



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL CASE NO. 24 OF 2012 (MURDER)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MWANGANGI MBEU MUCHUNGU.....ACCUSED**

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

1. The accused person face the charge of murder contrary to Section 203 as read with 204 of the Penal Code. It is alleged that on the night of 19/06/2012 at Kamutuanjiru village Mavuria location of the Mbeere South District of Embu County he murdered one Mwaniki Nthiga Kabore. A plea of not guilty was entered and the case proceeded for hearing.

2. Briefly the facts that on the 19/06/2012, the deceased who was the assistant chief of Kamutuanjiiru sub-location left his house at around 10.00 a.m. left to go to Kamutuanjiru primary school for a security meeting. He did not return home as expected on the material day.

3. On 20/06/2016 in the morning hours, information reached his family that parts of a human body had been recovered at Thiba river within Kamutuanjiru and that a crowd had already gathered there.

4. PW1 the wife of the deceased proceeded to the scene accompanied by a neighbour. On arrival she was shown a pair of spectacles, a torch and a biro pen recovered from the bloody scene. She identified them as property of the deceased and which were produced in evidence (ex 1 – 3). Police from Siakago police station, Deputy Commissioner Mbeere South sub-county and other leaders were called to the scene.

5. The clothes of the deceased including a dotted brown trouser, a left leg shoe and one sock identified as property of the deceased were also recovered after a further search in the river. PW1 said the clothing recovered was part of the deceased's dressing on the date he left home.

6. A human head with several cuts, the left leg severed at the knee and the left arm were recovered. Also retrieved from the river was a human body without the head, without legs and without hands were recovered. The family of th deceased identified the head and some of the body parts as part of the deceased's body. A rope was tied around the chest on the dismembered body.

7. The key witnesses in this case were PW7 and PW8 who testified that on the material evening, they passed on the road near the scene of the murder. They found a number of people who had powerful torches and were armed with pangas. They were talking to the deceased accusing him of making their lives unbearable through police harassment and threatened to kill him.

8. The deceased pleaded with the men to spare his life and sought for forgiveness. Despite the plea for mercy, the victim was cut severally with pangas. PW7 and PW8 stood at a distance watching and listening. The assailants flashed their torches at PW7 and PW8 and they decided to flee for safety.

9. The following day PW7 went to the scene at the river and was instructed by PW9 to help in the search of the body. Some parts of the body were recovered during the search. The accused and his accomplices threatened the witnesses with dire consequences in the event that they disclosed what they had seen. This prompted the witnesses to flee from their home and went to live far way from Mavuria location. At a later date the witnesses were placed under the witness protection programme.

10. PW10 Dr. Njiru produced the postmortem report by Dr. Godfrey Njiru. It showed that the lower and upper limbs had been cut off from the body. The doctors opinion was that the cause of death was multiple injuries and cuts.

11. Both parties filed submissions in this case at the close of the defence. Ms Manyal represent the State while Mr. D. Njoroge was the defence counsel.

12. The prosecution submitted that the case against the accused person had been proved to the standards required. That the evidence of PW3, PW7, PW8, PW10 and PW14 was cogent proof that the accused with others caused the death of the deceased. He was placed at the scene of crime and in his alibi he was not able to dislodge the prosecution's evidence.

13. The defence partly relied on its submissions at the close of the prosecution's case. It was argued that there was no evidence either direct or indirect pointing at the accused person in connection to murder. It was further submitted that PW3 did not witness the incident and that his voice identification on the phone call was not tested in evidence. As for PW7 and PW8 (D15 and D16), the defence said there was contradiction in their evidence as regards time of the incident and the distance of their location to the scene.

14. The defence further argued that the witnesses ought to have given the name of the accused to the police at the earliest opportunity which was not done as to the credibility of their evidence. Further that the alibi was not challenged by the prosecution although they had the opportunity to do so.

