



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR. NO. 32 OF 2015

(FORMERLY MERU HCCR NO. 22 OF 2014)

REPUBLIC.....PROSECUTOR

VERSUS

NATHAN RUNJI NYAGA.....ACCUSED

J U D G M E N T

1. **NATHAN RUNJI NYAGA**, the accused herein faces two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars in Count I as presented in the information before court are that on 16th June 2014 at Ngunga village Kiaritha within Tharaka Nithi County he murdered Fidea Igoki while the particulars in Count II provide that on the same date in the same locality, the accused herein murdered Naomi Wamugo. The accused denied committing the offence and the prosecution called eight witnesses to prove their case.

2. To begin with the evidence of 2nd witness Corporal Julius Mwiti (PW2) is that he told this court that while he was on duty on 16th June, 2014 at Kamende AP Post, the accused presented himself at around 1 p.m and reported that he had killed two people with a panga which he had and which had blood stains. The witness told this court that he took the panga from the accused and kept it before locking up the suspect in the cell. He then called the area chief known as Majau and together with another police officer they interrogated the suspect (accused herein) who reportedly told them that he killed an old woman and her daughter due to a land dispute. The suspect reportedly further told the three where the bodies were at Kiaritha Area. When the witness together with the Area Chief and another police officer went to the scene of murder, he told this court that they found bodies of two women. He called the OCS from Chuka Police Station who proceeded to Kamaende AP Post and re-arrested the accused person before proceeding to where the bodies lay to collect the same. The witness told this court that he observed bodies and saw deep cut on the head of one of the bodies and other injuries on the other body.

2. PW3 (Josiah Njagi Gachoi) on his part told this court that he was the Assistant Chief of Kiaritha Sub-Location where the incident took place and that on 16th June 2014 at around 2.30 pm while in the company of head of Nyumba Kumi Organization, he received a call from a pastor known as Shadrack Nyaga of New Apostolic Church that the accused had committed murder in his village at Ngunga. He told this court that he proceeded to the scene immediately and found Fidea Igoki and her daughter Naomi had been killed and were lying dead at the scene of murder.

3. Tabitha Nyonga (PW4) another witness called to testify informed this court of the deep rooted wrangles over land among family of the late Kamanu Nderi who started fending over his estate when he passed on. The witness told this court that when her late father passed on the accused person, who is a son to Nyaga Kamanu, a step son of Fidea Igoki Kamanu (one of the deceased or victim in this trial), forcefully entered the house of Fidea Igoki and started using the portion of land meant for Fidea Igoki (deceased) who was the mother of PW4. She further told this court that the accused swore that the witness and her other siblings should move out of the land or have "**a police vehicle parked**" at the homestead. It was her evidence that on 16th June 2014 she was called by her sister in-law and on reaching home she found her mother Fidea Igoki and her sister lying dead after being cut with machete on the head, hands and the neck.

4. The other witness called to testify was IP Martin Waga (PW6) who told this court that he was attached to DCI Meru South and that on 16th June, 2014 at about 3 pm, he was informed by OCS Chuka that two people had been murdered at Kiaritha and that he had gotten the report about the murder from an Assistant Chief of the Area. The officer told this court that in the company of Corporal Benson Muli (PW7), Corporal Ndogo, P.C Mutere and OCPD Beatrice Kiraguri, they went to the scene via Kiamwimbi where the Area Chief was waiting for them and proceeded to the scene. At the scene they found the bodies of Fidea Igoki and her daughter Naomi Mugo lying down with their throats slit. He told this court that they took the bodies to Chuka District Mortuary while the OCS and other officers proceeded to the AP camp to collect the murder weapon and the suspect.

5. PW7 Corporal Benson Muli; testified and largely corroborated the evidence of IP Martin Waga (PW6) regarding what they did after receiving the report about the murder. He added that when IP Waga took the bodies to the mortuary he together with CIP Nicholas Kipkorir proceeded to Kamandi AP Camp where they met Corporal Julius Mutu (PW2) who handed over the suspect (accused herein) and

the murder weapon which was a blood stained machete rubbed in a newspaper. The witness stated that he booked the suspect and proceeded with the investigations. He told this court that he took statements of all the witnesses and that he also took blood samples from the deceased persons given to him by Doctor who performed post mortem examination on the bodies for purposes of DNA analysis at the Government Chemist. The other action taken was to forward the machete and two blouses to the Government Chemist, an initiative he told this court that he personally undertook. He produced the machete or panga as P. Exhibit 2, blood stained blouse for the grandmother (Fidea Igoki) as P. Exhibit 3 and black flowered blouse for Naomi Wamugo as P. Exhibit 4. The investigating officer further told this court that he later received a report from Government Chemist indicating that the blood stains on the murder weapon (P Exhibit 2) matched the blood sample taken from the body of Fidea Igoki and the blouse (P. Exhibit 3) she was wearing. The blood samples from Naomi Wamugo did not tally because the samples he took from her had decomposed at the time of analysis.

