilty as charged and convicted under section 322(2) of the Criminal Procedure code.

**HON A. ONG'INJO**

**JUDGE**

**JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 27<sup>TH</sup> DAY OF FEBRUARY 2020.**

**In the presence of :**

C/A: Kinoti

Accused 1:- present in person

Accused 2: Present in person

Accused 3: Present in person

Accused 4: Present in person

Accused 5: Present in person

Mr Igweta Advocate for accused persons.

Ms Mbithe for state.

**HON A. ONG'INJO**

**JUDGE**

Ms Mbithe

We can have mention date to confirm if there are records as well as get victim impact statements.

Order: Mention 1.4.2020 for Mitigation, Records and Victim Impact Statement.

**HON A. ONG'INJO**

**JUDGE**