



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 8 OF 2011

REPUBLIC

VERSUS

JOHN KARIMI WANJIKU

JUDGMENT

The accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, cap. 63, Laws of Kenya**. The particulars are that on the 2nd day of February, 2011 at Nyeri township in Nyeri district within central province he murdered Ibrahim Mwangi Njeri, (herein “the deceased”). He entered a plea of not guilty and therefore the state called five witnesses in its bid to prove the charge against him.

The first of these witnesses was **Peter Mathai Mwangi (PW1)** who testified that on 2nd January, 2011, he was asleep at around 1 AM when he heard somebody call out the name of his wife, Muthoni. He woke up and went out of the house; he found out it was one Kiiru who had been calling. According to him Kiiru, asked him to go and separate the deceased and Karimi (the accused) whom he also referred to as “Mboche” who were then fighting. He described Kiiru as his friend while the deceased was his brother-in-law (or the brother to his wife).

Mwangi (PW1) then proceeded to where the deceased and the accused were fighting; in his estimation, this was about 100 metres from his house but 50metres from the deceased’s house. He found them combat though the deceased appeared to have been subdued by the accused; the latter is said to have been on top of the deceased hitting him on the head with rocks. He was able to see them with the help of a torch light. Though he managed to separate them, the deceased was not able to walk; instead, he crawled towards his house.

Initially, Mwangi testified that the deceased told him to tell the accused to return his clothes and identification card; later in his testimony, he said that in fact it was the accused who wanted his clothes and identification card from the deceased.

The witness was with his wife; besides them, there were other people at the scene also. When they went to the deceased’s house, he said to have uttered words to the effect that; “Mboche umeniua” meaning, “Mboche you have killed me”. The witness’ wife called for a taxi and together with his wife they took the deceased to the police station but were referred to Nyeri Provincial General hospital where he was admitted for treatment.

The witness’s wife found the deceased unconscious when she went to check on him the following day; they took him for a head scan at Mathari hospital. When he returned to the general hospital, he was taken to the intensive care unit from where he succumbed to the injuries and died on 2nd February, 2011.

When she went to report the matter to the police, the accused had already been arrested apparently for other offences.

Martha Nyambura Njeri (PW3) happened to be in the same house with Mwangi (PW1) and his wife at the material time. She heard Kiiru calling her sister; she knew it was him because she recognised his voice. She remained in the house as Mwangi and his wife went to the scene. She testified that the accused was popularly known in the village as “Mboche”

Mary Wangechi Ndigiriri (PW2) testified that she was asleep on the 2nd day of January, 2011 when she heard somebody knock on her house. The same person was calling her name and she recognised the voice as that of the deceased. She woke up and went out only to find the deceased fighting with somebody whom she could not identify since it was dark. The deceased told her to go to his sister’s place and take a photo, identification card and clothes; she however declined to go. She denied that Mwangi (PW1) separated them but that they only stopped fighting when she asked them to.

Police Constable David Ali (PW4) testified that he investigated the case and that on 2nd January, 2011, the deceased was brought at Nyeri police station in the company of **Mwangi (PW1)** and Joan Muthoni Mathai. The deceased had sustained injuries on the face and on the right side of the head; he was also unconscious. He entered the report in the occurrence book and referred them to Nyeri Provincial General

hospital.

The accused was initially charged with assault but after the death of the deceased, the charge was withdrawn and he was charged with murder instead. He testified further that initially, the accused had been arrested for the offence of possessing a substance used for making illegal alcohol.

Dr. Obiero Okoth (PW5) performed the postmortem on the deceased's body and presented his report in court. He noted external injuries on the body; there was also an injury on the left thoracic cavity and the genito-urinary system. There were bitemporal wounds on the head; a large curvilinear fracture crossing the midline and subdural hematoma. He opined that the deceased died of '*raised intracranial pressure secondary to head injury as a result of blunt trauma*'.

In his defence, the accused gave a sworn statement. He testified that he knew the deceased because they lived in the same village. However, he denied knowing anything to do with his murder. As a matter of fact, so he testified, he was arrested for possessing illegal brew and that he was only charged with the murder after he failed to raise the sum of Kshs. 10,000/=. He also admitted that he knew Mwangi (PW1) because he lived closer to him than even the deceased. He was also aware that he was related to the deceased. However, he said that he had a dispute with him over land; since the dispute was resolved by the elders in his favour, Mwangi had always had a grudge against him. He also denied that is called 'Mboche'. He admitted that he knew Mary Wangechi since she was a neighbour. He was also aware that the deceased lived with Mwangi (PW1).

Having outlined the evidence, it is now appropriate to consider the law and analyse the evidence in the context of the applicable law.