15. The conclusion of the defence submissions is that the prosecution have not discharged the burden of proof and that the accused ought to be acquitted.

16. The issue for determination are two fold:-

- (a) The fact of the death of the deceased, its cause and whether it was caused by an unlawful act or omission of the accused.
- (b) Whether such act or omission if proved was caused by malice aforethought on part of the accused.

17. The law applicable is Section 203, 204 and 206 of the Penal Code.

Section 203

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

Section 204

*Any person convicted of murder shall be sentenced to death.*

Section 206

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) an intent to commit a felony;*
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

18. PW7 and PW8 who are husband and wife are the only eye witnesses in this case. They testified that on 19/06/2012 they were walking home from Machang'a market. Near the home of one Muthuri, they notice some people walking ahead of them flashing torches as they talked. PW7 identified them using the light from the torches as the accused person, Kathuku, Muriithi Njiru, Muturi Muchungu, Njeru alias Sanyo and the deceased who was the area Assistant Chief.

19. The said Muriithi accused the deceased of making their life difficult by harassing them through the police. The men who were armed with pangas threatened to finish the deceased. He pleaded for forgiveness but the men could hear none of it. He was surrounded by his assailants and cut with pangas as he screamed for help. PW7 and PW8 got scared and decided to flee. They two witnesses were watching and listening from a distance of about 30 metres according to PW7.

20. PW7 further testified that about one hour after arriving home with his wife, the assailants who included the accused went there still armed with pangas and with wet clothes. It was Kathuku and Muriithi who called PW7 to go outside the house. He obeyed and was then addressed by Kathuku, Muriithi and Muturi who told him that they had spotted him running away from the scene. They warned him never to talk about what he had seen at the scene and that if he ever did so, they would do to him what they did to the assistant chief.

21. The following day PW7 said he joined the search team at Thiba river where some body parts of the deceased were recovered. On his way home, PW7 met the three men who told him that he would also be searched for like the deceased and never be found.

22. On arrival at home, PW7 was informed by his sister that the same three men had been to his home and said that PW7 should be told to be

very careful. Due to these persistent threats, PW7 and PW8 fled from the area on the night of 20/06/2012 and went to live in a scheme in Mwea. After a few days, the witnesses were followed by Muriithi, Kathuku and Njeru. Unfortunately the residents of the area attacked the three men and killed Kathuku and Muturi.

23. The defence raised the issue of contradiction and that of positive identification of the accused by PW7 and PW8. It was argued that the two witnesses differed on the time of the incident with PW7 saying it was around 8.00 p.m. while PW8 said it was 5.00 p.m. The two witnesses said they left their home together and went to Machanga. PW7 said it was 3.00 p.m. while PW8 said it was 5.00 p.m. The time in issue is when they were returning home and happened to find the accused and others not before the court on the road allegedly assaulting the deceased.

24. According to PW7, he said it was around 8.00 p.m. that they reached the scene. PW8 said she had accompanied PW7 to Machang'a and that they left their home at 5.00 p.m. There is evidence from the two witnesses that the incident took place on their way back from Machang'a. PW8 further stated that she left scene at 8.00 p.m. with PW7 and went home. It was further stated that by 9.00 p.m. some of the assailants went to PW7's home and threatened them. It is not in dispute that the witnesses were at the scene for a very short time as can be drawn from their evidence. I therefore find no contradiction as to the time the two witnesses were at the scene. It was around 8.00 p.m. but not 5.00 p.m. as alleged by the defence.

25. The other alleged contradiction was on the distance from the scene to the hiding place of PW7 and PW8. The first said it was 30 metres while the latter said it was 13 metres. This was a difference of 10 metres distance. It must be appreciated that it was at night and it was dark save for the torches that were being flashed by the assailants that provided light. The distance was an estimate by each of the witnesses since none of them measured it. It should not be lost there is a likelihood that some witnesses may get mixed up in differentiating metres from feet.

