



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 1 OF 2016

REPUBLIC.....PROSECUTOR

VERSES

MARTIN MUTUA MUSAU.....1ST ACCUSED

PAUL WAICHERE NDIRANGU.....2ND ACCUSED

PAUL WAICHERE NJENGA.....3RD ACCUSED

MARGARET MUTHONI.....4TH ACCUSED

JUDGEMENT

1. The 4 accused persons were jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the penal code**. The particulars of the offence were that **on the 29th day of December 2015 at around 2100 hours at Gitwamba village, Saboti Division within Trans Nzoia County murdered BERNARD MWITA CHEPASA**.

2. All the above accused persons denied the charge which necessitated the matter to go for a full trial in which the prosecutor called several witnesses to establish his case. The accused were thereafter placed on their defences and they each gave sworn evidence. It is necessary to summarise the evidence as presented during trial and thereafter analyse the same so as to determine whether the state proved its case against them.

3. **PW1 ELIZABETH WAITHERA OYIEGO** an analyst from the Government chemist Nairobi testified that she received some assorted items from the investigating officer for her to do an analysis which included undertaking a DNA on the samples. These included deceased blood sample in a bottle, a right foot gumboot, blood samples of the 1st accused, a pair of trouser belonging to the 1st accused, blood sample of the 2nd accused and a pair of safari boots shoe of the 2nd accused.

4. She found that the gumboots were stained with blood as well as the trouser and the safari boot shoes. The DNA sample of the said blood stained matched that of the deceased. The DNA profile from the trouser matched that of the 1st accused.

5. **PW2 MARY WANJIRU KARIUKI** from Gitwamba testified that she knew the deceased person who was her neighbour. She said that she bought land from the 1st accused brother one John in the year 2013. She was however refused entry into the land and she had to obtain a court order. She was however unable to stay peacefully on the said land as she was threatened by the accused persons herein. She reported the threats to the administration police but no action was taken as it was thought to be the normal threat.

6. A week before the incident she had been chased away by the 1st 2nd and 3rd accused while armed with a panga. They did threaten the deceased but he refused to be intimidated. He however told the deceased to be careful. The deceased was living in the house of his late brother who had purchased the land from John Waichere the brother to the accused.

7. On the fateful night she was told by one Robert that the deceased had been found bleeding and with the escort of police they went to the scene and she saw his body which had the throat cut and the neck severed as well as the cuts on the hand and the leg. The hand had been chopped off. He had gumboot on the right leg and there was blood inside.

8. The District Commissioner convened a barasa and the 3rd accused attempted to run but he was arrested. She said that she took the police to the 1st accused place and the 2nd accused was also arrested. She identified the trouser and the shoes which belonged to the 3rd accused.

9. When cross examined she said that the deceased body was found on a public road at around 9pm. She denied that she accompanied the police in recovery of the exhibits mentioned above. She however said that she would see the accused wear the shoes and the trousers. She said that they were threatened by the accused and told that the land was a graveyard and she has been out of the land for three years because of the threats.

10. **PW3 ROBERT SIMATWA CHEPKOROM** testified that the deceased was his nephew and they lived together in the same house at Gitwamba. The house they lived in belonged to the deceased brother who had bought the land from one John Waichere who was an uncle to the 2, 3, and 4th accused and a sister to the 4th accused.

11. He went on to state that the accused persons gave them a lot of problems and they would chase them while armed with pangas. When they took the surveyors on the land the accused would remove the beacons.

12. He said that on the 25th December 2015 one Allan who is a teacher wanted to buy the land belonging to the said John but he was threatened by the 2nd and 3rd accused who went on to tell him that someone will die within a week over that shamba. On 29th December, 2015 as he returned from his mother's house at night he found the deceased lying on the road bleeding. He rushed and told his neighbour. There were injuries on the body which included a severed neck. The police came and took the body to the mortuary. He also identified the gumboot which was won by the deceased that day.

