



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 15 OF 2015

(FORMERLY MERU HCCR NO. 30 OF 2013)

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MUINDI NDERI.....1ST ACCUSED

GERALD MUTENGI NDATHO.....2ND ACCUSED

JOEL MURIMI NDATHO.....3RD ACCUSED

J U D G M E N T

1. **EDWARD MUINDI NDERI** (hereinafter to be referred to as the 1st accused), **GERALD MUTENGI NDATHO** (2nd accused) and **JOEL MUTENGI NDATHO** (the 3rd accused) are all charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars of the charge presented to court by the state provides that on 11th March 2013 at Kanjoro Location Tharaka North District within Tharaka Nithin County murdered Peter Kangori Gaichu (hereinafter to be referred to as the deceased). When the accused persons were brought to court for plea the first accused herein pleaded that he killed the deceased alone but that it was not intentional. The 2nd and 3rd accused all pleaded not guilty. A plea of not guilty was entered for all the accused persons and the State presented 8 witnesses in support of their case.

2. The prosecution's case against the accused persons generally is based on direct evidence from some witnesses called to testify during trial.

3. Julius Kirema Kang'ori (PW1), a son to the deceased told this court that on 11th March, 2013 (the material date) at around 8.30 am he had accompanied the deceased to a farm which was about 500 metres away from their home. On reaching the farm, he told this court they were confronted by three men armed with bows and arrows. He was able to identify them as they were all neighbours to them. He further told this court the first accused was the first to shoot aiming at his father (deceased) which struck him on the right chest while the 2nd accused shot and hit the deceased in the right arm above the wrist. According to him the 3rd accused also shot at his father but missed. He added that his father ran back towards home screaming for help and that he fell down on the road where he was later taken to Marimanti District Hospital where he was pronounced dead upon arrival.

4. The witnesses (PW1) further told this court there was a dispute over the land where they had gone that fateful morning as the grandmother of the 1st accused claimed ownership of the plot and that there was an incident where the 1st accused's grandmother went and cut their cotton plants growing in the disputed plot and on another occasion the 3rd accused had pursued the deceased with arrows wanting to shoot him over the same dispute. He also recalled a previous altercation between the deceased and 1st accused where the 1st accused threatened to kill deceased.

5. Fridah Kagendo (PW2) the second witness presented by the prosecution told this court that she was at home on the material date when at around 8.40 am she heard screams from a short distance away and upon checking she saw the deceased, lying down with an arrow lodged on his chest. She ran back and informed her father in law and the wife to deceased. Mugambi Gaicho (PW3) also testified that he was called by his daughter in law (PW2) and informed that his brother (deceased) had fallen down near the fence with an arrow lodged on his chest. He confirmed the same when he went out to check. He further told this court that he noticed the right hand had also been injured and when he asked him who had shot at him, the deceased reportedly told him that Muindi (1st accused) had shot him with an arrow which was still lodged on his chest while Mutegi (2nd accused) had shot at him on the right arm. He also testified that he tried removing the arrow on the deceased's chest but that the arrow could not come out.

6. Tarasiria Ciari Kangori (PW4) the wife to the deceased on her part testified and told this court, her husband (deceased) left for the farm at around 7 am on the material date after taking tea. According to her, her husband went to the farm first followed shortly by her son Julius Kirema Kangori (PW1) and that not long after they left, Frida (PW2) called her informing her that her husband (deceased) had been shot. She told this court that she rushed to the scene where she was told her husband was and found him lying down with an arrow still lodged on his chest. She further testified that she went to the farm where her husband had been shot and found the three accused persons perched on some rocks on the farm and that they ran away when they saw her. She came back to arrange for transport for her deceased husband to the hospital which she did by securing transport means which ferried the deceased to hospital where she later found out that he had died.

7. Janet Kairu Murango (PW6) a daughter in law to the deceased testified too and recalled receiving a call at around 8.40 am on the material date at her place of work informing her that her father in law (deceased) had been shot. She told this court that on receiving the news she quickly arranged for transport and rushed to the scene and found his father in law with an arrow lodged on his chest. She added that she inquired from him who had shot at him and he reportedly told her that the 1st accused had shot at him on his chest while the 2nd accused had shot at him with an arrow which tore his right hand. She further stated that the deceased told him that the 3rd accused also shot an arrow at him but missed him. She accompanied the deceased to Marimanti Hospital where he was pronounced dead on arrival.