6. Dr. Justus Kitili (PW1) the first witness to be called testified and informed this court that he carried post mortem examination on the bodies of Naomi Wamugo and Fidea Igoki Kamanu on 20th June, 2016. In regard to the body of Naomi Wamugo, the doctor formed the opinion that the deceased died due to a severe head injury inflicted by a sharp object. He tendered post mortem report in that respect as P. Exh 1a. The doctor further testified that he also performed post mortem examination on the body of Fidea Igoki Kamanu and his opinion was that the cause of death was pulmonary arrest due to severe injury caused by a sharp object which caused a deep cut on the right side of the skull and a fracture on the skull bone. He tendered the postmortem report as P. Exhibit 1 b.

7. Henry Kiptoo Sang (PW8) another expert witness summoned by this court testified also and confirmed having receive samples for purposes of DNA profiling from P.C Benson Muli (PW7) . He told this court that he received the following items at the Government Chemist namely;

- (i) Blood samples in bottle marked 'A'
- (ii) A piece of flesh tissue in a plastic container marked "B"
- (iii) A machete/panga rubbed in a newspaper marked "C"
- (iv) A pink blouse in a kaki envelop marked "D"
- (v) A brown blouse with green flowers in kaki envelop marked "E".

8. The witness stated that he observed the panga or machete was slightly stained with human blood and that blouses "D" & "E" were stained heavily with human blood. Upon carrying the DNA profiling and analysis the witness told this court that he made the following conclusions:-

- a) The DNA profiles generated from blood stained panga and pink blouse matched those of deceased 'A' .
- b) The DNA profile of black blouse originated from unknown female person.

He tendered his report as P. Exhibit 9.

9. When placed on his defence the accused person chose to give sworn statement of defence and denied committing the offence in both counts. He told this court that on 16th June, 2014 at around 1.30 pm, he was called by area chief by the name Japhet M. Majau for purposes of distributing relief food and that upon reaching the chief's office the chief inquired from him whether he knew that two people had been murdered and he answered that he did not know as he was in his farm working with Nyaga Mwiti, James Ithagu (DW2) and Margaret Muthoni. He added that the incident that led to the demise of the two people being killed occurred at Ngunga 6 kilometers away from his home.

The accused person further testified that the chief ordered for his arrest accusing him for the killing of the two people.

10. The accused defended himself that he knew nothing about the killing and denied having any dispute with them because he lives in Makambora village while the deceased persons were living at Ngunga village.

He denied having spoken to Corporal Julius Mwiti (PW2) though he conceded that the same officer arrested him at Kamaindi Chief's Camp.

11. James Ithagu Nyaga (DW2) testified for the defence, told this court that on 16th June, 2014 the accused person, who is his brother had asked him to accompany him to his shamba which he did alongside Nancy Wanjiru (wife of the accused), Nyaga Mwiti and Kambura. He added that they went on in the farm until 1.30 pm when his brother (the accused) was reportedly called by the area chief over mobile phone. According to him the accused left them at the farm and they proceeded with the work and that he was later informed by the wife of the accused that his brother had been arrested.

12. The witness further added that he did not know why the accused was arrested though he conceded that he later learnt that he was arrested in connection with the murder of two people at Ngunga village. He further conceded under cross-examination that he was aware of the bad blood between the accused and the persons found murdered on 16th June, 2014.

In his written submissions done through learned counsel Ms Kaaria, the accused person faulted the evidence tendered by Corporal Julius

Mwiti contending that the evidence given did not constitute a confession and therefore the evidence tendered is admissible citing the provisions of **Section 25A of the Evidence Act (Cap 80)** which provides that a confession tending to the proof of guilt made by an accused shall not be admissible or be a proof against such a person unless such confession is made before a magistrate or a police officer of a rank not below Chief Inspector of Police and a 3rd party of the accused person's choice. The defence submits PW2 was a Corporal and therefore in his view the confessions made to him is admissible and cited a decision in the case of **Republic- vs- Elly Waga Omondi [2015] eKLR** in support of that contention. The defence further argues that if the confession was voluntarily nothing could have been easier than to formally record the confession in accordance with the law and produce the confession in court in evidence.

