



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL CASE NO. 10 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER NGINYA MAINA.....1<sup>ST</sup> ACCUSED**

**SIRIAKO MAINA NGINYA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. On 25<sup>th</sup> February 2011, the remains of John Gikunga Waweru were found at Kayahwe Bridge, not far from his homestead. The body had visible injuries including a severe blow to the head.
2. According to one witness (PW3), the deceased had an illicit affair with the wife of the 1<sup>st</sup> accused. Another witness (PW2) testified that on the night of 24<sup>th</sup> February 2011, she saw the two accused persons beating up the deceased at an entertainment joint styled *Ndikwe Bar*.
3. The Republic brought information to the High Court for murder contrary to section 203 as read with section 204 of the **Penal Code**.
4. The particulars were that on the night of 24<sup>th</sup> and 25<sup>th</sup> February 2011 at Kiawambeu Village, Muchungucha Sub-location, Mbirri Location within Murang'a County, the accused persons jointly murdered the deceased.
5. Three witnesses took to the stand. The primary evidence was from Mary Nyambura Ndogo (PW2). She testified that on 24<sup>th</sup> February 2011 she was drinking at the bar. She saw the deceased saunter in and proceed to the sitting area at the back. It was about 9:30 p.m. About 15 minutes later the two accused persons strolled in. The witness said there was a pressure lamp at the main bar while the rear was lit by some candles.
6. She said that the 1<sup>st</sup> accused confronted the deceased; held him up by the collar and said in Kikuyu:  
*Do you want me to kill you, you small dog? Haven't I caught you now?*
7. She said that the 2<sup>nd</sup> accused joined the 1<sup>st</sup> accused and they beat up the deceased until he fell unconscious. They were using fists and kicks. The witness tried to intervene but she was slapped and threatened by the 2<sup>nd</sup> accused. She said that the accused persons then dragged the deceased outside the bar. At the time, the deceased was bleeding from the nose and mouth.
8. When she saw the body of the deceased at the bridge the following day, she claimed it was dressed in the same clothes as those worn by the person who was assaulted by the accused the previous night.
9. The witness conceded that the fight took place at the rear of the bar which was lit by two candles. She also admitted she was tipsy. She was also stressed having buried her husband that very day. In cross examination, she stated that she did not recognize the person who was being beaten; and, that she made a connection when she saw the remains at the bridge.
10. The other evidence was tenuous. For instance, the father of the deceased, Waweru Kimani (PW1), parted ways with his son at about 5:00 p.m. He could not tell if he returned home that evening. The following day, he learnt that the body of the deceased was found at Kayahwe Bridge.
11. The other witness (PW3), claimed that her husband (the deceased) had an illicit affair with Mary Wanjiru, the wife of the 1<sup>st</sup> accused. No

clear evidence was led on that point. But she claimed that on 24<sup>th</sup> February 2011, the 1<sup>st</sup> accused called her and asked: “*should I do something drastic to [the deceased] and Mary Wanjiru?*”

12. When the accused were placed on their defence, they denied that they beat up the deceased or killed him.

13. The 1<sup>st</sup> accused said he knew the deceased but denied any knowledge of the illicit affair. He also denied that he spoke with PW3 on the night of 24<sup>th</sup> February 2011. He stated as follows:

*On 24/2/2011 I was at Muchungucha at Thome Bar. It was my club. I started work at 5.00 p.m. and closed at 11.00 p.m. On 25/2/2011, I was still at Muchungucha.....*

*I retired to bed behind the premises. On 27/2/2011, I learnt that police were looking for me. I went to the station. I was taken to my home at Kiawambeu. They searched. I do not know what they were looking for. They didn't carry anything. We went to my bar. I opened my living quarters. It was about 4:30 p.m. They left me there and asked me to proceed with my business.....*

*On 10<sup>th</sup> October 2011 I heard my son was arrested at a bar in Kiawambeu. I came to the police station. When I identified myself I was arrested.....*

14. The 2<sup>nd</sup> accused on the other hand said under cross-examination:

*I and 1<sup>st</sup> accused did not beat up the deceased at Ndikwe. I was at Kiawambeu from 7:00 p.m. I slept there. I was in my place. I do not know when my mother (DW2) left home. I never escaped after the incident. I used to work as boda boda. I was arrested in October. I can't remember the date. By that time deceased had died and had been buried. I do not know how he died.....Deceased was my age mate. I can't tell who may have had a relationship with my mother.*

15. Learned counsel for the defence, Mr. L. Kinuthia, filed final submissions on 28<sup>th</sup> August 2020. Learned Prosecution Counsel, Mr. S. Mutinda, lodged his submissions on 16<sup>th</sup> October 2020.

16. 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.*

17. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

18. There is *no* doubt about the *death* of the deceased. The deceased's father identified the body to the pathologist at Murang'a Level 5 Hospital on 3<sup>rd</sup> March 2011.

19. From the description of injuries by PW1 and PW2, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

20. The first major issue is whether the two accused persons beat up the deceased the previous night. That issue is intertwined with *identification*. PW2 conceded that the fight took place at the rear of the bar which was only lit by two candles. She was seated out in the front section and said she could see the goings on at the back. The trouble is that she had been consuming alcohol for about two hours. She admitted she had taken three bottles of beer and was drunk. She was also “stressed” having just buried her husband that very day.

21. When cross examined, she conceded that she did *not* recognize the person who was being beaten at the bar. She said:

*This was because I was drunk. But when I saw the body at the bridge the following day I recognized the deceased whom I know. It is my testimony that I did not at the time recognize the person who was being beaten by the accused persons.*

22. There is thus no explanation how the deceased ended up at the Kahaywe Bridge. When PW2 last saw the deceased at the bar, he was bleeding from the nose and mouth. I remain alive that the Republic had no duty to prove a motive. But there was no clear evidence that the deceased had an affair with the wife of the 1<sup>st</sup> accused which provoked the fight.

23. In a word, there is no clear cut evidence that the deceased died from the injuries inflicted by the two accused persons on the material night; or, that they had the requisite *mens rea*. It is glaring that the pathologist was neither called to the stand nor his report produced in evidence.

24. The accused denied that they beat up the deceased. They may have been less than candid. But the burden of proof never shifted to them. **Woolmington v DPP** [1935] AC 462, **R v Kipkering arap Koske & another** 16 EACA 135 (1949), **Bhatt v Republic** [1957] E.A. 332.

25. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

*“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”*

26. I have reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. I cannot say with confidence that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused, of *malice aforethought* killed the deceased.

27. I accordingly enter a finding of *not guilty*. The accused persons are hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 17<sup>th</sup> day of November 2020.

**KANYI KIMONDO**

**JUDGE**

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

Accused persons.

Mr. Kamata holding brief for Mr. Kinuthia for the accused instructed by L. M. Kinuthia & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

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