



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 53 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MAINA.....ACCUSED

JUDGMENT

1. Francis Maina (the “Accused”) is charged with the offence of murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully, and with malice aforethought, killing James Mbugua Gitau (“Deceased”) on 16/02/2016 at Gachie Village in Kihara Location within Kiambu County.

2. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

3. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

4. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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;
- c. Intent to commit a felony; or
- d. 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.

5. The Prosecution called seven witnesses. The Prosecution narrative, seen globally, was simple enough: The first three Prosecution witnesses (“Key Prosecution Witnesses”) alleged that they saw the Accused Person pursuing the Deceased with murderous intentions. The two of them were running towards the three witnesses who were Deceased’s friends. The Deceased was fleeing for dear life, and, in an effort to shake off the pursuing Accused, took a sharp turn with the Accused in hot pursuit. Shortly after that sharp turn, the three witnesses claim they heard the Deceased screaming – and so they ran in that direction. There, they found the Deceased lying on the ground with blood gushing from his forehead and the Accused on his heels running away in the opposite direction. It was at that scene that Inspector Oscar Wafula and his colleagues found the three witnesses attempting to give their fallen friend first aid. Inspector Wafula and his colleagues arrested the three witnesses on suspicion of assault causing grievous bodily harm – and took the Deceased to the hospital. The Deceased later died and the three witnesses apparently told the Police what had happened leading to the charges against the Accused Person.

6. In order to establish if the Prosecution narrative meets the very high threshold required -- to prove beyond reasonable doubt that it is the Accused who murdered the Deceased – it behooves this Court to assess the individual accounts of the three eye witnesses in order to test their potential veracity.

7. Kevin Macharia (Kevin) testified as PW1. He is 19 years old and was a friend of the Deceased. He recalled that he was with the Deceased and two others Timothy NjorogeGicheha (PW2) and Michael Kiuna (PW3) on 02/02/2016 at his grandmother’s house – by the gate. By Kevin’s telling, the Deceased left the three friends by the gate and told them that he was going to the Gachie stage. The stage is about 0.5 kms away from the grandmother’s house where they were. After sometime they saw the Deceased come back running and another man was running after him. The two were running towards them but about forty (40) metres from where they stood, the Deceased took a sharp turn at the Early Learners School so that they momentarily lost sight of him. His pursuer followed suit.

8. Shortly after the two – the Deceased and his pursuer turned the corner -- Kevin testified that they heard a loud scream. This prompted them to run in the direction where the screams were coming from. On turning the corner, they found the Deceased lying on the ground with blood gushing from his head. He had a deep cut on his head and one hand, and he was screaming and writhing in pain.

9. At this gruesome sight, Kevin testified, they all started screaming – which attracted the attention of the Police on nearby patrol. Once the Police arrived, they took the Deceased to the hospital and held the three friends for questioning.

10. Kevin was quite categorical that he clearly saw the person who was pursuing the Deceased. It was the Accused Person who he knew before. He testified that he clearly recognized him in the light produced by the security lights from the Early Learner’s School as well as nearby residences. He further testified that the Accused was carrying a *panga* as he chased down the Deceased and that the Accused ran away with the *panga*.

11. On cross-examination, Kevin testified that the person who was chasing away Gitau had a Maasai *shuka* and maroon trousers. He also alleged that when they found Gitau lying injured, he said it was Maina who had attacked him even though he (Kevin) neither told the Police that nor recorded in his statement to the Police.

12. TNG (“T”) was a 17-year old friend of the Deceased. He testified as PW2 and was sworn after I concluded that he understood the nature of oath after conducting a *voir dire*. He testified that he was with the Deceased and Kevin (PW1) at the Deceased’s grandmother’s place on the fateful day. Michael Kiuna (“Michael”) joined them later after Deceased had gone to Gachie stage. After Michael joined them, the three of them (T, Kevin and Michael) started walking towards Gachie when they saw the Deceased running towards them with a person chasing him. That person was the Accused and T testified that he readily recognized him as such. He knew the Accused as a conductor of *Ganaki Sacco Matatus*.

13. The broad strokes of T’s story as narrated in Court are the same as Kevin’s: Accused was pursuing the Deceased as the Deceased fled towards them. However, the Deceased took a sudden turn in an effort to

shake off his pursuer and ran towards Early Learner's school with the Accused barely two metres behind him in hot pursuit. Soon thereafter, T testified, they heard screams and the three friends rushed to the scene where they found the Deceased by the road lying with blood gushing from his head and one arm. They saw the Accused running away from afar. The three friends then decided to help the Deceased rather than chase after the Accused. They tried giving first aid to the Deceased using a bandage that Michael had on his hand – all the while in panicked screaming which attracted the Police who were on patrol nearby. Notably, by T's rendering, the Deceased never uttered a word: he was only able to make guttural noises due to the injury on his head.

