



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 52 OF 2011**

**REPUBLIC.....PROSECUTION**

**VS**

**JULIUS KIMATHI M'MBIJIWE**

**ERICK MUTUGI M'MBIJIWE.....ACCUSED**

**JUDGMENT**

The accused persons Julius Kimathi M'Mbijiwe and Erick Mutugi M'Mbijiwe were charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that the accused persons Julius Kimathi M'Mbijiwe and Erick Mutugi M'mbijiwe on the 17<sup>th</sup> day of September 2011 at Kaaru village Mukumbune sublocation, Kigane location, Nkuene Division Meru South District within Meru County jointly murdered Mungathia M'Mbijiwe.

PW1 the Assistant Chief of Gakuri sublocation got a phone call on 18<sup>th</sup> September 2011 at 6.00 am from Gilbert Mawira who informed him someone had been murdered at Kigane shopping centre. He proceeded to the scene and found a group of about 50 people surround the deceased whose neck was strangled and heavily severed. PW1 reported to OCS Nkubu. PW1 said he followed a trail of blood from scene to Julius Kimathi's house he said the door had a mark of blood on the door and a tricycle padlock on the door.

He said he peeped through and saw Erick Mutugi sleeping inside. When they knocked at Julius window he woke up and responded through the window. That Julius said he lost his key the previous night. That Julius had a cut on the face which he said was sustained when he ran through a neighbour's fence when robbers attacked him at night. He said Erick Mutugi left hand had a cut on the fingers and he was unconscious and he asked the driver to escort him to hospital. PW1 escorted Julius to scene and handed him to OCS Nkubu. PW1 said they recovered 2 blood stained pangas, a torch and brown leather jacket in the roof of Julius' house. The exhibits were recovered and taken to Nkubu Police station. Erick was admitted at Meru Gen. Hospital. Assistant Chief PW1 said the accused persons disagreed with their deceased brother over land and he went with elders who resolved the issue. He said that the deceased didn't also want the father's shop sold but accused persons wanted it sold. PW1 said one time he arrested Julius A1 when he assaulted the father with a spade. He said he had assisted accused persons mother so they don't sell land. He said nobody witnessed. A1 being attacked by robbers as alleged. He said the leather jacket recovered from A1 roof had blood stains and it belonged to A1. PW2 Elizabeth Nchooro testified that on 18<sup>th</sup> August 2011 at 2.00 am. She was called by Silas who asked if she knew Mungathia was dead. That she accompanied Silas to Kigane where she found a big crown and she saw Silas was dead and she got shocked and there was soil over his face. She said the neck was cut. She went away and the chief asked her to accompany him to Nkubu police station. PW2 said A1 and the deceased are her sons. She said there was a day they were sharing land and they had disagreements. She said she didn't witness the murder. She said Julius A1 and Erick A2 were both arrested from their houses. PW3 Josephat Muita M. Mbijiwe received call from the sister Judith Nkuene who informed him that his brother Silas Mungathia had been murdered. He travelled home and saw the body at Meru General Hospital.

PW4 Elizabeth Waithera Onyiego produced Government Analyst Report under S. 33 and 77 of the Evidence Act as the maker one Paul Waweru Kangethe had since retired from Public Service. The analysis concluded that DNA profile generated from blood on panga and torch matched profile from blood sample indicated as blood of the deceased Mungathia – Ex P1. Government Analyst – Report.

PW5 CPL James Gitaru was on duty on 18<sup>th</sup> September 2011 when at about 7.00 am he received a phone call from Assistant chief – PW1 that a dead body was within Kigane area. The OCS instructed him to proceed to the scene. He said after one hour A2 was brought to station and he had injury on left palm which was tied with a blood soaked lessa. That he booked report and sent him to Meru General Hospital. He received information that A2 who had reported assault was suspect of murder. He followed to Meru General Hospital where A2 was treated and on discharge he arrested him and took him to Nkubu Police Station where he was charged. That A2 claimed he was assaulted by unknown people. While going home from Kigane market. He said he established accused persons were brothers to the deceased.