8. The investigating officer CIP Robinson (PW7) told this court that he was stationed at Gatunga Police Station at the material time and that he received a call from the OCS CIP Erastus Olando at around 12 noon informing him that someone had been shot with an arrow at Kanjoro area. He testified that he together with another police officer P.C Nzioka proceeded to the scene where they found one arrow and a blood stained arrow stick. He further stated that they proceeded to Marimanti Hospital and found out that the deceased was already dead. They looked at the body and stated that he noticed two wounds on the right hand and on the right side of the chest. He also said the wound on the chest stick had arrow still sticking out. They then took the body to Meru Hospital Mortuary for postmortem examination.

8. According to the investigating officer (PW7) the cause of the attack on the deceased was a land dispute and that the 1st accused presented himself at Gatunga Police Station and confessed to shooting the deceased with an arrow. He tendered the confession by the 1st accused as evidence (P.Exhibit 1). He further tendered an arrow recovered at the scene as (P.Exhibit 2) and an arrow stick recovered from deceased body P. Exhibit 3 and an arrow head recovered from the body of the deceased during post mortem examination as P. Exhibit 4.

9. The doctor who performed post mortem examination, Dr. Njuguna was unavailable during the trial herein. In his place Dr. Brian Kiprof (PW8) testified on his behalf saying that he had worked with him for nine months as an intern and was well familiar with his handwriting and signature.

10. According to the general external observation of the deceased's body by the doctor that there was an arrow lodged between 8th and 9th ribs on the right side of the chest and some cut on the right forearm. Internally there was massive blood on the right side of the internal cavity of the chest with punctured right lung and diaphragm. Blood vessels to the liver were punctured to as well as the liver on the right side. The doctor concluded that the cause of death was massive hemorrhage due to penetrating chest and abdominal injury from an arrow. A death certificate No.447460 was issued and the doctor tendered post mortem report as P.Exhibit 5.

11. When placed on his defence the first accused defendant himself stating that he did not intend to kill. According to him he was first attacked by the deceased who was reportedly in the company of one Murithi Kithambi. He further told this court that it is the deceased who went to a farm he opines belongs to his grandmother armed and that it is the deceased who shot him with an arrow but missed him after he ducked behind a tree. He also stated that he took hold of the arrow and shot back at the deceased and took the opportunity to run away and report the matter to the police. When pressed under cross-examination by the Director of Public Prosecution, he reiterated that he reported the incident to the police on 11th March 2013 and that there was a land dispute between him and the deceased.

12. The 2nd accused person defended himself by denying the charge stating that the deceased was his uncle and a brother to his father. He raised an alibi as his main defence saying that on the material date and time he was at his farm picking millet with one Peter Mugao and Njeru Murithi and that while he was going on with the work he was called by one Atanasio Gitonga and informed that the deceased had been killed.

13. The 2nd accused denied any involvement in the killing and only recalled an incident in 2012 where he had gone to testify in court against the deceased and his son who had been accused of malicious damage to property belonging to the 1st accused in a Marimanti Law Courts. He further conceded that there was a feud between the deceased and 1st accused over a land dispute.

14. The 3rd accused also denied any involvement in the murder of the deceased herein. He also raised alibi stating that on the material date he had gone to attend a funeral of one Martha Kaongo which was 4 Km away from the scene of crime. He further stated that he had gone to the funeral to assist in digging the grave and that he was with Edward Nyaga and Francis Mithamo. He further added that they dug the grave from 7.30 am on the material date to around 11 am when he received the news that the deceased had been killed. He stated that he was arrested and charged for murder but did not know how and why the deceased was killed.

15. The 3rd accused was supported in his defence of alibi by Edward Nyaga (DW4). He told this court that he was with the 3rd accused on 11th March, 2013 (material date) from 6 am when they went to dig a grave at the home of one Marita. According to him they started digging the grave from 8 am until 2 pm and added that he was digging the grave with the 3rd accused and one Francis Majau.

16. Francis Majau Mitambo (DW5) also testified and supported the evidence of DW4 and the 3rd accused regarding the fact that they were involved with the digging of a grave on the material date at Marita's home.

