



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERUGOYA

MURDER CASE NO. 5 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BENARD MURIMI WANJIKU.....APPELLANT

JUDGMENT

1. The accused herein, **Benard Murimi Wanjiku** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars contained in the information are that on the 29th June, 2013 at Karaba area within Kirinyaga County, he jointly with others not before court caused the death of **Evans Kiarie Maina** (hereinafter to be referred to as the deceased).

2. The prosecution in this case called a total of nine witnesses in support of their case while in defence the accused person gave sworn statement of defence and called one witness.

3. The first witness called to testify (**James Maina Mwangi**) (P.W.1) told this Court, that on the 29th June, 2013 while at Kwibota Village working on a farm in the company of 3 other people namely John, Martin alias Mzazi and Kiarie (deceased) a large group of people came armed with rungu, pangas and stones. He told this Court that he could only identify two people in the group and one of those he identified physically is the accused in this case. He said that he saw him beat the deceased with a rungu. He stated that he did not know the names of the two people but that he used to see them in the shamba and the village. He further testified that the group of people attacked them by throwing stones at them and that as they ran away the deceased was hit on the leg and fell down. The witness told the court that the group also caught up with him and robbed him of his money and phone and told him to disappear. He said that he saw the deceased being cut with pangas and being beaten after which he saw him being carried away and later found him at a private clinic at a place called Kwibota where he was taken for treatment before being transferred to Embu General Hospital for further treatment. He told this Court that he was informed later that the deceased had succumbed to the injuries he had sustained.

4. The deceased's father **Douglas Maina Kangangi** testified as P.W.2 and told this Court that he had a land dispute with one DEDAN MUTHIE and his father one GATHOMBE RURIGE. The dispute was over 1 ½ acre rice farm which the witness claimed was given to him by Rice Board and which was also claimed by one GATHOMBE RURIGE. The witness further claimed that the said Gathombe Rurige gave the disputed portion to his son Dedan Muthii despite a court order. He told this Court that he did not know the accused in this case. He further testified that on 29th June, 2013 he sent his deceased son to the same disputed rice farm to work and because he suspected impending trouble, he went to the chief's camp to get security from the Administration Police and that while there a lady by the name Wanjiku came

shouting that “today somebody will die” because she claimed that the disputed parcel had been assigned to her and Dedan Muthie by their father Gathombe Rurige. The witness further told this Court that the said Wanjiku was accompanied to the chief’s camp by Dedan and was complaining furiously that some people were uprooting her crop. After a while the witness told the court that Wanjiku received a call on her mobile phone and started screaming that her child had been killed. It was then that the witness added that two Police officers reported that there was trouble in the maize field and the witness was informed that his son, the deceased herein, had been injured and had been rushed to hospital.

5. **P.W. 3 Peter Ngige Ngugi** told the Court that he was passing by the disputed farm on 29th June, 2003 when he heard people screaming and on approaching found a person stuck in the mud and injured on the leg and shoulder. He assisted him by removing him from the mud and cleaning him. He then took him to a nearby Health clinic at Kwibota.

6. The only witness who positively identified the accused in this case as having been in a group that attacked the deceased and the three witnesses he was working in the disputed rice farm was Martin Irungu Muchira (P.W.4). He testified that he was boda boda rider and on the material date that is 29th June, 2013, he was called through his mobile phone by the deceased to ferry them to the rice farm which he did. He identified the rice farm as **UNIT 9 No. 4611**. He also told this Court that he took the deceased, Maina (P.W.2) and John to the said farm where he told this Court that he decided to also work on the farm to earn extra money on top of the transport costs which he had earned. He told this Court that they started uprooting rice from the paddy but after 30 minutes they saw a group of people numbering between 10 to 20 armed with stones and pangas approaching and sensed danger when the mob started throwing stones at them. He told this Court that he immediately took off and got onto his motor bike and sped away for his own safety and that of his motorbike as he added that the group had warned him that they would burn the motorbike. Before running away he stated that he managed to identify Benard (accused) among the attackers because he knew him. According to the witness, the accused was the one leading the mob and he saw him cut the deceased with a panga as the others in the crowd descended on him beating him with sticks. He told this Court that he ran away and never came back and only learnt later that the deceased had been taken to hospital and later died as a result of the injuries he sustained. He confirmed that one of the persons who was with them was Maina (P.W.2) and that he was also attacked and robbed.