26. However, the court must look at other evidence at the scene to determine whether identification was positive. PW7 and PW8 said they identified the accused person and his accomplices by their voices and later by their physical appearance aided by light from the powerful torches that were being flashed around. The witnesses knew the accused and the other men in his company since they were neighbours.

27. I am in agreement with the defence that the prosecution failed to lead the witnesses on evidence of voice identification. Even if the witnesses were to say they were familiar with the voices of the assailants, evidence of voice identification is a legal requirement.

28. It was held in the case of **PETER NJUGUNA MBUGUA VS REPUBLIC [2006] eKLR** where the case of **Karani Vs Republic [1985] KLR 290** was cited that:-

*Identification by voice nearby always amounts to identification by recognition. However care must be taken to ensure that the voice is that of the Appellant, that the Complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.*

29. I reach the conclusion that the evidence of voice identification by the prosecution does not meet the threshold required by the law.

30. The witnesses said that the accused and his accomplices were their neighbours and knew each other. There is evidence that both witnesses knew the neighbourhood well. It was their evidence that the scene was near the home of Muthuri which was not disputed. Further evidence was adduced that some of the assailants followed the witnesses to their house which was about an hour after PW7 and PW8 left the scene. The witnesses said they knew where the witnesses lived. During cross-examination PW8 seemed to know a lot about the group known as "Muturi" to which the accused and his accomplices belonged.

31. The court is satisfied that there is sufficient evidence to demonstrate that PW7 and PW8 knew the accused well. It may be assumed that it was dark that night at the scene at the material time since none of the witnesses said there was moonlight that night. Both PW7 and PW8 said they were aided by the light from the powerful torches of the accused and his gang to see them and to see the deceased. The torches were being flashed several times as the deceased was threatened and later cut with the pangas. The witnesses said they saw the accused whom they knew before the incident and recognized him. He later came to their house with three others and warned them of dire consequences should they say what they saw at the scene.

32. This was recognition of the accused by the two witnesses which was not challenged by the defence. PW8 said during cross-examination that Mwangangi used to visit their home and had interacted with him a lot. Recognition is more reliable than identification as was held in the case of **GEORGE KAMAU MUHIA VS REPUBLIC [2014] eKLR**.

33. Back to the distance, the evidence of PW7 and PW8 on what they saw at the scene was not at variance. It was clear that they recognized the assailants and identified the weapons they were armed with being pangas. This confirms that the two were at a distance conducive to positive identification of course aided by light as described. The description given of "powerful" torches is sufficient to lead to a conclusion that the light was bright enough to visibility of the scene.

34. The defence raised the issue of lack of credibility of PW7 for not giving the name of the accused to the police at the earliest opportunity. The reason for not doing that was explained by PW7 in that he was threatened about one hour after the incident when the accused came to his house accompanied by three others. PW7 was threatened the following day for joining the team searching for the deceased's body. On arrival at his home from the river, PW7 found that another threat had already been passed through his sister who had been found in PW7's house in his absence. These threats were categorical that PW7 was to be killed and would be searched for and never found if he disclosed that he had witnessed the incident.

35. The two witnesses were therefore scared and feared for their lives. PW7 said "I got scared because my life was at risk. I took my wife and children and fled the area". It would have been taking a big risk and almost suicidal for the couple to report to the police before fleeing

from the area. It is important to note that the witnesses were put under witness protection from where they came to testify.

36. The other question was why PW7 went to the scene and participated in the search if at all he had witnessed the incident and was consequently threatened. The evidence of PW7 and his wife (PW8) was that they fled from the scene after the accused and the others descended on the deceased with pangas. There was no evidence that PW7 knew that the deceased had been killed and cut into pieces and thrown in to the river. PW7 must have learnt of this development when he reached the scene. While at the scene he saw a trail of blood going towards the river.