17. The 2nd accused was supported in his alibi by Peter Majau (DW6) who told this court that he was at the home of 2nd accused on the material date harvesting millet with the 2nd accused and that they worked on the farm from 7.30 am until 5pm on that day when they got the

news of murder of the deceased. He further added that he knew about the differences between the deceased and first accused. He further added he was later called by the police at Gatunga Police Station where the 1st accused reportedly confessed to killing the deceased in his presence.

18. The above reflects the summary of the evidence tendered in this court during the trial of the accused persons facing a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The prosecution's case largely is based on the evidence of an eye witness (PW1), dying declaration and the strength of the exhibits tendered. For a conviction to be found against an accused person in a case of murder the prosecution is required in law to establish not only the death of the victim but two elements or ingredients of murder namely;

- (i) Actus reus (proof that the accused willfully and unlawfully through his conduct caused the death of the deceased.)
- (ii) Malice aforethought/mens rea /guilty awareness that his action would cause death or grievous harm.

19. There is no dispute that the deceased herein (Peter Kangori Gaichu) is dead and was murdered as per the medical evidence tendered (post mortem P. Exhibit 2) by Dr. Brian Kiprop (PW8). The state has submitted that the cause of death was massive hemorrhage due to penetrating chest/abdominal injury inflicted by an arrow which is a fact as attested by the post mortem report I have referred above. The main question or issue for determination in this trial is who caused the fatal injuries?

20. The State through the office of Director of Public Prosecution represented by learned counsel Mr. Machirah has submitted the evidence that have tendered in this trial established sufficient proof that the deceased met this death due to unlawful and violent acts of the three accused persons herein. It is contended that the accused persons were guilty of a wrongful act of solving a land dispute through use of coordinated acts of violence and an attack which submits was premeditated and organized by accused persons.

21. The 1st accused in his written submissions through P.M Mutani Advocate has conceded that he shot at the deceased but that he did so in self defence. This court has noted the consistency with which the 1st accused adopted from the time he was presented in court. He admitted to the charge but pleaded that he did not intend to kill. I have looked at the self-confession he made before C.P Calestus Orando on 15th March, 2013 (four days after the incident) which was tendered in evidence as P. Exhibit 1. This court finds that the confession is admissible in law pursuant to the provision of **Section 29** of the **Evidence Act** as the confession was made before a police officer above the rank of an inspector.

22. The same explanation on the confession statement (P.Exhibit 1) is reflected on the 1st accused defence when he was placed on his defence. There is no doubt therefore that the element of actus reus was clearly established and proved as against him. I shall shortly delve into the question of whether the 1st accused carried out the unlawful act out of self defence, as he claims or whether he harboured malice aforethought as the state submits.

23 The 2nd and 3rd accused persons have both distanced themselves away from the involvement in the killing of the deceased. They have both raised alibi. In their submissions through Nelima Associates they have stated that the evidence of PW1 that he saw who attacked his father is rebutted by the evidence of Phylis Kagendo (PW2). According to the 2nd and 3rd accused PW2 did not see anyone when he responded to the screams of the deceased. They have further faulted credibility of PW1 saying that his evidence that he had followed his father to the disputed parcel was contradicted by his mother (PW4) who according to them stated that he (PW1) followed his father after one hour at 8.30 am. I have looked at the evidence tendered by both Julius Kirema Kangori (PW1) and Tarasiria Kangori (PW4) and contrary to the contention by the 2nd and 3rd accused there is no material inconsistency on the time PW1 following his father (deceased) to the disputed farm. PW1 stated that after taking his breakfast at around 8.35am he followed his father to their farm which was around 500 metres away. PW4 gave the same narrative;

"My husband went to the farm and was followed shortly by his son Julius (PW1)."

This court finds no inconsistency on the evidence of the said two prosecution witnesses in regard to the departure time and intervals between the deceased and the son (PW1). PW1 stated he followed his father (deceased) 20 metres behind him.

24. On the 2nd question of whether the evidence of PW1 and that of PW2, PW3 & PW4 were inconsistent as to whether PW1 was alone to see and identify who attacked his father, this is what PW1 told this court about the attack;

"My father screamed calling me and told me to run away. I dashed into a nearby bush running towards our home my father ran towards home on the road but fell down near the home of my uncle Paul Mugambi..... I was running on the left side parallel on the road. I saw my father fall."

