



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 59 OF 2010**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**PAUL NDEGWA MWANGI.....1<sup>ST</sup> ACCUSED**

**JOSEPH GICHERU NDEGWA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The accused persons namely **PAUL NDEGWA MWANGI** (hereinafter referred to as the 1<sup>st</sup> accused) and **JOSEPH GICHERU NDEGWA** (hereinafter referred to as 2<sup>nd</sup> accused) have both been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with section 204 OF THE PENAL CODE.**

The particulars of the charge were that

***“On the 1<sup>st</sup> day of June, 2010 at Wanyororo B farm in Solai in Nakuru North District within the Rift Valley Province jointly murdered PETER GICHINGA MUKUMA”.***

Both accuseds pleaded ‘**Not Guilty**’ to the charge. Their trial commenced on 9/5/2010 before Hon Lady Justice Hellen Omondi who heard the evidence of all the six (6) prosecution witnesses. On 18/7/2014 the Honourable Judge delivered a ruling in which she found that both accuseds had a case to answer and placed them on their defence. At this point Justice Hellen Omondi was transferred to Bungoma High Court and I took over the hearing of the matter.

**PW1 STEVEN MUKUNI GICHINGA** was the father to the deceased. He told the court that on 31/5/2010 he was at his home at Wanyororo Farm with the deceased. The deceased told **PW1** that he was feeling unwell and also told **PW1** that he (deceased) had already purchased medicine. The two took their supper and slept.

At about 12.00 midnight the deceased called **PW1** saying that there were many people outside. **PW1** lit his lantern and looked outside but saw nobody. The deceased still insisted that there were people outside so he moved his bedding and went to sleep in the living room. The deceased went to exhibit even more bizarre behavior. He stood on a chair and climbed through the roof into the bedroom where **PW1** was sleeping. The deceased then sat atop a table in the bedroom. Eventually the deceased left the house through window. **PW1** who was unwell did not follow the deceased. He only phoned one of his other sons to tell them what had happened.

The next day **PW1** saw the deceased walking home having been badly injured and bleeding all over. **PW1** told the court that his friend Ndegwa (1<sup>st</sup> accused) had come and reported to him (**PW1**) that he had badly beaten the deceased.

**PW2 MOFFAT MBUGUA MUKUNA** was a brother to the deceased. He told the court that on 1/6/2010 his father **PW1** phoned him and told **PW2** that his brother (the deceased) was displaying insane behavior. **PW2** advised his father to lock all the doors and not to let the deceased leave the compound. **PW1** called later and informed **PW2** that his brother had disappeared from the house. He later called again at 6.00am to inform **PW6** that the deceased had returned home bearing severe injuries from a violent beating.

**PW2** then rushed to the home and found the deceased lying in his bed which was soaked in blood. The deceased had severe cuts and wounds all over his body. **PW2** helped to wash and clean the deceased wounds then gave him some tea. He then took the deceased to Nakuru PGH where he was admitted. Later the deceased was admitted at the psychiatric wing of the same hospital where he died on 7/6/2010.

Following the death of the deceased the police commenced investigations into the matter. The two accused were eventually arrested and

charged.

Both accused elected to give sworn defence each denied any involvement in the fatal attack on the deceased. This court must now analyse the evidence on record and determine whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined as follows by Section 203 of the penal code, Cap 63, Laws of Kenya

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

The fact of the death of the deceased is not in any doubt. **PW1** the father of the deceased and **PW2** the deceased’s brother both testify that the deceased sustained serious and grievous injuries to his person. **PW2** rushed the deceased to hospital but unfortunately he succumbed to his injuries. Both **PW1** and **PW2** who knew the deceased very well identified him as **‘Peter Gichunga Mukuma’**

**PW3 DR. TITUS NGULUNGU** a consultant pathologist based at the PGH Nakuru told the court that he conducted the autopsy on the body of the deceased. He noted multiple wounds on the scalp and body of the deceased **PW3** opined that the cause of death was **‘head injury due to blunt force trauma’**. He filled and signed the post-mortem report which is produced as an exhibit **P. exb 1**.

Having proved the fact as well as the cause of death the prosecution must go further and tender evidence to prove that it was the two accuseds (or one of them) who unlawfully and fatally assaulted the deceased.

There was no witness to the assault on the deceased. **PW1** told the court that the deceased jumped out of the window during the night and ran away. **PW1** has no idea where the deceased went to. He only saw the deceased return home the next morning having been badly injured.

In his evidence **PW1** claims to have met the 1<sup>st</sup> accused who told him that he had beaten the deceased badly. If indeed the 1<sup>st</sup> accused uttered such words then this would amount to a confession. The law regarding the admissibility of confession is clearly set out in section 25A of the Evidence Act. No confession was ever recorded from the 1<sup>st</sup> accused and none has been produced as an exhibit in court.

Further in his evidence **PW1** states that he learnt that the deceased went to the home of the two accuseds and climbed over their fence. However **PW1** admits that he did not witness this at all. **PW1** did not state who gave him that information.

In his evidence **PW2** told the court that the deceased claimed that he ran to the accused’s home where he sought help but instead he was beaten. However **PW2** admits under cross-examination that he did not include this in his statement to the police. If the deceased had informed **PW2** the identity of the persons who beat him so savagely I have no doubt that **PW2** would have included this fact in his written statement. This is not a fact that one would just ‘forget’ to include.

From the evidence of **PW1** and **PW2** it is clear that the deceased was not in his right senses during this period. **PW1** says that the deceased claimed to be hearing voices and his act in jumping out of a window is certainly not normal. **PW2** in his evidence stated

***“The deceased appeared to me like he was having mental problems. He claimed there were people calling him on phone yet he did not have a phone. He also claimed that there were people pursuing him”***

The court was told that the deceased was actually confirmed by a doctor to be suffering from psychiatric problems and was admitted in the psychiatric ward in the hospital. Given the fact that the deceased was less than stable mentally whatever statements he made cannot be taken as the gospel truth. In the state of mind which the deceased was in it is very likely that he was not himself aware of where he had gone when he ran out of the house or who actually assaulted him. Given that nobody saw where the deceased went after he ran out of his house and nobody saw the deceased at the home of the 2 accuseds. This court has no basis upon which to implicate the 2 accuseds in this crime. The very real possibility that the deceased may have been assaulted by persons other than the two accuseds has not been ruled out.

In their defence the two accuseds both deny having assaulted the deceased. They both deny that the deceased went to their home on the night in question. There is nothing to disprove this defence.

**PW6 PC GEORGE MATHENGE** the investigating officer told the court that he searched the home of the two accuseds and recovered a wooden club. **PW6** suggested that this was the wooden club used to hit the deceased. There was nothing on the club to suggest that it had been used in an assault. No blood stains were found on it.

The assault and death of the deceased was undoubtedly tragic. However I find no evidence at all to link the 2 accuseds to this fatal assault. The *actus reus* of the charge of murder has not been proved against the two. I therefore enter a verdict of **‘Not Guilty’** and I acquit each accused of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 3<sup>rd</sup> day of August, 2017**

Ms Wangari holding brief for Waiganjo

**MAUREEN A. ODERO**

**JUDGE**