



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 31 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NGANGA GACHERU.....1ST ACCUSED

JOSEPH KAMAU WANYOIKE.....2ND ACCUSED

JUDGMENT

1. The Accused Persons, John Nganga Gacheru (“1st Accused”) and Joseph Kamau Wanyoike (“2nd Accused”) (together “Accused Persons”) are charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. They are accused of unlawfully killing John Ngatha on 28/11/2015 at Gitombo Area within Kigumo Location in Murang’a County.
2. The Prosecution presented eight (8) witnesses to prove the allegations as per the charge sheet against the Accused Persons. The evidence that emerged from the witnesses was as follows.
3. Philip Gathara testified as PW2. He knew both Accused Persons before the incident. Gathara is a bodaboda operator. According to his testimony, on 28/11/2015, he was heading home at around 10:00pm in his bodaboda. He had Duncan Kamau (who testified as PW3) and John Ngatha (the Deceased) as his pillion passengers. As he rode in the vicinity of Gitombo Primary School, he slowed down the bodaboda because of some bumps on the road. They noticed some people fighting by the side of the road. He stopped the bodaboda and parked it by the road side. He said his aim was to help the person who seemed to be getting the short side of the fight. By this time, he had noticed that the person who was on the wrong side of the fight was his friend, Samuel Mwaura (PW6).
4. Gathara testified that on stopping his bodaboda and getting close to where the scuffle was, he noticed that it was 1st Accused and the 2nd Accused who were fighting with Samuel Mwaura. He noticed the 1st Accused repeatedly hitting Samuel Mwaura with a helmet. He and his friends, Duncan Kamau and the Deceased decided to step in to help Samuel Mwaura. He also noticed that John Muthama (PW5) and Simon Mbugua (PW7) were at the scene but they did not intervene. The incident took place right outside John Muthama’s gate.
5. Gathara and his friends were successful in stopping the fight ephemerally – and Samuel Mwaura got an opportunity to run away. However, the two assailants – the Accused Persons – now turned on them. At first, in Gathara’s rendering, they turned on the Deceased – demanding a cap which the 2nd Accused claimed the Deceased had stolen from him. The Deceased (and by extension Gathara and Duncan Kamau) claimed they knew nothing of the cap. This infuriated the Accused Persons who now attacked them in what appeared to be a full scale fight. By this time it was the Accused Persons on the one hand fighting with Gathara, Duncan Kamau and the Deceased on the other hand.

6. At this point, both Gathara and Duncan Kamau were united in their testimony, that the 1st Accused suddenly brandished a knife. Neither of them knew where it had come from and neither of them saw it clearly enough in the night to identify it: all they knew was that it was a knife in the hands of the 1st Accused. Duncan Kamau held the 1st Accused as he tried to attack Gathara with the knife. Gathara got the opportunity to bolt. He ran over to his parked bodaboda, started it and ran away. He says he was going to the nearby shopping centre to get help since he had concluded that things were not going well.

7. Meanwhile, the 2nd Accused was attacking the Deceased. At some point, shortly after Gathara ran away, Duncan Kamau got an opportunity to disentangle himself from the 1st Accused and ran away too in the same general direction that Gathara had run to. He left the Deceased at the scene – caught up in the Accused Person's cross hairs.

8. Gathara and Duncan Kamau came back to the scene a few minutes later – Gathara having failed to get help and having met Duncan Kamau on the road as he ran away. When they arrived back at the scene, they found the Deceased lying on the roadside by John Muthama's gate bleeding profusely. A crowd was already forming. Both Accused Persons tried to run away – but the crowd was able to restrain and detain the 2nd Accused. Indeed, the crowd administered some “mob justice” to the 2nd Accused.

9. Both Gathara and Duncan Kamau testified about the unfolding of this incident with remarkable consistency and corroboration – including of minor details. The testimony of Samuel Mwaura, who testified as PW6 and that of Simon Mbugua Muthama, who testified as PW7 tended to complement and, in some instances, corroborate this narrative.

10. Samuel Mwaura Kangethe testified that on that night (28/11/2015), he and Simon Mbugua Muthama (PW7) were headed home at around 10.00 p.m. On their way they met with the 1st accused and the 2nd accused who claimed that he (Mwaura PW6) had stolen their cap and they started beating him. The 2nd Accused got a helmet from Nganga's motorbike which was parked nearby and handed it over to the 1st Accused who used it to assault Mwaura. At this point, Mwaura screamed hoping that someone would come to his rescue.