13. The defence have also submitted that the prosecution's case against the accused is marred with contradictions and inconsistency. He has pointed out that PW2 stated that he surrendered himself at the chief's camp while PW6 stated he surrendered himself at Chuka Police Station. He has also stated that the evidence of PW1 that the bodies were well preserved contradicts the evidence of PW8 who stated a body tissue marked 'B' had decomposed such that it was not possible to generate any DNA result. He has further submitted that the DNA evidence was inconclusive as to how the deceased persons met their death and what weapon was used to murder them.

14. The defence submits that there was no eye witness to the murder and that suspicion alone cannot found a conviction. On this score he relied on the decision of **MUSILI TULO -VS- REPUBLIC [2014] eKLR**.

15. The defence has further submitted that his defence of *alibi* is well grounded as he tendered evidence showing he was far away from the scene of crime at the material time. The accused has in sum submitted that the prosecution has failed to prove its case against him and should be acquitted as the case has not been proved beyond reasonable doubt.

16. The prosecution on the other hand has submitted it has proved its case beyond reasonable doubt pointing out that they have been able to establish and prove beyond reasonable doubt the necessary ingredients in the charge which are *actus reus* and *mens rea*. Mr. Machirah learned counsel for the state has in that respect cited the decision in the case of **Republic - vs- Mohammed Dadi Kokane & 7 others [2014] eKLR**.

17. This court has considered the evidence tendered in this case and the able written submissions filed by both the defence and prosecution. It is true that the prosecution's case is based on the circumstantial evidence as there was no eye witness to the incident that left Fidea Igoki Kamanu and her daughter Naomi Wamugo dead. However it is not a correct hold that since there was no eye witness to a crime, conviction cannot lie. The correct position is that a court can make a presumption of likely occurrence or existence of fact if the prosecution is able to establish and prove nexus between a fact or what took place and a common course of human conduct or natural events. The provisions of **Section 119 of the Evidence Act** gives court of law the leeway to use circumstantial evidence as basis of conviction if the only inference that can be drawn from a set of facts is that which points to the guilt of an accused person. The question on whether evidence tendered by the prosecution in this case is sufficient to draw an inference of guilt against the accused herein will be addressed shortly.

18. In this case, evidence was tendered by the prosecution that proved that Fidea Igoki and Naomi Wamugo (the victims of the homicide) were murdered on 16th June, 2014 at Ngunga village Kiaritha Location in Tharaka Nithi County. This is uncontested by the fact and evidence tendered by Dr. Justus Kitili (PW1), the Doctor who performed postmortem examination on the bodies of Fidea Igoki Kamanu and Naomi Wamugo as evidenced by the two post mortem reports he tendered as P. Exhibit a and P. Exhibit 2 b shows that the two victims were brutally murdered. Their bodies were identified for purposes of post mortem examination by a relatives (Asenath Wanyaga Ndwiga - PW5), Area Chief Josphat Njeru and investigating officer Corporal Benson Muli (PW7).

19. Doctor Kitili (PW1) further gave details on the injuries he noted from the bodies of the two victims when he performed the post mortem examination. The details tendered by the doctor were in tandem with the pictures of the bodies of the victims tendered by Corporal Benson Muli (PW7) as P. Exhibit 5(a) and b (body of Fidea Igoki) and P. Exhibit 6 (a) - (d) body of Naomi Wamugo. The ghastly pictures shows that the victims were grisly murdered and met their deaths in the most horrendous and gruesome way. The big question is who did this and what motive drove the murderers to do such acts not against one person but two people.

20. The above questions brings to the most important ingredients or elements in a murder case which is *actus reus* or the act or the conduct and *mens rea* which is motive or malice aforethought or premeditated thought to cause death to someone. To establish a case of murder, the prosecution has the onus to prove these two important elements for a conviction to be sustained.