37. PW7 was directed by the chief of the area to get into the water and help in the search. The chief also directed one Ngari, Kithungu, Andriano and Felicio to help. This was confirmed by PW14 who said, "*One Felicio a member of public was leading the search.*" This explains that PW7 did not know what had transpired after the assault he witnessed until he went to the scene. The fact that the witness was requested to help in the search and agreed does not affect the credibility of his evidence.

38. It was argued by the defence that if the accused was a suspect in the murder of the deceased, he should have been arrested on 20/06/2012 like the other six (6) suspects. There was no evidence that PW7 and PW8 attended the chief's baraza where the names of the suspects were given by members of the public. Even if they had attended, it would not have been safe for them to mention the name of the accused or any other suspect given the threats they had received.

39. PW14 the investigating officer said "*One Mwangangi (accused) and Stanley Murage were yet to be arrested.*" This suggests that the police were still looking for the two suspects. Their names must have been mentioned by members of public. The accused presented himself to the police on 26/06/2012 saying that he feared for his life. Members of public had already lynched two suspects by 20/06/2012 and the first accused had reason to believe that his life was at risk. This is a confirmation that the name of the accused was already with the police long before PW7 and PW8 came from their hiding place to record their statements.

40. PW14 further testified that the accused told him that he had gone into hiding because the public were looking for him. This narrative sufficiently answers the question why the police did not arrest the accused on 20/06/2012 or before 26/02/2012 until he presented himself.

41. I have looked at the cross-examination of both PW7 and PW8 and noted that most of these questions raised in the defence submissions were not addressed. That was the right time for the accused to begin building his defence.

42. The prosecution relying on the case of *ATHUMAN SALIM ATHUMAN VS REPUBLIC [2016] eKLR* argued that the accused raised his alibi defence a bit late in the day and that they had no time to investigate its truth or otherwise. It was held in that case that:-

*"The principle has long accepted that an accused person who wishes to rely on a Defence of Alibi must raise it at the earliest opportunity the prosecution an opportunity to investigate the truth or otherwise of the alibi."*

43. It was therefore argued that in a case of late alibi presentation, the correct approach is for the court to weigh the evidence of the alibi and reach a conclusion.

44. The defence on the other hand argued that the prosecution ought to have applied for adjournment after the defence case and verified the truth of the alibi. The defence relied on Section 309 of the Criminal Procedure Code which provides:-

*If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.*

45. The provisions of this section were discussed in the case of *KARANJA VS REPUBLIC [1983] KLR 501* where it was held that the burden of testing an alibi is upon the prosecution.

46. The law places the duty of evaluating the evidence and making its conclusions as to the issues for determination. I am not in agreement with the prosecutions that the alibi of the accused should be totally ignored if it is introduced late in the case. Irrespective of the stage the alibi is introduced, it still remains evidence on record that must be evaluated.

47. Neither do I agree with the defence that if the prosecution do not take the initiative to test the truth of the alibi, that the court should take the alibi as the gospel truth. The position I take is that the court has a duty to test the alibi as against the evidence on record and reach its conclusion.

48. The accused person in his sworn statement of defence said that on 19/06/2012, he was not at his home at Kamutuanjiru village. He had traveled to Voi and returned on 20/06/2012. He said that PW7 who said that he saw him and heard his voice at the scene had a grudge against him which was yet to be resolved at the material time. He stated that no murder weapon was recovered from him and that the only panga police took for analysis was said to have no blood on it.

49. As I had said earlier, cross-examination of PW7 and PW8 did not raise the issue of the absence of the accused from Kamutuanjiru at the material time. Neither did the issue of the grudge arise until during the defence. The accused was represented by a counsel throughout the trial. Although the burden of proof does not shift to the accused to prove his innocence, the accused ought to have produced at least bus fare receipts to show that he had traveled to Voi and was absent from his home area on 19/06/2012.