11. It was the screams by Mwaura that attracted the attention of Gathara, Duncan Kamau and Ngatha who at that moment were on Gathara's bodaboda heading home. After Mwaura got an opportunity to run away, he later came back to the scene and found the crowd gathering, the Deceased lying unconscious and the 2nd Accused detained by the crowd. Mwaura was later taken to the hospital together with the Deceased where he received treatment for the injuries to his head.

12. Simon Mbugua Muthama, who is a cousin to the 1st Accused and a son to John Muthama Mbugua (PW5), confirmed that he was walking Samuel Mwaura home that night when the 2nd Accused claimed that Mwaura had stolen his cap and a fight ensued. He confirmed that at some point both Accused Persons attacked Mwaura and that when Mwaura called for help, Gathara, Duncan Kamau and the Deceased came to his rescue. Simon Mbugua Muthama claims that at that point he ran away to their compound and does not know what ensued after. He says he only came out of the compound later in the night when he heard a commotion only to find the Deceased lying by their gate seemingly unconscious.

13. Bernard Karuru testified as PW4, he stated that he was asleep at about 10.30 p.m. when he received a call from John Mwaura Karanja informing him that his nephew Ngatha had been assaulted by the road side. He continued to testify that he found Ngatha unconscious but not dead. His heart was skipping a beat but he was bleeding profusely. He assisted in identifying the body on 02/12/2015 for post mortem. He was present during the post mortem and noted only one stab. He recorded a statement to that effect.

14. Dr. Eunice Mugweru is the pathologist who conducted the autopsy at Kigumo Sub District Hospital. The body was identified by Bernard Karuru and Ngatha Kamau in the presence of a Corporal Julius Kemboi.

15. Dr. Mugweru found that the body belonged to an African adult male of 26 years. His clothes were blood stained. His nutrition was good and was of moderate physique. He was about 5ft 7 inches. He had

been refrigerated and therefore well preserved. Dr Mugweru found that the Deceased had crusted blood on the chest, abdomen and chest. He also had minor bruises on the right side of the face. He had a 7 cms stab wound on the right anterior side which had penetrated all the way to the lungs, to the ribs all the way to the right lung and had pierced the right lung causing a stab 6 cms wide.

16. The doctor concluded that the cause of death was heavy internal haemorrhage caused by internal injury due to a stab wound consistent with assault with a sharp object. She filled out the Autopsy Report with her findings and produced it as evidence.

17. The last Prosecution witness was Cpl Julius Kemboi from Kibicho Police Station. He was called by PC Dikanya who was at the report office. He informed him that a serious assault had been reported and one of the victims was unconscious. The report was made by Dancun, Mwaura and Gathara. Cpl Kemboi went to the office but did not find anyone since the victim had been rushed to Kigumo Hospital.

He followed them there but unfortunately found out that the victim had succumbed to the injuries. He noted that he had a stab on the right side of the chest and his clothes were soaked in blood.

18. Cpl Kemboi found that the 2nd Accused had been detained at the hospital by members of the public. He escorted him to custody with the assistance of PC Koshomani. They also visited the scene that night. He collected a broken helmet and one sandal. Bernard Karuru (PW4) with other members of the public took the Police Officers to the 1st Accused Person's house. They found him asleep but he was very drunk. Upon searching the house, they found a knife covered in mud and arrested the accused person. The following day the officer went back to the scene and found a motorbike which he handed over to the 1st Accused's family.

19. Put on their defence, the Accused Persons elected to give unsworn statements. The 1st Accused person testified that he is a bodaboda operator and that on 28/11/2015 he was working at his usual stage at Komothai girls. He said that he worked until 3.00 p.m. when he got a call from his friends Simon and Kangethe who sent him to buy spare parts for them. He later escorted them home. While on his way home, he met with the 2nd Accused and they proceeded back to Gathigi Shopping Centre to have a drink. They also met with Muthama (PW5). Later Muthama asked the 1st Accused to take him home. When they got to Muthama's compound he escorted him to the house and left Kamau outside. On coming back, he found people beating Kamau and on enquiring he was also beaten and was knocked down unconscious. He stated that he was later woken up by heavy down pour. He proceeded to his house but was later woken up by police officers who charged him with the offense of murder.

20. The 2nd Accused Person testified that on 28/11/2015 he was called by his grandmother to chop cow feeds. Later in the day he went to Gathiroini Shopping Centre and met with Nganga (1st accused) and they went to have a few drinks. Later Muthama, asked Nganga to escort him home and they all boarded the motorbike. When they got to Muthama's home, Nganga went inside and Kamau was left at the main road. He stated that while at the road side, Njuguna and Gathara came demanding for the motor bike. That he refused to let go of the motor bike and that is when they started beating him. At this point the 1st Accused had come back and was lying on the ground. Then a vehicle came and they were taken to hospital. Inside the vehicle, another person was lying down. They proceeded to Kigumo Health Center and he was later charged with the offence of murder.