13. When cross examined he said that he did not witness the incident but had been threatened on the 25th although he did not report to the police as he deemed to be the usual threats which they were used to.

14. **PW4 IRINE CHEPKEMOI CHEPKWONY** testified that she lived in Nakuru and the deceased was her elder brother. John Waichere sold land to his late brother in the year 2013. She said that she was present when that land was purchased and the final payment made in 2014 and as they did survey work she met the 2nd accused who threatened her that the land belonged to them and she should not go there. They all threatened to kill the said John and they dispersed as police officers were present.

15. She went on to state that they buried her deceased brother after obtaining a court order and that the 1st accused had threatened to exhume the body. They build the house and placed the deceased as a care taker as the chief and the police had assured them of protection. She said that she spoke with the deceased on the 24th as he was to go to Nakuru. On the 25th he called her and told her that he had been threatened by the accused, Paul and Muthoni.

16. When cross examined she said that the deceased was disabled as he was paralysed on one side and that he was not taking alcohol. He had lived on that land for about 9 months.

17. **PW5 JULIUS CHEPKWONY NDIWA** testified that the deceased was his nephew and the accused persons are his neighbours. He said that the deceased brother had bought land from John measuring half an acre but he died and they decided to bury him on the same land. But as they arrived on the land the 4th accused and her children chased them from the land and he had to call John Waichere who came with the title deed indicating that he was the owner of the land. He then came to court where he was given an order permitting them to bury the deceased on the land on 11th April 2015 under police and the area chief's supervision.

18. He went on to state that the deceased was thereafter left to take care of the land. In December 2015 PW2 told him that the 4th accused had purchased a panga which she threatened to use it in killing her. She told her to report to the police. After a week on 30th December, 2015 he received a call that the deceased had been killed. He went in the morning and found that the deceased had been killed. The police came and took the body. John Waichere spoke at the funeral that the land was his and nobody would stop him from selling it. He suspected that it was the accused who had killed the deceased pursuant to the threats they had made that nobody was going to occupy the land.

19. When cross examined he said that the deceased was killed while heading home on a road next to his house. He said that the deceased was lame and he used to sale groundnuts at the market and he did not take alcohol.

20. **PW 6 SGT AMOS KOCHULAN** from Gitwamba patrol base testified that he was from Gitwamba market heading to the office when he met people talking to APC FRANCIS SAGALA who told him about the deceased death. He knew the deceased as he used to sale groundnuts. He went to the scene with other officers using the station vehicle. The body was lying in a pool of blood and had injuries on the neck, leg and hands. He called the inspector who in turn informed the police from Kitale police station.

21. **PW7 DR PATRICK MUSITA** from Endebbes sub county hospital did post-mortem on the deceased body on 6th January 2016 and concluded that the cause of death was severe multiple injuries and severe external haemorrhage. The specimen was taken for DNA analysis.

22. **PW8 ASP JOSEPH NZIOKA** carried out the investigations after being directed by his boss. He went to the scene and found that the deceased was living on his late brother's land. He also found that the accused had refused the deceased late brother from being buried on the land which he had purchased from John Karanja Waichere. He also found pw2 who had bought land from John Waichere and she had been threatened as well.

23. He went on to state that the deceased had been attacked using a panga which they did not recover. He had all the accused persons arrested and he preferred charges against them. He went ahead to produce all the exhibits which included the sketch plan of the scene as well as the copy of the title deed for land parcel number **SABOTI /KIBOROABLOCK 1 GITUWAMBA /271**.

24. When cross examined he said that there was no eye witness to the incident but pw2 heard the accused threatening the deceased. He said that the 4th accused was seen sharpening the knife.