PW6 CPL Kenneth Otieno said when he went to scene of murdered on 18.9.2011 he found a crowd of people gathered around a body in a

sukuma wiki garden. He said Assistant Chief had already arrested and brought Julius A1 to scene. He said the body had a deep cut on the throat and there was a huge stone near scene that had blood stains and it was also taken away as exhibit. He said they also followed blood trail to accused persons houses which was like ½ km. He said the trail of blood was both on the road and the shamba. That Julius confirmed the house to which blood trail led them was his. That on top of the roof were recovered 2 blood stained pangas. That it was timber house and had no ceiling board. PW6 produced the 2 pangas – ExP2 (a) and (b). He also produced blood stained leather jacket – Exp 3. White/purple/yellow torch –Exp4.

A pair of brain shoes which also had blood stains – Ex P5. He said the deceased person's blood stained shirt was taken for sampling - EXP6 he did prepare exhibit memo form and used it to form land samples – EX P7. He said A1 was placed in cells whereas A2 was admitted in hospital but on discharge was arrested and charged.

PW7 Dr Gichunjia Nthuraku M'Rara produced post mortem Report on behalf of the doctor who conducted post-mortem and filled the form – Ex P8.

PW6 was recalled for cross examination on 19.4.2016. PW1 was also recalled on 11.5.2017 for cross examination. When prosecution closed its case accused persons were placed on defence and A1 in sworn statement and said that on 17<sup>th</sup> September 2011 his son woke up and went to get milk. That he left the son at home and went to his car wash place of work. That he worked upto 8.00 pm when he went home. That he slept and at 9.00 am Gitonga called him when he tried to open the door he found it was locked from outside and it is Gitonga who opened for him. That he was told the chief wanted him at the road. That he proceeded to the road and chief told him his brother had been killed. He said he was arrested but he didn't know what caused his brother's death. That police were called and he was taken to Nkubu police station. He said in their home there are three wives. He said that Muthuri who said that the deceased was killed because of a plot once implicated him and he was charged with offence of malicious damage. He said it is the deceased who used to take his child to school and they lived peacefully. He said it is Assistant Chief who arranged the case because they disagreed. He said it is Assistant Chief who knew where the exhibits were recovered. He said Muthuri wanted to kill A1's uncle in 2010. He said that he has evidence to show Muthuri killed his uncle. He said PW1 Assistant Chief was not cross examined about killing A1's uncle. He said his mother didn't testify against him. He said his mother PW3 left home in 1990 and it is when the A1's father died in 2010 that she returned and they lived in peace.

A2 Erick Mutugi in his sworn statement said that prior to his arrest he used to work as herdsman for John Guantai. That on 18<sup>th</sup> September 2011 after he had grazed cattle upto 5.00 pm he closed down and went to Kigane market where he bought Miraa and started eating/chewing. That Kenneth told him they should go to Nkubu and they went to Kawasaki bar where they drank upto 9.00 pm. That they went back to Kigane and continued drinking upto 11.00 pm he said they walked with Kenneth while drunk and when they got to Nkubu they met 6 people who stopped them and asked where they had come from. He said he was slapped and he fell. That they continued beating and he decided to fight back and he was cut on the fingers. He said he didn't know the people who attacked him and he didn't identify them. He said he was cut on the head and left leg. He said he lost consciousness and came to the next day when in hospital. He said the deceased was his great friend and was like his father because he held him when he was circumcised. He said A1 and the deceased are his brothers. He said they had nothing over which to have a dispute. A2 said that his mother PW2 used to go and live with the chief whenever she was chased away from home by his father. A2 said the chief ones cut their tree and when they questioned A1 was charged with offence of assault. He said it is the chief who wanted money to distribute land and he was not at home when land was distributed and he had no objection to whatever portion he was to be given. He said he didn't know about the murder, he was suspected because of the injuries he had.

He said Chief framed him because of land. He said they are 5 brothers and 28 sisters and none was called to testify. A2 said Assistant Chief used to interfere with their home and when he cut their trees they reported at Nkubu. He said chief framed A1 with arson in 2006. He said that when Chief was recalled for cross examination he was not called about the trees on even about living with A1's mother. He said he didn't know PW6 prior to this case and he also didn't know the officer who arrested him CPL Gitau. He said he was at Kawasaki bar until at 9.00 pm and he was attacked on his way home and he found himself in hospital and he reported assault at Nkubu Police station.

The 2 witnesses Kithinji Reche and Riungu whom the accused persons wanted to call were not in court on 13<sup>th</sup> July 2017 and even after Justice Wendoh had gone on transfer and trial taken over by court 3 and matter fixed for Further Defence hearing on 23.2.2018 and witness summons issued the said defence witnesses didn't attend and Assistant chief of Mikumbune sublocation and chief of Kiigene location came to court and confirmed they didn't know the witnesses accused persons alleged they wanted to call.