21. I will begin with the first element of *actus reus* and evaluate the evidence tendered to determine if this element was proved by prosecution against the accused person herein beyond reasonable doubt. As I have observed above, the prosecution case against the accused person particularly on this ingredient is circumstantial. There was no eye witness to the incident and besides that the accused person has raised a defence of *alibi*. The prosecution called witnesses in this case who in their view sufficiently proved that the accused must have murdered the two victims in this case. The evidence of Corporal Julius Mwiti (PW2), Corporal Benson Muli (PW7) and Henry Kiptoo Sang (PW8) in my view was key to the prosecution's case. Corporal Julius Mwiti's evidence has been faulted by defence on the ground that the evidence that the accused surrendered himself amounted to a confession and should have been properly taken before being presented to court. However, looking at the circumstances obtaining at the time as told by PW2 and corroborated by Josiah Njagi Gichohi (PW3), the Area Assistant Chief, it is clear that when the AP officer was faced with a situation where someone shows up with a blood stained panga saying that he has murdered two people, the first thing that comes to mind is not to bother about how the confession will be recorded but first establish if what the suspect says is true. This is what the AP officer did. He took the blood stained panga and safely kept it, locked the suspect and sought help of other police officers before proceeding to the scene of murder where they found two people brutally murdered and lying dead. The blood stained panga or machete was tendered by PW7 as P. Exhibit 2. Further to this evidence, DNA analysis of the blood sample taken from the panga by Henry Kiptoo Sang (PW8) marched with blood got from the pink blouse (P. Exhibit 3) which belonged to Fidea Igoki. Though the forensic analysis of the tissue taken from the 2nd victim Naomi Wamugo was not conclusive, of the explanation given by the forensic expert that the tissue had decomposed and therefore unable to generate DNA results made sense to this court. Furthermore the fact that the blood samples taken from a black flowered blouse from Naomi Mugo (P. Exhibit 4) was found to be from unknown female by the forensic expert did not in my view negate the positive connection made by the same expert of the blood samples on the panga (P. Exhibit 2) and blood pink blouse (P. Exhibit 3) which was taken from the body of Fidea Igoki. The evidence given by Corporal Julius Mwiti (PW2) was well corroborated by independent evidence from other witnesses and the evidence

cannot be termed as a confession. The officer acted on the report he received and that action yielded positive results to what had been reported to him.

22. The above evidence clearly shows that the panga that the accused surrendered to the AP officer (PW2) was the murder weapon used to murder the two victims in this case. There is no doubt about this fact established by the evaluation of the above evidence. The AP officer (PW2) gave vivid evidence on how the accused surrendered to the AP camp. The accused in defence stated that he went to the AP camp after being summoned by the Chief and that he was not near the scene of the murder at the material time. This court is however not persuaded by this defence because the accused person did not accuse either the AP officer (PW2) or the Area Chief for being biased against him or of harbouring ill motives against him so as to give false evidence against him. Furthermore, I find that the only witness called by the accused to support him on his *alibi* is his own brother James Ithagu Nyaga. The evidence given by that witness is suspect because apparently two of the witnesses who were with them one Nyaga and Mwititi were both deceased. When asked at cross-examination why the wife of the accused had not come to testify, he replied that the wife had developed mental problems. Besides this the evidence given by the accused in regard to who was with them at the farm during the material time is inconsistent with the evidence of DW2. According to DW1 (the accused) he proceeded to his farm on the material date which according to him was 6 kilometers away in the company of his brother James Ithagu (DW2), Nyaga Mwititi and one Margaret Muthoni. DW2 James Ithagu on his part testified that they went to the shamba in the company of Nyaga Mwititi and one Kambura. The accused did not allude to the fact that Nyaga Mwititi was deceased or that his wife has mental issues. The evidence given by James Ithagu under cross-examination does not make it clear whether Nyaga Mwititi was one and the same person or there were two people known as Nyaga and Mwititi who have since passed on. I do find this inconsistency suspicious in addition to the fact that the accused did not call the Chief to support his *alibi*. This court finds that the accused person raised this defence as an afterthought and the only person he found to assist him in his defence was his brother (DW2). The defence of *alibi* is weak when weighed against the prosecution's case. The accused throughout trial from the moment the plea was taken to the time prosecution closed its case did not raise the issue of *alibi*. I find that this aspect of his defence is a mere diversionary in an attempt to avoid the truth and the course of justice.

