



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 91 OF 2010**

**REPUBLIC.....STATE**

**VERSUS**

**STEPHEN KANGETHE MOGE.....1<sup>ST</sup> ACCUSED**

**KENNEDY NGANGA IRUNGU.....2<sup>ND</sup> ACCUSED**

**MOSES KAMAU NJERI.....3<sup>RD</sup> ACCUSED**

**RULING**

The three accused persons namely **STEPHEN KANGETHE MOGE** (herein after referred to as the 1<sup>st</sup> accused), **KENNEDY NGANGA IRUNGU** (hereinafter referred to as the 2<sup>nd</sup> accused) and **MOSES KAMAU NJERI** (herein after referred to as the 3<sup>rd</sup> accused) have all jointly 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 29<sup>th</sup> day of August 2010 in Nakuru District within the Rift Valley Province, jointly murdered T K”***

All three accused persons pleaded ‘Not Guilty’ to the charge. Their trial commenced on 17/7/2012 before **Hon. Justice Anyara Emukule** who recorded the evidence of the first eight (8) witnesses. Following the transfer of the learned trial judge to the Mombasa High Court, I took over the matter and recorded the evidence of the last witness. The prosecution called a total of nine (9) witnesses in support of their case.

I must at this stage point out that although the hearing of this case commenced in July 2012 it was not until June 2017 that the final witness was heard. Part of the delay was caused by the 3<sup>rd</sup> accused who absconded from the court for a period of about two (2) years – it was not until 18/4/2017 that the 3<sup>rd</sup> accused was traced and brought to court under a warrant of arrest. It is this factor that contributed to the significant delay in finalizing the case.

The facts of this case revolve around the killing of a young boy aged 7 years who was allegedly found stealing maize from farms in Likia area of Nakuru County. From the evidence of the prosecution witnesses, it is apparent that during this period there existed hostilities between the Masai and Kikuyu communities in the area. The deceased child was from the Masai Community.

**PW3 PIUS MBURU THANDI** the chairman of Likia Location told the court that on 26/8/2010 he received a report that a young boy had disappeared and that his body had later been recovered at Waitemare Farm. **PW3** went to the farm and found the dead body of the deceased. He had no idea how the deceased met his death.

**PW4 GEOFFREY NDUNGU KARATHI** was the chief of Likia Location. He told the court that on 30/8/2010 he was informed that a young Masai boy had been found dead at Waitemare Forest. The 1<sup>st</sup> accused was arrested on suspicion of involvement in the death of the child. Later the 2<sup>nd</sup> and 3<sup>rd</sup> accuseds were also arrested in connection with the offence.

The fact of the death of the deceased is not in any doubt. **PW4** the local chief told the court that he saw the dead body of the boy on the forest and that he assisted the police to remove the body to the mortuary. **PW7 PC VICTOR OMONDI** told the court that he witnessed the autopsy at the Nakuru Municipal Mortuary. **PW8 PC DAN IKONGE** was one of the officers who recovered the body of the deceased at Waitemare Forest. **PW8** stated that he saw cuts on the head and back of the body and both legs had been chopped off.

**PW9 DR. TITUS NGULUNGU** was the pathologist who gave evidence regarding the autopsy conducted on the body of the deceased. Upon examination the doctor noted 3 deep cuts to the head and both lower limbs (legs) had been chopped off.

Upon internal examination the pathologist noted a fracture to the skull. The cause of death was opined to be **‘severe head injury with excessive bleeding due to trauma to the head and chopping off of the lower limbs’**. **PW9** produced the duly completed and signed post-mortem report as an exhibit in the case **P. exb 6**. Thus it is clear that this unfortunate young boy met his death due to a vicious and cruel assault on his person.

The next question requiring an answer is whether it was the three accused (or any of them) who viciously attacked and killed the young boy.

There was no witness who saw any of the accused persons assault the deceased. Indeed no witness saw any of the 3 accuseds in the company of the deceased, nor were they found in the forest where the body was recovered.

Although the investigating officer indicated in his evidence that the deceased was attacked because he was found stealing maize, this evidence is not corroborated by the other prosecution witnesses.

**PW1 PETER MACHARIA** a farmer in the Likia area and **PW2 ROBERT MAINA GICHEHA** both told the court that their farms had been invaded by cattle which destroyed their maize. In his evidence **PW1** stated

*“We went and reported to the police on the destruction of my maize. I do not know anyone called Pius. I have never heard of maize thefts”*

Under cross-examination by counsel **PW1** stated

*“I do not know whose cattle had invaded my shamba. I do not know whether the cattle belonged to the Masai”*

On his part **PW2** stated

*“Another person called Kamau also came and informed me that his maize too had been eaten by invading cattle”.*

Thus it is clear that the complaint which the farmers in the area had was that their maize was being destroyed by invading cattle. None of them mentioned that their maize crop was being stolen by human beings.

**PW3 PIUS MBURU THANDI** the chairman told the court that he found the body of the deceased dead in the farm. **PW3** did not see the child stealing any maize. **PW3** did not mention having seen any of the 3 accused persons in the area where the body of the deceased was recovered. He had no idea who killed the boy.

**PW4** who was the local chief told the court that he **‘began to hear that some people were suspected to have killed the boy’**. On the basis of this information **PW1** surrendered the name of the 1<sup>st</sup> accused and he was arrested. **PW1** did not give the names of those who had identified the 1<sup>st</sup> accused. It is clear that his naming of the 1<sup>st</sup> accused was based on suspicion alone. Under cross-examination **PW1** stated

*“There was tension, this area is inhabited by Kikuyu and Masai whose son had been killed by Kikuyu. So I had to move fast to arrest the suspect and apprehend the 1<sup>st</sup> suspect”*

From this statement of the chief it is clear that he arrested the accused’s **Not** because he had any tangible evidence of their involvement in the killing but only because he wished to diffuse the tension in the area.

**PW6 INSPECTOR BENSON NZOMO** who was the investigating officer told the court that he was informed by a man that **‘Kangethe’** had cut the deceased with a panga. The person who gave **PW6** this information was not called to testify. He was said to be mentally unstable. The panga which was recovered had no blood stains on it as it had allegedly been washed. Thus there existed no tangible evidence to connect the 1<sup>st</sup> accused to the murder weapon. A panga is a common farming implement and is found in almost every rural home in Kenya.

On the whole the evidence adduced by the prosecution in this case is a collection of rumours, hearsay and innuendo. There is no direct evidence to link any of the accused persons to the death of the young boy. I find that no prima facie case has been proved. Accordingly I acquit each accused of this charge of murder. Each of the 3 accused persons is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 30<sup>th</sup> day of October, 2017.**

Mr. Ombati holding brief for Mr. Njogu

Mr. Chigiti for DPP

**Maureen A. Odero**

**Judge**