50. During cross-examination, the accused said the bus fare receipts were misplaced. In cross-examination, he contradicted himself when he said that the receipts were in custody of his daughter at home for he had remained in remand. The accused had a lot of time to produce the

the said receipts if he wanted to. He called his grandmother who said she lives in the same home or place with the accused. If his daughter was at home as he said, the accused was still in contact with people at his home. I reach a conclusion that the accused had no such bus fare receipts raising serious doubts that he traveled to Voi on 18/02/2012 as he claimed.

51. As for the grudge on the land boundary dispute, the accused said it started with their parents and it has not been resolved. No questions in cross-examination were put to PW7. However, PW8, on cross-examination by the counsel for the 2<sup>nd</sup> accused Amos Mwaniki Muchengu denied that there existed such a dispute.

52. PW7 and PW8 knew the accused well for he was their neighbour and they had interacted with him for the many years they lived together. PW8 said the accused used to visit them before the incident. This was not challenged in cross-examination and it leads to a conclusion that the two families related well.

53. PW14 testified that when the accused presented himself to the police on 26/02/2012 he told the police he had been in hiding because he feared for his life. What could be further from the truth? This evidence was not challenged in cross-examination. This court did not believe the defence of the accused and his witness on the alleged boundary dispute. From the foregoing, I find that the issues of the alibi and the boundary dispute were an afterthought merely calculated to have the accused exonerate himself in this case.

54. The accused further stated that no murder weapon was recovered from the accused. It is not an ingredient or a legal requirement in a case of murder that the murder weapon must be produced. The recovery of such a weapon only serves as additional or corroborative evidence to other evidence in the case. A conviction is sustainable even without recovery of the murder weapon.

55. The court found the evidence of PW7 and that of PW8 credible. It was explained as stated earlier that with the powerful torches being flashed on the deceased and around the scene, the witnesses were in a position to see and recognize the accused.

56. As for DW2 the defence witness, it is possible she was either lying to the court that the accused was in Voi at the material time or she just believed what the accused told her when he came out hiding. She said she communicated with the accused on phone informing him that his father and brother had been arrested. There was no evidence to show that the accused was speaking from Voi or from his hideout wherever it was. She contradicted the evidence of the accused when she said that he came back home on 23/02/2012. The accused said he returned home on 26/02/2012. I found DW2's evidence not credible and of no help to the accused. It is my considered opinion that the defence was a sham and an afterthought.

57. The prosecution's evidence placing the accused at the scene of crime was cogent and was not shaken by the defence. It was corroborated by the medical evidence that the deceased died of multiple cuts and multiple injuries which included severing of the head and limbs.

58. I find that the prosecution have proved that the accused with others not before the court caused the unlawful act which resulted in the death of the deceased.

59. The other issue for determination is whether the prosecution have proved malice aforethought. The report of the doctor described the injuries on the deceased as follows:-

- severing of the head
- severing of the upper and lower limbs
- missing tissue covering the ½ of the humerus.

In other words, the multiple cuts and other serious injuries had been inflicted on the deceased. The severity of the injuries including cutting off the head and the limbs was aimed at ending the life of the deceased instantly. He was not to be left alive by any chance.

60. The evidence of PW7 and PW8 disclosed the motive of the killing. The accused and his accomplices accused the deceased in his capacity as the area assistant chief of harassing them through the police. There was evidence that the accused and his accomplices were members of an illegal group called Muturi who were fighting to be allocated the government land they occupied. They were bound to be on a collision path with the provincial administration save the area chief (PW6) who was supporting the group and was a suspect in this case. The key witnesses testified that they saw the accused cut the deceased with a panga as well as did his accomplices.

61. I find that the act of six or more men cutting one unarmed man with pangas simultaneously and dismembering his body was intended to kill him. The heinous act with common intention fits the description of malice aforethought under Section 206(a) and (b) of the Penal Code.

62. It is my finding that malice aforethought has been established against the accused.

63. Consequently, I find the accused guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF FEBRUARY, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Mate for State**

**Mr. Njoroge for accused**

**Accused present**