23. The Area Assistant Chief and AP officer (PW2) had no reason to falsely implicate the accused. The defence offered none either. This court finds that the evidence tendered by the prosecution is incompatible with the innocence of the accused person and facts presented are incapable of any other explanation other than the fact that it is the accused person who while armed with a machete (P. Exhibit 2) descended on the victims and brutally murdered them as seen from the grisly photographs (P. Exhibit 5 (a) -b) and P.Exhibit 6 (a) - d. I am not persuaded by the defence submissions that the prosecution's evidence was full of inconsistencies and unreliable. The evidence tendered by the prosecution on the question of the element of *actus reus* in my view was reliable notwithstanding the fact that there was no eye witness. As ably illustrated by the case cited by the defence in the case of John Mwangi -vs- Republic [1983] eKLR, conviction can be sustained by circumstantial evidence so long as;

" before drawing the inference of the accused's guilt from the circumstantial evidence, it is necessary to be sure that there is no other co-existing circumstances which would weaken or destroy the inference....."

I must say that I do not find any evidence tendered by either the prosecution or the defence which can weaken the inference this court has made about the accused person on the question of *actus reus*.

24. On the questions of *mens rea* or motive, the prosecution has submitted that they have proved that the unlawful act committed with malice aforethought on the part of the accused and that the attack on the deceased persons was not spontaneous but carefully planned. The evidence tendered by Tabitha Nyonya (PW4), Asenath Wanyaga Ndwiga and James Ithagu Nyaga (DW2) clearly proved that there was a deep rooted family conflict over land since the demise of the late Mr. Kamanu the husband of Fidea Igoki and father to Naomi Wamugo, (deceased) PW4 & PW5. PW4 told this court that when their father passed on, the accused invaded their mother's (Fidea Igoki) house with the intentions of evicting her. She also alluded to some threats saying that the accused told them that for them to reside on the land "**a police vehicle had to be packed on the land**" to protect them. The wrangles was said to have previously caused the burning of the house belonging to the father of the accused and Fidea Igoki and her daughters were implicated. The fact that there was bad blood between the family of the deceased persons and the accused and his family shows the motive of the murder. The evidence of PW4 and PW5 clearly show that the heinous act committed by the accused was premeditated and actuated by malice. It is my finding that the prosecution has proved this other important ingredient of murder against the accused.

25. Further to this finding is the fact that the cause of death of the two victims in this case as observed above has been well established by the evidence of Dr. Justus Kitili (PW1). That evidence went unchallenged by the defence. Two victims were brutally murdered and the weapon used the machete produced as P.Exhibit 2 at the trial. This court finds that the prosecution has discharged their burden of proving their case beyond reasonable doubt. From the evidence tendered I find that the accused is guilty of the two counts of murder and he is accordingly convicted.

Dated, signed and delivered at Chuka this 20th day of June, 2018.

R.K. LIMO

JUDGE

20/6/2018

Coram:

Before Hon. R.K. Limo (J)

Prosecutor Mr. Machirah

C/A Martha

Accused -present

Machirah for state

Kaaria for accused present

English- Kimeru

Court:

Judgment signed dated and delivered in the open court in the presence of Kaaria for accused and Machirah for state.

R.K. LIMO

JUDGE

20/6/2018

Machirah:

We do not have previous records. He can be treated as a first offender.

Kaaria:

The accused person is remorseful. He prays that this court puts into consideration the fact that the accused has spent time in custody during trial. He has been incarcerated. We pray that the factor be considered.

SENTENCE:

Court:

This court has considered the mitigation from the accused person and though he says he is remorseful and that he has been in custody for a long period nothing can take away the fact that the accused herein committed a heinous crime in a most brutal way. The victims met their deaths in most horrendous way and there can never be excuse for that. The law at the moment under **Section 204** provides for only one sentence for person convicted of murder but the supreme court has held that that provision should not tie the court's hands in meting out any appropriate sentence besides death. In that regard given the circumstances the accused deserves appropriate punishment commensurate to what he did. He should not have murdered two people simply because of land dispute. Land disputes are solved through a civil process not murder. Infact under **Section 96** the **Law of Succession Act**, a murderer automatically loses right to inherit property of a murdered person. Having said that, the accused is sentenced to life imprisonment. 14 days right of appeal.

R.K. LIMO

JUDGE

Machirah:

We pray for a copy of the Judgment.

Kaaria:

We also pray for a copy of the Judgment and typed proceedings.

Court:

A copy of the Judgment be provided to the Director of Public Prosecution and typed proceedings and Judgment be supplied to the defence.

R.K. LIMO

JUDGE

20/6/2018