



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 15 OF 2012**

**(FORMERLY NYERI HC CRIMINAL CASE NO 20 OF 2011)**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. MOSES NDUNG’U GUCHU**

**2. PETER WAINAINA NDUNGU ..... ACCUSED**

**J U D G M E N T**

1. The accused persons herein, **MOSES NDUNG’U GUCHU (1<sup>st</sup> Accused)** and **PETER WAINAINA NDUNG’U (2<sup>nd</sup> Accused)** are charged with **murder** contrary to **section 203 as read with section 204** of the **Penal Code**. It is alleged in the information dated 19/10/2011 that on 18/08/2010 at Gacharageini Village in Kigumo District within Murang’a County, jointly with others not before court, they murdered one **JAMES MUTURO GACHUHI (the Deceased)**.

2. They were originally charged separately – the 1<sup>st</sup> Accused in the present case, and the 2<sup>nd</sup> Accused in **Nyeri HC Criminal Case No 31 of 2010**. They took their pleas separately. Subsequently the two cases were consolidated and later transferred to Murang’a before hearing commenced.

3. My predecessor Ngaah, J took the evidence of the first three prosecution witnesses. I heard the rest of the case. I have carefully considered the testimonies.

4. The prosecution case is as follows – PW1 (**Stephen Gachuhi Muturo**) was the Deceased’s father. On 18/08/2010 at about 9.30 pm he was in his house with his wife **Martha Wanjiku Gachuhi (PW2)**. The Deceased was in his own house in the same compound. PW1 heard people outside knocking on the door of the Deceased’s house. He and PW2 came out. There was good moonlight, and he even told PW2 that the lamp she had come out with was not necessary as there was sufficient light.

5. On going out of his house PW1 first saw **Wainaina Ndung’u** and then **Moses Ndung’u**. He identified them in court as the 2<sup>nd</sup> and 1<sup>st</sup> Accused respectively. He recognised them because there was good moonlight and he had known them before as residing in his village.

6. PW1 asked the Accused persons what they wanted, and they answered that they wanted his son, the Deceased. He asked them why, but they did not respond. They kept knocking on the door of the Deceased’s house.

7. In the meantime other people, about 20, had emerged from behind the houses. Some were knocking on the windows of the Deceased’s house.

8. The Deceased then opened his door. He was immediately grabbed and dragged outside, the lot of them falling the process. The 1<sup>st</sup> accused raised a panga to cut the Deceased but PW1 pleaded with him not to cut him. He did not cut him. The crowd then pulled the Deceased to the road as they beat him. The 1<sup>st</sup> Accused told PW1 that he would never see the Deceased alive again. PW1 and PW2 started screaming and neighbours came.

9. They all followed the crowd and the Deceased towards the trading centre. They found the Deceased, apparently alone and gravely injured. He had cut wounds. PW1 never saw him being cut. They looked for a motor vehicle and first took the Deceased to Maragwa Police Station and then to Murang’a General Hospital. At the hospital they were informed the Deceased was already dead.

10. PW1 and others then reported back at the police station where they were given a document to enable the Deceased’s body to be accepted at the mortuary.