PW2 on the other hand I heard screams from the deceased and alerted his father in law, Mugambi Gaicho (PW3) who went and found the deceased lying down with an arrow lodged in his chest. PW4 found both the PW3 and PW1 at the scene where the deceased laid writhing in pain. This court does not find any material contradiction in the testimonies of the four witnesses that is PW1, PW2, PW3 and PW4 to question the credibility of the evidence of PW1 on the identities of the persons who attacked his father (deceased). PW1 got the message from his father loud and clear when the deceased was confronted by three people armed to the teeth with bows and arrows. The cautionary message was ran away and he took to the bush and retreated back home. That is what any reasonable person can do when faced with such danger. This court finds that PW1 going by his evidence and that of his mother (PW4) had the chance to witness what befell his father (deceased). It was around between 8.30 and 9 a m in the morning and given that the assailants are people he knew well because they were from the neighbourhood he had no problem identifying them. Furthermore, the fact that the 2nd and 3rd accused persons are relatives with the deceased makes it even better to conclude that identification was positive. All the accused persons were positively identified by PW1 and there was nothing to show that perhaps he may have been mistaken in his identification.

25. I am also satisfied that the evidence by both Mugambi Gaicho (PW3), who was a brother to the deceased and who was the first to arrive at the scene, and Janet Kairu Murango (PW6) a daughter in law to the deceased that the deceased identification of the three accused persons as the people who had attacked him amounted to a dying declaration as the deceased clearly stated at an imminent death. The evidence that he reportedly told them separately that the 1st accused shot him with an arrow which was still painfully lodged on his chest, that the 2nd accused Mutegi Ndatho had shot him with another arrow on the forearm with a shot from the 3rd accused missing him is clearly corroborated by the evidence of PW1 and partly by the confession made by the 1st accused (P.Exhibit 1).

26. Now turning on the defence of alibi raised by the 2nd and 3rd accused persons is that though both the 2nd and 3rd accused called witnesses to back up their respective alibis, I do not find much weight on the same because the same appeared to have been made up and an afterthought. To begin with the alibi raised by the 2nd accused is that he says he was at his farm at the material time harvesting millet and according to him he was with Peter Mugao (DW6) and one Njeru Murithi. Peter Mugao (DW6) however stated that he was with the 2nd accused and his wife. That inconsistency pointed out by the state in its written submissions negates the defence of alibi by the 2nd accused. The alibi raised by the 3rd accused and supported by DW4 Edward Nyaga and Francis Majau Mitambo (DW5) is also questionable because if it is true that the family of the late Marita (deceased) had engaged them (3rd accused, DW4 and DW5) to dig the grave; why not avail a close family member of the late Marita or a religious leader present or even a village elder present to come and support them in the allegation that they were engaged in the grave digging at the material time?. I am also in agreement that the inconsistencies by DW4 and DW5 on who was carrying a shovel and a mattock between them adds to cast doubts to the defence of alibi by the 3rd accused person. The defence of alibi may have been made up with a view to diverting or deflecting the weight of the prosecution evidence against them (2nd and 3rd accused). There is no doubt in my mind going by the evidence tendered that the three accused persons were involved in the same act in different degrees with the murder of the deceased herein.

27. The confession by the 1st accused (P. Exhibit 1) clearly mentions that he spent the night at the home of 2nd accused person after informing him that the deceased had been seen harvesting millet in the disputed farm. The confession states in part;

" Niliweza kufika kwa boma ya Mutegi Ndatho (2nd accused) saa kumi na mbili za joini. Nikalala kwa boma yake pamoja na madugu zake"

The 2nd and 3rd accused both admitted that they are brothers which suggests that they met and planned to lay an ambush and attack the deceased the following day which they did because apparently they were displeased with the fact that the deceased was harvesting the millet in a farm claimed by the 1st accused. In my view that is where the intention and motive of attack lay and thus brings me into the final and critical issue for determination which is whether the prosecution establish and proved the element of mens rea against all the accused persons in this trial.

28. The state has submitted that malice aforethought can be inferred from the proved actions taken (actus reus) by the accused persons. The 1st accused has submitted that the issue of who shot the fatal arrow that hit the deceased on the chest has not been resolved. That however not the case as the evidence tendered before this court from PW1, PW3 and PW6 show that it is the first accused who first shot at the deceased with an arrow that fatally hit him on the chest. The confession statement attests to this further cementing the fact. The medical evidence tendered (P.Exhibit 5) by the doctor (PW8) and his professional opinion shows that what caused the death of the deceased was that arrow which went through the chest and damaged internal organs and caused massive hemorrhage that led to his death. There is no doubt that the 1st accused is the one who fatally shot at the deceased hitting him on the chest. The only question posed in respect to the 1st accused is whether he did so in self defence as he has claimed or whether he harboured malicious intention of putting to rest the land dispute.