25. As indicated earlier when placed on their defence each of the accused persons gave sworn evidence denying the charge. The 1st accused **MARTIN MUTUA MUSAU** testified that he lives in Gitwamba and does transportation using donkeys. He said that on the 29th December 2015 he was home in the evening with his family. He took dinner and slept till the following day when he went to the shamba with his donkeys to ferry potatoes.
26. When he arrived home at around 2.00 p.m the police came and told him that they wanted him to carry some potatoes the following day. He was however taken and locked in the cells without being informed of the offence he had committed. He was thereafter charged. He went on to state that on the material night he did not see his co accused. He however confirmed that he knew John Karanja who was still alive.
27. When cross examined he said that they lived together with PW2 and that the 2nd accused was his brother in law as well as the 3rd accused and the 4th accused is their aunt. They were all related. He denied that he had any interest over the land.
28. The 2nd accused **PAUL WACHIRA NDIRANGU** testified that he was a driver and lived at Gitwamba. He said that on the 29th December, 2015 he did his business of matatu using motor vehicle registration number KBJ 327D Probox. He produced his driving licence as an exhibit. He parked his vehicle at the shopping centre after that day's work and went home to be with his family.
29. The following day he went to his business and at the trading centre he heard that there was to be a Chiefs barasa. After 30 minutes' police came and arrested him and took him to his house where a search was conducted. They did not however find anything. He was thereafter taken to the police station without being told what offence he had committed.
30. He went on to state that he knew John Waichere who was his uncle. He denied that he had died. He said that he knew the deceased and had never quarrelled with him.
31. When cross examined he said that the co - accused were his relatives. He denied that the shoes produced in court belonged to him.
32. The 3rd accused person **PAUL WACHERE NJENGA** testified that he was a *boda boda* rider and that on the 29th December, 2015 he was at home with his family and after taking supper they slept till the following day when he went for his duties. While he was heading to Gitwamba from Saboti he met 2 police officers who stopped him and demanded that he goes with them. When they arrived at Gitwamba they met many people and they took him to his house where they conducted a search but did not collect anything. He was thereafter taken to Kitale police station and charges preferred against him which he continued to deny.
33. When cross examined he said that he used to see the deceased but he did not know him beyond that. He however said that the rest of the accused were his relatives. He denied that he had threatened the deceased.
34. The 4th accused **MARGARET MUTHONI** testified that she runs an hotel at Gitwamba and on the 29th December, 2015 she was at her work place. She was being assisted by her daughter. Some customers came and she gave them food. They introduced themselves as CID officers and they went with her to her house where they conducted a search but they did not get anything. She thereafter left with them and taken to Kitale police station. She said that she knew the deceased as a resident of Gitwamba but she did not see her that night. She denied that she had differed with the deceased.
35. She denied on cross examination that she had any dispute with pw2 and that she did not know where the deceased lived. She heard that the deceased was killed on the road and she had no land dispute with him.
36. When the matter was closed, the parties were advised to file written submissions which they have complied. The learned state counsel opined that all the ingredients of the offence had been met by the evidence tendered. He submitted that there was malice aforethought on the part of the accused persons and that they all conspired to commit the offence. He relied inter alia on the now famous authority of **REP V. KIPKERING ARAP KOSKEI & ANOTHER**. In essence the circumstantial evidence overwhelmingly points to the accused persons as guilty of the offence.
37. The counsel for the accused on the other hand has submitted strongly that the prosecution has failed to discharge its mandate of connecting the accused with the offence. He submitted that they failed to call one John Waichere who was a critical witness. He said that there was no sufficient circumstantial evidence to find the accused persons guilty of the offence.
- ANALYSIS AND DETERMINATION**
38. Having heard the parties in this matter, what is not disputed is that the accused persons are all related to one John Waichere who sold land to the deceased brother who predeceased him. The deceased was taking care of the said shamba till the time of his demise. It is also not in dispute that the deceased was physically challenged and was engaged in the business of selling groundnuts at Gitwamba trading centre even as he takes care of the land.
39. It is equally not in dispute that the deceased met his death in the early hours of the 29th December 2015 and his body was found on a public road near his home. There was no eye witness to the incident.
40. The accused from the evidence on record had a dispute over the land namely land parcel number **SABOTI /KIBOROA BLOCK 1 /GITWAMBA/271** registered in the name of John Karanja Waichere. Their beef over the same has to do with the ownership namely that the said Waichere sold it to third parties without their consent or involvement.
41. It is equally safe to state that the burial of the deceased brother was not without drama as it took the intervention of the court through an

order to have him buried on the land. As a result, the deceased lived in the house built during the burial of his brother as was agreed by the family.