7. **Dedan Muthii Kathumbi** (P.W. 5) on his part testified that on 29th June, 2013 he was informed by one Kibuchi that some people were working on his paddy farm **No. 4610** and decided to go and check. He further testified that he found six people working on paddy No. 4611 which to his knowledge belonged to Leah Wanjiku. So he called her and informed her that six people were uprooting her rice crop and they agreed to meet at an Administration Police camp known as Ciagini to to make a report which they did. He further told this Court that after a while a phone call came in to the said Leah Wanjiku informing her that her son the accused in this case had been cut and injured. He further stated that they later went with the Police to the disputed paddy and found nobody in the said paddy but got information the injured person had been taken to Complex Medical Centre for treatment.

8. Another witness summoned to testify was **Lydia Wambui Maina** (P.W. 6) who told this Court that she was a sister to the deceased and only learnt about the incident after it had occurred when she was called by her sister that her brother (the deceased) had been attacked and had been taken to Embu General Hospital where the witness resided and carried on business. She told this that she rushed to the said hospital and found her sister, Raura Wachege, her brother Paul Mureithi Maina and her deceased brother undergoing treatment. The following Tuesday she was informed that her brother had succumbed to the injuries. This evidence was replicated by P.W. 7 – James Wanyoike who told this court that he was also informed of the attack and later informed that his deceased brother had passed on. He only attended a postmortem examination on 4th July, 2013 where he identified the body of his late brother (deceased).

9. **Dr. Godfrey Njiru** (P.W. 8) was the doctor who conducted postmortem on 4th July, 2013. He confirmed to court that upon examination he noted that the deceased had suffered the following injuries:

- (i) Fractured right lower limb.

(ii) Fractured ulna bone.

(iii) Cut wound on the shoulder that had been stitched.

The doctor further testified that the body was pale indicating that he had lost blood. He also noted a fracture on the base of the skull and concluded in his report which he produced as Prosecution Exhibit 1 that the deceased died as a result of head injury.

10. The investigating officer in the case **Corporal Christopher Oroko** (P.W. 9) told this Court about the actions he took after receiving a report that a group of around twenty armed youths had attacked the deceased and injured him in the process. He told this Court that he was briefed and given the responsibility to carry out the investigations on 3rd July, 2013 after the demise of the deceased on 2nd July, 2013. He gathered evidence from eye witnesses and took their statements and he testified that the accused person was identified as one of the people who attacked the deceased. He confirmed to court that he established that there was a land dispute between the deceased family and the family of the accused and that could have triggered the altercation. He further told this Court under cross-examination that the initial report booked at Wanguru Police Station was an assault and that the reportees were James Maina Mwangi (P.W.1) and Jane Maina Nyokabi had indicated that they had identified Dedan Wamuriuki Alias Muthee as one of the persons who had attacked the deceased.

11. This Court based on the above evidence placed the accused person on his defence in accordance with **Section 211** of the **Criminal Procedure Code** and the accused person elected to give sworn evidence and denied committing the offence. He told this Court that on the material day that is on 29th June, 2013 at around 8.00 a.m. he was sent by his mother to scare away birds from the rice fields and on reaching there found nine to ten men uprooting rice seedlings from her mother's paddy and inquired why they were destroying the crop. He also added that he did not know the people who were uprooting the rice crop and that before he finished asking, he was attacked with pangas which he claimed that the men were using in destroying the paddy. He told this Court that he sensed danger and screamed for help and this, he stated, attracted villagers who rushed in to rescue him. The accused stated that he was rescued and taken away and met his mother who took him to Karaba Police Post to report using a motorbike (boda boda). He added that he later went for treatment at Kategi health Centre where he was treated and discharged. He went back to the Police Post on 2nd July, 2013 where he stated that he was referred to Wanguru Police Station where he reported the incident and was given a P3 form to take to the health centre where he alleged to have been treated. He further added that the P3 form was filled and he took it back to Wanguru Police Station where he was told to get witnesses to record statements. As he looked for the witnesses, he told this Court that he was told by his mother that the Police had summoned them to Wanguru Police Station. He claimed that he was locked up as soon as he arrived and later on 25th July, 2013 he was charged with the offence of murdering the deceased herein. He admitted that his mother had a land dispute with the father of the deceased but denied a suggestion by the prosecution that her mother had lost the civil case in court. He denied that he had gone to report to the Police that he had been assaulted as a cover up arguing that he could not have gone to the Police if he was involved in the attack of the deceased. He denied knowing the deceased or Douglas Maina (P.W.2).