11. The following morning PW1 went back to the police station. He gave to the police the names of the people he had seen drag away the Deceased the previous night. The names were written down.
12. PW1 then led the police to the home of Moses Ndung'u. They did not find him there. He then led the police to the home of Wainaina Ndung'u. They found him there and he was arrested.
13. PW1 then led the police to his own home and showed them the Deceased's house from where he was dragged away. From there they went back to the house of Moses Ndung'u, but once again they did not find him there.
14. PW1 further testified that when he saw the Accused persons outside his house they were armed with pangas and rungas. It was they who violently pulled the Deceased away from the arms of his mother (PW2) and they all fell down in the process.
15. In cross-examination, PW1 stated that he saw the Accused persons and about 18 others armed with pangas, and that it was the Accused persons who said they wanted the Deceased.
16. PW1 further stated that he identified the two accused persons from among the crowd of about 20 people that were outside and about his home. He saw their faces. They were the ones who grabbed and pulled the Deceased. He did not see any of the Accused persons cutting the Deceased with their pangas, but they were the ones who removed him from his home.
17. PW2 (Martha Wanjiku Gachuhi) was the wife of PW1 and the mother of the Deceased. In the material evening she was in her house with her husband. Their son, the Deceased, had already gone to his own house within the compound after supper.
18. As PW2 and PW1 prepared to sleep, PW2 heard people knocking on her son's door. She went outside and saw three people. She asked them what they wanted. They told her to go back to sleep as they had nothing to do with her. She said she would not until they told her what they wanted. They told her they wanted her son James Muturo (the Deceased). The three people she saw were Moses, Wainaina and Mwaura. Mwaura was not in court.
19. PW2 and PW1 told them not to break the Deceased's door. PW1 then called the Deceased and told him to open his door and he did so. Wainaina and Moses then pulled him outside. PW2 held onto the Deceased; as the two pulled the Deceased they pushed PW2 and the Deceased down. They were about to cut them with pangas but PW1 pleaded with them not to, and they did not.
20. PW2 then let go of the Deceased, and he was then dragged towards the road while they were beating and cutting him. PW2 and PW1 followed them wailing. Wainaina and Moses mocked them saying they would wail even more.
21. When PW2 and PW1 got to the road, PW2 further testified, they found that the Deceased had been taken towards the trading centre. Fellow villagers came, and they told them what had happened. They all followed towards the direction for the trading centre. They found the Deceased on the road seriously injured with cut wounds. He was not talking and appeared to be in great pain.
22. PW2 further testified that they got a motor vehicle and first took the Deceased to Maragwa Police Station where they were advised to take him to Murang'a General Hospital. They did so, but there they were informed that the Deceased was already dead.
23. PW2 finally stated that there were many people, but she recognised only 3 of them by moonlight. She had known them since they were young. The three were Moses Ndung'u Guchu, Wainaina Ndung'u Kimeta and Mwaura wa Cucu. She identified Moses Ndung'u Guchu and Wainaina Ndung'u Kimeta as the Accused persons in the dock.
24. In cross-examination PW2 clarified that she did not see any of the accused persons cut the Deceased, and that she had gone out of her house with PW1 when she heard people knocking on the Deceased's door.
25. PW3 (**Simon Chege Gachuhi**) identified the body of the Deceased to the pathologist who performed the post-mortem examination. He was a younger brother of the Deceased.
26. PW4 (Dr Chris Kimathi Mugambi) performed the post-mortem examination of the Deceased's body. He noted fractures to the skull and defensive wounds (including bone fractures) in both arms. The body also had many bruises and lacerations. Upon opening the skull the doctor noted a depressed fracture and also a linear fracture on the right side of the skull. He also noted subdural haematoma with laceration to the brain on the right side.
27. As a result of his examination, PW4 formed the opinion that the cause of death was severe head injury secondary to blunt force trauma. He prepared and signed the post-mortem report which he produced in evidence as **Exhibit P1**.
28. PW5 (**PC Lawrence Owino**) was the investigating officer of the case. He stated that he and other officers visited the scene where the Deceased was allegedly assaulted. PW1 then led the police officers to the home of the 2<sup>nd</sup> Accused, Peter Wainaina Ndung'u. They found him at home and arrested him. PW1 had already reported that Peter Wainaina Ndung'u was one of those who had assaulted the Deceased. He had identified two other persons from the 20 or so people who had assaulted the Deceased. He named them as **Mwaura Kinyungu (wa Cucu)** and **Moses Ndung'u Guchu**. Moses Ndung'u Guchu was later arrested. He was the 1<sup>st</sup> accused in the dock. Mwaura Kinyungu was never arrested. He was still at large.
29. PW5 later recorded the statements of some witnesses and charged the Accused persons.

30. In cross-examination PW5 stated that none of the witnesses interviewed said they saw any of the Accused persons hitting the Deceased on the head. They had seen the Accused persons and others taking away the Deceased.