42. The cause of the deceased death was proved by the production of the post mortem report by the doctor which showed that he died a gruesome death as his limbs were severed and the throat slit. Obviously those who attacked and killed him did not intend that he would survive to tell the ordeal.

43. The matter as rightly summarised in their submissions by the counsels on record shall only be proved by circumstantial evidence. The courts in many authorities have held that the same must be cogently proved. The Court of Appeal in **OMAR MZUNGU CHIMERA V. REP CRIMINAL APPEAL NO. 56 OF 1998** stated that;

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

44. The relationship between the accused and the deceased and his family clearly deteriorated after their uncle Waichere sold a portion of the land to PW2 as well as the deceased brother. This was demonstrated by the incident of stopping the burial of the deceased brother until they sought the court as well as police assistance. This although vainly denied by the accused was the truth. It was submitted by the defence counsel that there was no production of the said court order, but that position was not challenged during cross examination as well as when they defended themselves.

45. The evidence of PW2 in the view of this court was independent and demonstrated a chronology of the events surrounding the land dispute. She testified that she had been forced to rent a house at the trading centre for fear of being attacked by the accused persons who had previously threatened and chased her. Although there was no evidence that the matter had been reported at the police station for there was no occurrence book (OB) details, there is every probability that she made the complaint but the police were reluctant to record as it appeared that the threats had been usual and ongoing.

46. Taking the DNA report produced as evidence in this court, there is no doubt that the same was credible. Even the cross examination by the defence counsel did not shake the fact that the blood samples matched that of the 1st accused. There was the argument of course whether the clothes and the shoes belonged to the accused persons. That again was answered by the scientific analysis by pw1. Even for argument sake, what was the deceased blood stains doing in the clothes recovered from the suspects house?

47. Even though there were no distinguishing marks on the clothes and the shoes, the witnesses said that they would occasionally see them wearing the same. At any rate these were items recovered immediately after the incident, in fact that particular morning.

48. Each of the accused in their defence generally denied that there was any dispute concerning the land. Accused 1 said that he did not know who owned the land in which the deceased lived and the 4th accused equally said that there was no land dispute. This line of defence runs contrary to their demand that John Waichere was still alive and he should have been called to testify.

49. In the premises, though the accused were not caught in the act there is sufficient circumstantial evidence to show that the accused had a common intention to secure the land which was sold by their relative John Waichere without their consent. The hostility exhibited against the deceased's brother, the deceased himself as well as pw2 sufficiently showed that they did not want anybody on that land.

50. Further the threats made by the accused persons jointly and separately on various occasions clearly demonstrated that they did not intend to have the land occupied by some other person's least of all the deceased who was left by the family to manage and guard the same.

51. This court finds it difficult to disassociate any of the parties from the offence. Although their arrests were done separately on the same day, their defences which more less were alibi does not stand. None of them was able to rebut the prosecutions allegations and none of them called any witness to support the alibi. In any case that was raised later in the day and at the tail end of the matter which is contrary to the requirement that it ought to be raised as early as possible.

52. There was therefore a common intention by the accused to harm the deceased. This common intention is best described under Section 21 of the Penal Code which states that;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

53. The accused thus combined forces to harm and kill the deceased ostensibly because he had stayed on the disputed land. The evidence of the purchase of a panga by the 4th accused and the threats that someone will die within a week was not farfetched. The sole intention was to retain the land under all circumstances.

54. This court therefore finds all the accused jointly and severally guilty of murdering the deceased on the said date. Each one of them is therefore guilty as provided under Section 203 of the Penal code.

Dated, signed and delivered at Kitale this 16th day of September 2020.

H. K. CHEMITEI

JUDGE

16/9/2020