



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL CASE NO. 9 OF 2016

REPUBLIC PROSECUTOR

Versus

GEORGE MWANGI KABIRU 1ST ACCUSED

KENETH KIMATHI KARIUKI 2ND ACCUSED

DANIEL KOOME MARETE 3RD ACCUSED

RULING

1. **OSPAT MAINA KAMURA (deceased)** was murdered on 27th June 2012. He was a resident of Mwireri village in Laikipia. Before his death he was a teacher at a local school in that area. He also operated a bar called New City bar.
2. Three persons were charged with his murder, namely George Mwangi Kabira, Kenneth Kimathi Kariuki and Daniel Koome Marete.
3. On 27th June 2012 Samwel Mwangi Kibata PW 1 a resident of Mwereri heard the deceased whom he had known for seven years passing by. It was then 10 p.m. PW1 walked about 300 meters from his home to the farm where he had left his cows grazing. The intention was to tie the cows for the night. As he was walked across the road he heard the deceased speaking to himself in his drunken stupor. PW 1 did not interrupt the deceased. Although it was dark on that night PW1 was sure that it was the deceased because he recognised his voice since he had known him for 7 years.
4. In a short while PW 1 heard the noise of a motorbike that was approaching where the deceased was. PW 1 heard the occupants of the motorbike asking the deceased if he wanted a lift. The deceased responded by asking them where they were going. PW 1 heard the motorbike riders say that they were going to Karachi. It was PW 1's evidence that the deceased rode on that motorbike. He however did not note the registration number of that motorbike.
5. 10 minutes later when PW 1 entered the farm where he intended to tie his cows he heard screams of a man's voice. Soon PW 1 heard screams of a woman. He then heard the motorbike driving away.
6. When PW 1 went to the place where the deceased was he found the deceased bleeding from his head. The deceased was then still alive. The deceased informed him that he had been given a lift by boys who were from a place known as Maili Sita. The deceased further informed him that one of the boys was Muthui and that the other one was the husband of Grace.

7. The deceased was taken to Nanyuki Teaching and Referral Hospital by the police who arrived at the scene. He however was pronounced dead on arrival.

8. Samwel Gachanja Kanaki PW 2 on 27th June 2012 heard screams near his home. He heard a woman and a man screaming. Ongoing to the scene he found the deceased lying down and trying to get up but could not. He asked the deceased who had attacked him and the deceased responded by saying that it was Grace.

9. Mary Muthoni Mburu PW 3 was on that day asleep at her house. At about 11 PM. She heard a motorbike stop on the road near the gate of her house. This was about 3 meters away from her house. When it stopped she heard a lot of noise made by people. She could not make out what they were saying. She however heard somebody crying and calling out the name of John. She recognised the person crying out as the deceased with whom they attended the same church. She said that the deceased was also known in that church as Baba John.

10. PW 3 after hearing there were many people outside her house walked out to see what was happening, she did not however go near the scene where the deceased lay.

11. PW 4 was a resident of the area where the deceased was attacked. He stated that he arrived at the scene and was not able to talk to the deceased whom he noted had been attacked.

12. Purity Nyaguthii Kabiri PW 5 was employed by the deceased to operate his bar. On 27th of June 2012 at about 9 a.m. the deceased went to the bar and after confirming all was well he left. That was the last time that PW 5 saw the deceased alive.

13. Muthii Mwangi PW 6 is an operator of Boda Boda. He could not recall whether on the subject date he had seen the accused persons. He however confirmed that the accused persons were also BodaBoda operators.

14. Priscilla Karea Mutea PW 7 operated a bar called Lovely. She confirmed that on 27th June 2012 both the 2nd and 3rd accused persons, in the company of the lady called Esther went to her bar at 10 p.m. They left the bar at 12 a.m. but because the 3rd accused person was too drunk he hired a room where he slept together with the lady called Esther. The 2nd accused took the 3rd accused motorbike and left.

15. The doctor who performed the post-mortem PW 10 was of the opinion that the deceased died from haemorrhage secondary to sharp trauma.

16. It is important to state that apart from PW 6 all the other witnesses who testified did not know the accused persons and had not seen them before.

17. **Section 306(1)** of the Penal Code provides that at the completion of the prosecution's case if there is no evidence that the accused had committed the offence the court should make a finding of not guilty. **Section 306(2)** of the same Act provides that where the court considers that an accused person has committed an offence the court shall call upon such an accused person to give evidence in his defence.

18. **Justice J. Wakiaga** in the case **Republic Vs Mbogo Wambugu (2017) eKLR** in considering what the court should consider at the close of the prosecution's case referred to the case **Republic versus Samwel Karanja Kuria Criminal Case No 130 of 2004 Nairobi (2009) eKLR** as follows:

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, but the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding killing. The governing law on this point is well settled....”

In the Court of Appeal, No. 77 of 2006 the Court of Appeal expressed that too detailed analysis of the evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence is too much detail in the trial court ruling then compromised evidentiary quality of the defence to be mounted.”

19. What evidence, however, the prosecution produced in this case was very tenuous in respect to the 2nd and 3rd accused. It is clear from that evidence that no one saw the people who attacked the deceased. Further in respect to the 2nd and the 3rd accused they have an alibi in the witness, PW7 confirmed that they were at her Bar until 12 a.m. on the night in question. The deceased was attacked between 9.30 and 10 p.m.

20. However in respect of the first accused person the prosecution did prove a prima facie case against him.

22. It is because of the above finding I order as follows:-

(a) This court hereof records a finding of not guilty against the 2nd accused person, namely Kenneth Kimathi Kariuki, and again the 3rd accused person namely, Daniel Koome Marete.

(b) This court finds that George Mwangi Kabira, the 1st accused has a case to answer and he is informed that he has a right to address the court, either personally or by advocate and to give evidence on his own behalf, or to make a unsworn statement, and to call witnesses in his defence.

DATED and DELIVERED at NANYUKI this 28th day of FEBRUARY 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

1st Accused: George Mwangi Kabiru

2nd Accused: Keneth Kimathi Kariuki

3rd Accused: Daniel Koome Marete

For 1st Accused

For 2nd Accused

For 3rd Accused

For state:

Language:

COURT

Ruling delivered in open court.

MARY KASANGO

JUDGE