21. 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.

22. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt 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.

23. On the other hand, malice aforethought is established, under section 206 of the Penal Code, 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; or
- 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; or
- 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.

24. In this case, there is no question that the Deceased died in the night of 28/11/2015. The actus reus is not in issue. The two main issues are whether the actus reus was caused by the Accused Persons, and whether, if the answer is in the affirmative, they had the requisite mens rea (malice aforethought.)

25. The evidence of the Prosecution witnesses – and, in particular, that of Gathara (PW2), Duncan Kamau (PW3) and Samuel Mwaura Kang’ethe (PW6) are quite consistent about what happened. These three witnesses – and in particular, Duncan Kamau – struck me as honest and straight-forward witnesses. In material details, their narratives corroborated each other. The Accused Persons attacked Mwaura first. Mwaura testified that the 2nd Accused was demanding for a cap which he knew nothing about. It turns out that he was demanding for the same thing from the Deceased when Mwaura got an opportunity to run away.

26. I believe the testimony of these three witnesses. I do so because the context and established surrounding circumstances supports the narrative by these witnesses as eminently possible. Aside from the material details which coincide and the believability of the testimonies, the following three factors have persuaded me that their version of the narrative is the correct one about what happened:

- a. First, the version of these three witnesses aligns with that of Simon Mbugua Muthama (PW7) in the sense that PW7 confirms that he was with Mwaura (PW6) when the 2nd Accused Person attacked him demanding for his cap and that later, the 1st Accused joined in the fray. Simon Mbugua admits that he ran away from the scene when Gathara, Duncan Kamau and the Deceased arrived and tried to rescue Mwaura. It is noteworthy that Simon Mbugua is the cousin to the 1st Accused Person.
- b. Second, the injuries to Mwaura are consistent with the narrative he gave about what happened.
- c. Third, a knife was found in the bag of the 1st Accused Person by Cpl Kemboi the same night. This evidence was not impugned or even challenged on cross examination and I believe it. The knife found was covered in mud – and was the same knife that Gathara and Duncan Kamau saw the 1st Accused brandishing that night.
- d. Fourth, the Defence narrative is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). In my view, it is not possible to say that the Accused’s Person’s version of events has any reasonable inherent probability that it is true. In my view, it is not possible to say that the Accused Persons’ version of events has any reasonable inherent probability that it is true. A few tell-tale signs establish this beyond reasonable doubt:

- i. First, although Gathara, Duncan Kamau and the Deceased were known to both Accused

Persons, in his unsworn statement, the 1st Accused only claims that some people attacked them without mentioning their names. The 2nd Accused Person mentions the three by name. Neither of them acknowledges that Simon Mbugua was at the scene.

ii. Second, the 1st Accused says that he was knocked unconscious and he remains at the scene until much later in the night when a heavy downpour woke him up after which he headed to his home. This does not explain why he chose to leave his motor bike at the scene.

iii. Third, this narrative does not quite tally with the narrative by the 2nd Accused who says that some people came in a vehicle and offered to take him to hospital: if the 1st Accused Person was still lying at the scene unconscious, why was he not taken in the vehicle as well?

27. On her part, Mrs. Omungala, Counsel for the Accused Persons suggested that there were “cracks” in the Prosecution Case which, in her view, makes it unsafe to conclude that the two Accused Persons were the ones who caused the death of the Deceased. She raised seven issues. I will briefly deal with each of them:

a. First, Mrs. Omung’ala takes issue with the fact that the Pathologist concluded that the cause of death was a single stab wound caused by a sharp object while most of the Prosecution witnesses suggested that there was a fierce fight where the Deceased “must have been beaten and attacked by the two Accused Persons to death using uncouth ways.” As I understand it, Mrs. Omung’ala is saying that if the Prosecution narrative is true, the Deceased must have suffered other injuries and that, therefore, it would not have been possible to conclude that the cause of death was a singular stab wound. This critique misunderstands the evidence by Dr. Eunice Mugweru. The doctor was categorical that the cause of death was severe internal hemorrhage caused by penetrating chest injury due to a stab wound consistent with assault. She also reported that she found that the Deceased had bruises on the right side of his face. I believe that these are consistent with the narrative that there was a physical confrontation in which the Deceased was involved.