29. I have considered the defence raised by the 1st accused. He told this court the deceased went to the disputed farm armed and that he was attacked by the deceased and only reiterated in self defence. However, looking at the evidence of PW1 and PW4 the deceased was going to his farm to harvest millet and it was early in the morning. There is nothing to suggest that he was prepared for a confrontation with the 1st accused because if he was he could have been better prepared with his son (PW1). The 1st accused clearly made up the story that he shot back at the deceased with an arrow which he was purportedly was using to scare monkeys away. That narrative is simply incredible in the face of what happened to the deceased.

30. This court finds out that 1st accused having received prior information from the 2nd accused that the deceased had been seen on 10th March, 2013 harvesting millet on the disputed farm going by his own confession, intentionally planned to cause grievous harm and/or death to the deceased. It is quite apparent there was a long standing feud over land between the 1st accused and the deceased. This was confirmed by the prosecution witnesses (PW1, PW7) and the accused persons themselves in this case. That is what triggered the tragic attack of the deceased herein, and that where malice is established. The question posed is whether there was a common intention established between the 1st accused on one hand and 2nd and 3rd accused on the other.

31. According to the evidence of PW1, PW3, PW4 and PW6 the 2nd and 3rd accused took part in the attack on the deceased and this court as observed above finds that the element of actus reus has been established against 2nd and 3rd accused as well in this trial. The medical evidence (P.Exhibit 2) tendered corroborates the fact that the deceased did suffer an injury to the right forearm and the chest. He was therefore shot more than once and the irresistible conclusion going by the evidence of PW1, PW3, PW4 (who spotted all the accused persons at the crime scene) and PW6 is that all the three accused persons herein took part in attacking the deceased. It is clear from evidence of PW1 that his father on noticing that the assailants outnumbered them and well-armed saw no chance to defend himself and that is why he shouted at his son to take cover in view of the grave danger facing them. PW1 took heed and ran off to the safety of the bush. This court finds that the element of actus reus has been established by the prosecution and connected to all the 3 accused persons.

32. Going back to the question of mens rea, this court agrees with the Director of Public Prosecution's contention and submissions that the provisions of **Section 10 of Evidence Act** as read with **Section 20 and 21 of the Penal Code** is applicable against all the accused herein. As I have observed above the confession by the 1st accused that he slept at the 2nd accused's house where he was told about what the deceased had

done on the disputed farm on 10th March, 2013, a day before he was killed, shows or demonstrate an element or common intention by all the accused persons to arm themselves early the following day and attack the deceased which they did and probably caught him unawares heading to the disputed farm with his son (PW1). The evidence tendered by the investigating officer (PW7) who recovered the murder weapon and other offensive weapons (P.Exhibit 2) and P.Exhibit 3) shows that all the accused set out to kill or cause grievous harm to the deceased. The fact that the 3rd accused missed the target when he aimed his arrow at the deceased does not absolve him from blame. **Section 206** of the **Penal Code** applies against all the accused persons herein. The dying declaration connects all the accused herein with the crime of murder. The two crucial elements in the case (mens rea and actus reus) has been proved by the prosecution against all the 3rd accused persons herein.

33. The 1st accused chose to settle his differences over a parcel of land with the deceased in a most brutal and unlawful way. He was assisted by both the 2nd and 3rd accused persons who apparently shared his concern and hence a common purpose to unlawfully bring the dispute to an end. They ought not to have resorted to that because there exist legal avenues to address land disputes in this country. This court finds that the prosecution case against the three accused persons herein has been proved beyond reasonable doubt. They are all found guilty of murder of **PETER KANGORI GAICHU** and are hereby convicted accordingly.

Dated, signed and delivered at Chuka this 31st day of October, 2018.

R. K. LIMO

JUDGE

31/10/2018

Judgment signed, dated and delivered in the open court in presence of all accused persons, Machirah for state and Mutani for 1st accused.

R.K. LIMO

JUDGE

31/10/2018