In a charge of murder, the state has the burden of proving the fact of a person's death; it has also to prove that the death was unlawful and was not a natural occurrence; that, the act or omission causing the death was perpetrated by the accused; and, finally, that the accused was motivated by malice aforethought. All these elements are encapsulated in **section 203** of the Penal Code under which the accused was charged; that section reads as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Although the accused was also charged under **section 204** of the **Penal Code**, that section has since been held to be inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Going by the uncontroverted evidence of the pathologist, there is no doubt that a person died and that his death was not natural; the nature and extent of the bodily injuries suggest this to have been the case. While certifying the death in question, the pathologist opined that the deceased died of what he described as "raised intracranial pressure secondary to head injury as a result of blunt trauma". I understand this to mean that the deceased died of injuries inflicted on his head. There was no evidence, and it was never suggested that those injuries were self-inflicted; they were certainly caused by somebody else in circumstances that were obviously unlawful. I am therefore convinced that the state proved beyond all reasonable doubt that the deceased was murdered and that his murder was unlawful as understood in **section 203** of the **Penal Code**.

The next hurdle which the state had to surmount was to prove that the accused was the person behind the murder. In this regard, the evidence of **Peter Mathai Mwangi (PW1)** was crucial as he was presented as the only single identification witness.

The evidence available shows that the deceased was involved in some sought of violent confrontation in the wee hours of 2nd January, 2011. According to **Mwangi (PW1)** the confrontation occurred soon after midnight; it was dark, so he testified, and he could only see with the help of his torch. It was his evidence that when he and his wife ventured out, he found the accused on top of the deceased, hitting him with rocks on the head. He managed to separate them. As noted, he also testified that it was not just him and his wife who were at the scene; there were other people there too.

Intriguingly, none of these people, including his own wife either testified or implicated the accused in the murder. Identification of an accused is always crucial and I reckon that if Mwangi(PW1) was at the scene with his wife, there is no reason why she should not have testified; I note the learned counsel for the state indicated that efforts to get the witness had proved fruitless and therefore closed the state's case because, in any event, her evidence was going to be similar to the testimony of her husband (PW1). I dare say it is precisely for this latter reason that it was necessary for her to testify and corroborate, or at the very least, give weight to her husband's testimony considering the primary issue upon which the prosecution case revolved.

It is worth noting that the accused denied having been at the scene of crime or even having fought the deceased on the material day. In the face of this denial, it was necessary, though not mandatory, to have the testimony of any other witness who may have probably recognised or identified him. I must not be mistaken to be saying that the evidence of a single identification witness is not always sufficient; in appropriate circumstances, the court can convict based on such evidence provided it is cautious that a single identification witness can be mistaken particularly if the conditions for identification were not favorable. This is what was held in **Ogeto versus Republic (2004) KLR 19; the Court of Appeal held that:**

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

Again, the Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

A conviction resting entirely on identity invariably causes a degree of uneasiness...

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

The circumstances of identification in the present case were obviously not favourable; **Mwangi (PW1)** himself admitted that the incident out of which the deceased sustained fatal injuries happened in the dark. None of the people whom he said were present during the fight, including his own wife ever testified on the identification of the accused or at all; had they testified, they would have probably shed more light on this issue of identification. Apart from **Mwangi (PW1)** himself, the only other witness at the scene who witnessed the fight and testified to that effect was **Mary Wangechi Ndingirui (PW2)**; she admitted, however, that she was not able to identify the person the deceased was fighting with due to darkness.

The same witness testified that the two stopped fighting when she asked them to; the stranger then walked away. Although she admitted that she did not know whether they ever fought again, she was categorical that Mathai (PW1) came to the scene after the fight had stopped. And if that is the case it means that Mathai arrived after the stranger who fought the deceased had left and therefore it could not be true that he is the one who separated the dueling parties. As matter of fact, Ndingirui(PW2) was emphatic that nobody separated the two combatants.

Besides contradicting the evidence of Mathai (PW1), the testimony of Ndingirui (PW2) also implies that Mathai (PW1) did not see the person with whom the deceased fought. He did not therefore have any basis to conclude with any certainty that he saw the accused hitting the deceased.

One other person whose evidence whose evidence would have been quite useful for the prosecution was Kiiru; he is the person who alerted Mwangi (PW1) and his wife that the deceased was being beaten. He probably may have had some information on the person that the deceased was fighting with. For some unexplained reason he was not called to testify.

In the final analysis, there is reasonable doubt that the accused was positively identified as the person who inflicted the fatal injuries to the deceased. Accordingly, I hold that it would be unsafe to convict the accused based on the not so credible evidence of the single identification witness.

In the ultimate, I am inclined to come to the conclusion that the state has not proved its case against the accused beyond reasonable doubt. The accused is accordingly acquitted of the offence of murder. He shall be set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 25th day of January, 2019

Ngaah Jairus

JUDGE