14. On cross-examination, T testified that the Accused was dressed in a Maasai *shuka* and that he was carrying something *inside* his *shuka* but that he (T) could not see what it was.

15. Michael Kiuna ("Michael"), another 19 year old friend of the Deceased, was next in the Witness Box. In material part his story was, broadly, the same:

I went out and met my friends, T and Macharia near Gitau's grandmother's place at a place called Munanda. I was going to the shops. As we were walking towards Gichagi, we saw James Gitau running towards us. Then just before he got to where we were, he took a turn towards a school nearby called Early Learners. They were about 15 metres away. Someone was chasing Gitau. It was the Accused, Francis Maina who was chasing Gitau. Francis was only about 2 metres behind Gitau.

When we got to Saki Furniture we heard screams and we rushed to the scene. We found Gitau lying by the road with a head wound and a deep cut on the hand. We didn't find the person who was chasing him. He had run away. We could see him running away. I recognized the Accused as he had a Maasai *shuka* around his upper body. He was about 15 – 18 metres away. Macharia ran to go get a motor bike to take Gitau to the hospital. Meanwhile, we raised alarm and people came out. But no one came to assist us. The police came and took Gitau to the hospital. We were also held by the Police. We were in the Police Cells for 2 days.

16. On cross-examination on the question of what the Accused was allegedly carrying as he pursued the Deceased, Michael testified thus:

It was as if Accused had something in his hands but we couldn't really tell. His hands were inside the Maasai *shuka*.

I told the police that there was electric light allowing us to see and identify the Accused. I didn't record that in the statement.

When we were first arrested, I didn't tell the police who had cut the Deceased. We didn't say at first because I thought the deceased would be okay and he would be able to come and say who had cut him.

17. Allan Nyoike Mbugua is the father to the Deceased and he testified about being informed of an attack on his son on 02/02/16 and how he visited Kihara Hospital and found him lying in a hospital bed. He was not able to speak with him since the Deceased was in bad shape medically. He witnessed his son being taken in an ambulance to an ICU where the son died. Later, Allan went to identify the Deceased during the post-mortem examination. He noted that the injuries included a deep cut on the head and on his arms.

18. Inspector Oscar Wafula was in the group of the first officers who happened on the scene. They were on patrol in Gichagi Village at around 9.30 pm on the material day. His colleagues were APC Muriithi and APC Kamau. They found the deceased writhing in pain by the side of the road. He was bleeding profusely from the head and arms. They just happened on the scene. It was a side road leading to the highway. There were residences on either sides of the road. According to Insp. Wafula, there were three people at the scene. Since they were unsure what the three people were doing, they arrested the three men and took them to the hospital and then took the three to the police station to assist with investigations. The three men found at the scene who were arrested were Kevin, Timothy and Michael.

19. Corporal Gibson Gitonga is the Investigating Officer in the Case. He found Kevin, Timothy and Michael at Kihara Police post on 03/02/16 after they had been taken there by Inspector Wafula. At the time, they were being treated as suspects for injuring the Deceased who had not yet died. They were handed over to Corporal Gitonga by Inspector Luchachi, the Officer-in-charge of the Kihara Police Post. Corporal Gitonga proceeded to record fresh statements from them – apparently unaware that they had recorded statements at Kihara Police Post.

20. It is the new statements recorded by Corporal Gitonga that were eventually adopted as witness statements for the case. The earlier recorded statements were neither given to Corporal Gitonga nor the Defence. By and large, these “new” statements recorded by Corporal Gitonga reflect the narrative told by Kevin, Timothy and Michael in Court in their testimonies. It is worth noting at this point, however, that these statements were recorded three days after their arrest. The statements recorded immediately after their arrest which seem to have told a different narrative were neither supplied to the Investigating Officer nor the Defence.

21. This curious anomaly is a good place to begin our analysis. As Mr. Mbiyu, the Defence Counsel argued, evidence of first reports to the Police is often quite instructive in establishing the truth of what happened. As the Court of Appeal remarked in ***R v Shabani Bin Donaldi(1940) 7 EACA 60***, it is desirable in “almost every case in which an immediate report has been made to the Police by someone who is subsequently called as a witness that evidence of the details of such report...should always be given at the trial.” This is to insure against the witness belatedly changing his or her story or purporting to identify a person whom he or she did not really identify at the time of reporting.