b. Second, Mrs. Omung’ala complains that PW2 seemed unsure about the number of people who congregated at the scene variously putting the number at 10 and 20 during the Examination-in-Chief and Cross-examination respectively. My view is that this is a minor discrepancy which does not go to the substance of the witness’ testimony or his credibility. Our law does not require that a witness be perfect; it only requires that they be straightforward and tell the truth as they recall it.

c. In the third place, the Defence argues that PW4 only gave hearsay evidence. The only role of PW4 was to testify that he identified the body of the Deceased to the Pathologist and led Cpl Kemboi to the house of the 1st Accused. That is not hearsay evidence.

d. Mrs. Omung’ala also complains that PW5 did not witness the fight. I do agree. The evidence of PW5 was unhelpful to the Prosecution as he testified that he saw nothing. However, this is hardly a “crack” in the Prosecution case.

e. Fifth, the Defence Counsel focused on the fact that PW6 (Mwaura) admitted that it was dark and that he could therefore not see who killed the Deceased. It is true that all the Prosecution witnesses testified that it was at night (after 10:00pm) and that it was, therefore, dark. However, all of them testified that the scene was illuminated by the light from the bodaboda belonging to Gathara which was at the scene. In any event, all the four witnesses at the scene testified that they knew and recognised the Accused Persons as they were known to each other. There is, therefore, no possibility of misidentification.

f. Sixth, Mrs. Omung’ala claims that PW7 testified that he was in the company of PW1 (Gathara) and PW2 (Duncan Kamau) and that they had been on a drinking spree where PW7 had drunk six bottles of Alsops beer. However, PW7 gave no such evidence. Instead, PW7 testified that he had been drinking with PW6. PW1 and PW2 came with the Deceased in PW1’s bodaboda.

g. Lastly, Mrs. Omung'ala took issues with the Investigating Officer claiming that he did no investigations other than collecting the helmet from the scene. She also pointed out that the knife was only covered in mud not blood which could be an indication that it was not the murder weapon. I would point out that collecting the physical evidence from the scene and apprehending the Accused Persons while recovering the murder weapon amounts to investigations. While the blood of the Deceased on the murder weapon would have been irrefutable proof that the knife was the murder weapon, even in the absence of such blood, other evidence can conclusively tie the knife to the murder. In this case, the testimony of Gathara (PW1) and Duncan Kamau (PW2) provides the needed connection.

28. The Defence has vigorously argued that none of the Prosecution witnesses saw the Accused Persons stabbing the Deceased. The Defence is correct. None of the witnesses testified to seeing either of the two Accused Persons stabbing the Deceased. However, this was one of the cases where it can properly be said that the "inculpatory fact is incompatible with the innocence of the Accused [Persons], and is incapable of explanation upon any other reasonable hypothesis than that of his guilt." See ***R v Kipkering Arap Koske & Another 16 EACA 135***. I say so because I have accepted the evidence of PW1 and PW2 that they saw the 1st Accused Person with a knife which he attacked them with. A few minutes later, they found the Deceased lying unconscious with a stab wound on his chest. Later that night, a knife covered in mud was found in the house of the 1st Accused Person.

29. It is true that "suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt." See ***SAWE –V- REP [2003] KLR 364***. However, in this case, the evidence goes beyond mere suspicions. The evidence presented brings the case within the circumstances laid down ***in ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990 (UR)***. In that case, the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

30. All these conditions are satisfied here.

31. Finally, it is important to deal with one aspect of the case: while it has not been established which of the two Accused Persons actually did the stabbing, both are jointly responsible. This is because each of the Accused Persons was involved in an unlawful activity when the murder occurred. Hence, whoever actually committed the act of stabbing is not relevant for purposes of attributing responsibility: both Accused Persons would be equally responsible. See the case of ***Republic v Charles Mwaura & another [2016] Eklr*** where the Court of Appeal cited ***Njoroge -vs- Republic (1983) 197*** in holding that:

If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....

32. I will finally turn to the question of mensrea. The evidence tendered in this case establishes that the two Accused Persons viciously attacked the Deceased (and others). There is no question that the object of the attack was to cause death or at least grievous harm to either the Deceased or his colleagues. There is, therefore, no doubt that this constitutes malice aforethought sufficient to sustain a conviction for the offence of murder as charged.

33. In the premises, it is my finding that all the ingredients of the offence of murder have been proved in the instant case. Consequently, I find both Accused Persons guilty in the murder of John Ngatha Ng'ang'a contrary to section 203 as read together with section 204 of the Penal Code. I

hereby convict both Accused Persons accordingly.

34. Orders accordingly.

Dated and Delivered at Kiambu this 21st Day of September, 2017.

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JOEL NGUGI

JUDGE