31. The prosecution then rested their case.

32. In their own defence each Accused gave sworn testimony and was cross-examined; neither of them called any witnesses.

33. The 1<sup>st</sup> Accused, Moses Ndung'u Guchu, testified that he resides in Muthithi Sub-location and was a farmer when he was arrested. He recalled that on 18/08/2010 he was at home in Gacharageini Village. He woke up at about 5.00 am and proceeded to his place of work at Ikuyu Village where he arrived at about 6.00 am. He had leased some land there and was growing food-stuffs. He went there early to prevent monkeys from destroying his crops. He stated that he spent the entire day in his shamba. At about 7.00 pm he set off for home where he arrived at about 8.00 p.m. He was tired; so he bathed, cooked and ate. He then slept. He was alone.

34. On 09/07/2011 at about 10.00 pm he was at home preparing to have his supper. About five (5) people came. They said they wanted him. They said they were police officers. They arrested him and took him to **Maragwa Police Station**. Later he was charged with this murder.

35. The 1<sup>st</sup> Accused finally stated that he did not know anything about the murder of the Deceased. He did not kill him. He had heard the testimonies of the witnesses called by the prosecution, particularly the Deceased's parents, but he did not commit the offence.

36. In cross-examination the 1<sup>st</sup> Accused stated that he knew the Deceased in this case. He knew his home. But he was only an acquaintance. He did not know the Deceased's parents. He first saw them in court.

37. He further stated that he was arrested in his own home at Gacharageini Village, Kigumo. He was not arrested at Mpeketoni in Lamu. If any police officer stated that he was arrested at Lamu, it was not true.

38. As for the 2<sup>nd</sup> Accused, Peter Wainaina Ndung'u, he testified that he hailed from Mahigaini Village in Kigumo. He denied that he killed the Deceased. He stated that on the day of the alleged murder, 18/08/2010, he was in his shamba working. He was arrested there by the police. They took him to his house and searched it. They took his identity card from inside a small bible. They then took him to **Maragwa Police Station** where he was beaten while being accused of murder. But he was first arraigned before a court in Kigumo where he was charged with robbery. Later he was taken to the **High Court** at Nyeri where he was charged with murder. He denied the charge. He did not kill the Deceased.

39. In cross-examination the 2<sup>nd</sup> Accused stated that he did not know the Deceased in this case or his home. He was arrested on 19/08/2010 in the morning hours. He had spent the previous day, 18<sup>th</sup>, in his shamba where he was arrested.

40. Finally the 2<sup>nd</sup> Accused stated that he did not know his co-accused.

41. That was the entire evidence placed before the court. From it a number of facts are not in dispute –

(a) On 18/08/2010 at about 9.30 pm a crowd of about 20 persons went to the home compound of PW1 and PW2 and riotously knocked on the door and windows of the house of the Deceased (the son of PW1 and PW2) that stood in the same compound.

(b) The Deceased opened the door of his house and stood in the doorway. From there he was grabbed by members of this crowd and dragged toward the road and trading centre nearby.

(c) A very short while thereafter the Deceased was found by PW1, PW2 and others gravely injured and lying beside the road not far from the trading centre. He died shortly thereafter as he was being taken to hospital.

(d) The post-mortem examination of his body revealed that the Deceased died from a blunt-object trauma to the head that had fractured his skull and led to bleeding in his brain. He had many other injuries all over his body, including fractures (defence wounds to his hands and arms).

42. What is in dispute in this case, and thus the issues that the court will have to make judgement upon, are the following issues –

**(a) Who inflicted the injuries that caused the Deceased's death?**

**(b) Were the Accused persons among the group of persons that forcibly took away the Deceased from his home?**

**(c) If the answer to (b) above is yes, did the group of persons (and therefore indeed the Accused persons) intend to cause the death of the Deceased or do grievous harm to him? In other words, is malice aforethought proved beyond reasonable doubt against the Accused persons?**

**Issue (a): Who inflicted the injuries that caused the Deceased's death?**

43. From the testimonies of PW1 and PW2, I am satisfied beyond reasonable doubt that the Deceased was forcibly taken away by a crowd of about 20 people on the fateful night. He was taken into the road nearby and thence towards the shopping centre. Very shortly thereafter he

was found lying beside the road grievously injured. He soon thereafter died from those injuries.