22. Here, what the three Key Prosecution witnesses told the Police when they were found in the company of the mortally wounded Deceased person turned out to be diametrically opposed to the statement they recorded three days later – which they sought to adopt in their respective testimonies. When Inspector Wafula and his colleagues first found them, they could not explain “satisfactorily” (that is Inspector Wafula’s term) how the Deceased had been injured. Even though their story turned out later to be that it was the Accused who had attacked the Deceased with a *panga*, they did not offer this story in the first instance. They only did so after three days in the Police Cells where they were being held as suspects. This omission is made more consequential by the surrounding circumstances of this case: their story is that the Accused had just attacked the Deceased then ran off in the opposite direction. It would seem eminently rational that they would have informed the Police who arrived at the scene shortly thereafter that the Accused was fleeing so that the Police could assist in arresting him. Instead, the three witnesses kept a curious silence. They maintained this silence that night even at the pain of being held as suspects – and only broke it on the third day when the Deceased had died and the nature of the case had changed from assault to homicide.

23. To my mind, this would be enough to create doubt in the mind of a reasonable person whether the Prosecution’s narrative is true. But there is more. There are number of material inconsistencies in the Prosecution narrative that make it impossible for the Prosecution to discharge the very high burden placed on it to prove its case beyond reasonable doubt:

a. First, the three key Prosecution Witnesses all testified that they saw the Accused chasing the Deceased menacingly carrying a *panga* (at least one of them says he saw the *panga* while the rest were clear that he was carrying something underneath the *shuka* he wore on that night). Yet, despite the obvious danger to their friend, the Deceased, all three of them chose not to intervene at that point. They did not run to rescue him even though the Deceased and his pursuer came to as close as fourty metres of where they were. Instead, all three testified, they merely quickened pace towards where the Accused and the Deceased were. This appears wildly implausible and introduces some doubts into their narrative of what actually happened on that night.

b. Secondly, there is the baffling evidence about the *panga* the Accused was allegedly carrying as he pursued the Deceased. Kevin was categorical that he saw the Accused armed with a *panga*. Timothy and Michael did not see a *panga*. What they saw was the Accused carrying an item underneath the *shuka* he had wrapped around his upper body. It is important to pause and vision

this: a man, menacingly chasing another one who is fleeing for dear life – with one arm tucked underneath a Maasai *shuka* yet able to run as fast the Deceased was running! The spectacle of a man running with his hands harnessed beneath a Maasai *shuka* is enthralling fictionally but troubling if offered to prove murder charges beyond reasonable doubt. This aspect of the case is made more problematic by the fact that none of the three Key Prosecution Witnesses told the Police on first report or when recording their statements about the *panga* or anything the Accused was allegedly holding underneath his *shuka*. This crucial aspect of the case arises, for the first time, on the dock during their testimony.

c. Thirdly, the context in which the Prosecution narrative unfolds invites two questions: were other members of the public present in this admittedly (on cross examination by all the witnesses) densely populated area when the alleged incident happened? Related, did the three Key Prosecution Witnesses scream on seeing the Deceased so badly injured? All the witnesses who testified were categorical that this was a densely populated area and that at around 9:00pm when the incident allegedly happened, there were a lot of people walking along the road where the incident happened it being only a few hundred metres from Gachie main stage. Yet, no one else, apparently, saw or heard what happened. What is more is that the three Key Prosecution Witnesses claim they screamed when they saw the injuries on their fallen friend. However, Inspector Wafula, who happened on the scene immediately after was quite categorical that they heard no screams or call for help.

d. Fourthly, and perhaps most material, is the fact that the three Key Prosecution Witnesses, on being found at the scene with a mortally injured man, offered no explanation whatsoever about what had happened. They remained mum through initial arrest and through two days of Police detention. It is only on the third day that they served up the narrative they told in Court. By that time, the Police Officers had concluded that the three should be charged over the incident.

e. Lastly, Kevin (PW1) claimed that on getting to the scene, the Deceased told him that it is the Accused who had hacked him. He appeared quite unsure of that position on cross-examination – and then, T and Michael were both quite categorical that the Deceased was incapable of talking when they found him. He could only make guttural noises due to his injuries.

24. It is worth noting, for the record, that during testimony, I made the following parenthetical remarks about T who testified as PW2:

The witness strikes the court as shifty and unsure of what version of the story to tell and comes across as not completely truthful.

25. In my view, this opinion fairly characterizes the evidence presented by the Key Prosecution witnesses. The evidence was unreliable, inconsistent and implausible. It does not come anywhere near establishing the guilt of the Accused Person beyond reasonable doubt as the law requires. It is not even necessary to assess the Defence theory of the case.

26. This leaves the Court with only one option: it must acquit the Accused Person of the charges of murder as charged. It hereby so does. The Accused Person is acquitted under section 306(1) of the Criminal Procedure Court. He shall be set at liberty forthwith unless he is otherwise lawfully held.

27. Orders accordingly.

Dated and delivered at Kiambu this 18th day of May, 2017.

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JOEL NGUGI

JUDGE