The defence case was consequently closed and defence counsel Mr Nyenyire made oral submissions whereas the prosecution relied on written submissions filed on 29<sup>th</sup> May 2018.

Mr Nyenyire submitted that the prosecution had not proved its case beyond all reasonable doubt. That none of the accused persons were seen committing the offence and no malice was proved on the part of the accused persons. It was submitted that the Assistant chiefs evidence should be treated with suspicion as he had a grudge with A1. He submitted further that evidence of prosecution witnesses was not consistent and murder weapon was not recovered from accused persons.

The prosecutions written submissions are that they have proved beyond all reasonable doubt that it is a fact that there was a death and cause of death is in post-mortem – Exp8 as massive haemorrhage secondary due to deep lacerations to the neck severing spinal code and vessel of the neck.

It was submitted that blood trail from scene to accused persons houses as stated by PW1 and PW6 confirms it is accused persons who committed the murder. That 2 blood stained pangas, blood stained torch and blood stained leather jacket was recovered in A1's house corroborates/support allegations that accused persons murdered the deceased. The Government analysts report was to the effect that DNA profile on blood generated from the exhibits recovered from A1's house and DNA profile from blood sample generated from the deceased persons to profile. It was further submitted that evidence on record proved malice aforethought in the commission of offence as accused persons and the deceased had disagreed over land. In reference to A2 evidence that he was attacked while in company of Kenneth it was submitted that the said Kenneth didn't come to testify. It was submitted A2 does not explain how he got home if indeed he became unconscious after alleged attack. The prosecution urged the court to find accused persons guilty. From the evidence on record for the

prosecution and defence as well as the submissions the issue for determination is whether prosecution has established its case beyond all reasonable doubt against accused persons. The offence was committed at night and there is no evidence of an eye witness save for the evidence of PW1 the Assistant Chief and PW6 the investigating officers that there was a trail of blood from the scene to the houses of the 2 accused persons and further that 2 blood stained leather jacket belonging to A1 was recovered hidden in the roof in his house. That the blood stained exhibits when analysed and compared with blood sample from the deceased was found the DNA profiles matched that of the deceased. The circumstances of this evidence of blood trail from scene to the houses of the accused persons and the blood stained exhibits makes this court find that the only inference to be made out of the circumstances is that accused persons participated in the murder.

The accused persons raised a defence which was to the effect they were framed by PW1 the Assistant chief but when the Assistant chief PW1 and PW6 the Investigating Officer were recalled for further cross examination these defences and allegations were never put to them. The defences are therefore an afterthought and too late in the day. The accused persons sought courts assistance to summon their witnesses but the Assistant Chief and chief through whom the summons were to be served came and said they didn't know the alleged witnesses. I do find that the accused persons defences have been challenged by the prosecution and can't stand. The prosecution's evidence has proved beyond all reasonable doubt that accused persons committed the murder. They are guilty and are convicted under section 215 Criminal Procedure code.

**HON. A.ONG'INJO**

**JUDGE**

**RULING SIGNED, DELIVERED AND DATED THIS 27<sup>th</sup> DAY OF JUNE 2018**

**IN THE PRESENCE OF:**

C/A:-Penina

Prosecution: -

Accused: -A1 – present in person

A2- Present in person.

Mr Nyenyire Advocate for Accused persons.

**HON. A.ONG'INJO**

**JUDGE**

**Mr Kiarie**

We don't have any records. I urge court to look at seriousness of the offence and circumstances and manner under which accused persons murdered own brother.

**Mr Nyenyire Advocate in Mitigation.**

Accused persons are remorseful for what transpired both are young people. They had families to fend for prior to arrest. We pray for leniency in sentencing accused persons. The court should consider the years they have been in custody since 2011.

**Court**

The accused person's mitigation is considered but the blood of the deceased person is still crying loudly. The manner of the execution of the murder is apparent was not accidental. It was planned and executed with precision. The deceased had to die from the hands of his own blood brothers. These are not people one can look at with kind eyes and mercy.

**Order.**

Accused persons sentenced to suffer death as prescribed by the law. Right of Appeal 14 days explained.

**HON. A.ONG'INJO**

**JUDGE**