44. Although no eye witness has testified to seeing the injuries being inflicted upon the Deceased, the time-frame was such that the crowd of people who forcibly took him away from his home (or members of that crowd) must have inflicted upon him the injuries that resulted in his death. Members of that group of people were heard to tell PW1 and PW2 that they would never see their son alive again. These were threats that they intended immediately to do the Deceased grievous harm or cause his death. The circumstances were such that no one else, apart from the members of the group of persons who forcibly took the Deceased away from his home, could have inflicted upon him the injuries that killed him.

**Issue (b): Were the accused person among the group of people that forcibly took away the Deceased from his home?**

45. Again from the tested testimonies of PW1 and PW2, I am satisfied beyond reasonable doubt that both Accused persons were part of the group of about 20 people that forcibly took away the Deceased. They were clearly seen by the two witnesses in good moonlight. The moonlight was so bright that PW1 told his wife (PW2) that there was no need for the lamp that she had carried out of the house. Both Accused persons were well known to the two witnesses who were their village mates whom they had seen as they grew up. The two had spoken when they said they wanted the Deceased in response to the query by PW1, what they wanted. The 1<sup>st</sup> Accused had raised a panga to cut the Deceased, but he did not as PW1 pleaded with him not to. The 1<sup>st</sup> Accused also told PW1 that he would never see the Deceased alive again.

46. PW1 and PW2 therefore did not err in their identification by recognition of the two Accused. They gave the names of the two to the police the same night, leading to their arrest. At the time PW1 and PW2 saw the two Accused persons the situation was not yet chaotic, and they had good opportunity to observe the persons knocking upon their son's door and make a good and positive identification. The prevailing circumstances, which included bright moonlight, were good and conducive to a positive identification of the two Accused persons. I so hold.

**Issue (c): Did the group of persons who forcibly took away the Deceased from his home (and therefore indeed the two Accused persons) intend to cause the death of the Deceased or do grievous harm to him?**

47. The group of people were variously armed with pangas and sticks. The 1<sup>st</sup> Accused was armed with a panga. Then there were the words of the 1<sup>st</sup> Accused to PW1 that he would never see his son alive again.

48. The available evidence shows that as soon as the group of people forcibly removed the Deceased from his parents' home they immediately set upon him and inflicted upon him the various injuries from which he subsequently died. When PW1 and PW2 and others followed them shortly, they found the Deceased alone by the roadside already grievously injured. These circumstances were such that he was viciously set upon and mercilessly assaulted, and many grievous injuries inflicted upon him, in a very short span of time. The nature of the injuries inflicted upon him was such that there could not have been any other intention but to kill him or cause him grievous harm.

49. The fact that the crowd had gone to the Deceased's home already variously armed and forcibly grabbed and dragged him away, further reinforces this prior intention to kill him or cause him grievous harm.

50. I therefore find proved beyond reasonable doubt that the Accused persons were part of the group of about 20 persons who went to the Deceased's home, forcibly removed him from there, took him to the public road nearby and there swiftly inflicted upon him grievous injuries from which he shortly died.

51. There was a common intention among the members of that group of persons to kill the Deceased or cause him grievous harm. The Deceased died shortly after the injuries were inflicted upon him. His death was a direct result of those injuries.

52. Malice aforethought is therefore proved against both Accused persons beyond reasonable doubt.

53. In the result I find each Accused persons guilty as charged of the *murder* of **James Muturo Gachuhi** contrary to **section 203 as read with section 204** of the *Penal Code, Cap 63*. I hereby convict them accordingly.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF MARCH 2019**

**H P G WAWERU**

**JUDGE**