Leah Wanjiku Warui (D.W.2), testified in defence of the accused person who is her son and supported the accused person in the evidence he had adduced. She confirmed that she had sent the accused to go and scare away the birds in her paddy and that she was informed that some people were uprooting her rice crop and that is why she went to Ciagini Administration Police Camp to report the incident. She also confirmed that she met Dedan Muthii (P.W. 5) on the way and they together went and found Maina Kangangi (P.W.1) who according to her admitted that he had sent the men to go and uproot her rice seedlings from the disputed parcel. She denied knowledge of the deceased and his father Douglas Maina Kangangi. She also conceded upon prodding by this Court that her son did not suffer any physical injury but that his leg experienced some pain.

12. Evaluation of the evidence tendered by prosecution shows that the prosecution case mainly rested on the evidence of P.W. 4 and P.W. 1 as these were the only eye witnesses who told this Court that they were positive that the accused herein was one of the people who had ganged up to not only chase them from

the disputed paddy but to cause harm to particularly the deceased. The accused in his defence submissions contended that the two eye witnesses had contradicted themselves with P.W.1 (James Maina Mwangi) stating that the accused beat the deceased with a rungu while P.W. 4 (Martin Irungu Muchira) stated that the accused used a panga in attacking the deceased. The accused submitted that if P.W.4 had also been threatened and was taking off in a motor bike he was not in a position to clearly identify the accused person or see him attacking the deceased. It was submitted that if it was true that the accused had been identified positively, he could have been mentioned in the initial report at the Police Station. It further submitted on behalf of the accused that the deceased and his group were the ones who were beating up the accused and that it was villagers who rescued him.

13. I have carefully considered the evidence tendered by the defence and find that the narrative that the accused was beaten up and injured is not supported by any evidence. The accused's own mother told this Court that the accused did not have any physical injuries and only took him to hospital because he had complained of experiencing pains on the leg. The prosecution in their written submissions have contended that this was an after thought on the part of the defence and faulted them for not adducing any medical evidence to back up his claims about assault. The prosecution's contention appears to be well founded because the defence did not offer any explanation why the accused chose to report to Karaba Police Post instead of Wanguru Police Station which was near and well suited to handle the case. D. W. 2 – the mother of the accused told this Court that he took the accused to Karaba Police Post to report about the assault but went to Wanguru Police Station to report that her rice had been uprooted. She did not offer any explanation why she saw it fit to do that and in my view either the story was made up or no report about the alleged assault on the accused person was ever made. After all no evidence was ever tendered by the defence to establish that fact.

14. It is however, a basic principle in law that the burden in criminal law is always on the prosecution and I agree with the defence that it is not the duty of the defence to prove their innocence. The prosecution are required in law to prove their case against an accused person beyond reasonable doubt. In a case of murder such as this, the evidence tendered must show that the conduct of the accused person caused the death of the person murdered and there was malice aforethought.

15. The prosecution case against the accused is that the accused herein together with a group of youth attacked the deceased and the people he was working with in the farm. The defence has stated that there was an inconsistency on the number of people in the company of the deceased with P.W.5 saying he saw 6 people while the other witnesses (P.W. 1 and P.W. 4) said they were four. But the number of people in the company of the deceased in my view was not an important factor in this case. What was significant is what actually took place. When the accused person and his group went to the disputed paddy did they have a common intention? Common intention is an important element in a crime involving more than one person. **Section 21 of the Penal Code** defines common intention as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The question to be answered in this case is whether the evidence tendered established that the accused person and the group of youths went to the disputed paddy with a common intention to cause harm to the deceased.

16. The evidence of P.W. 5 (Dedan Muthii Gathumbi) was telling in this respect. He told this Court that on 29th June, 2013 at 8.30 a.m. he was alerted that there were some people in his paddy and upon going to check he realized that it was the next parcel No. 4611 which according to him belonged to Leah Wanjiku (D.W.2) the mother of the accused person. He called her and told her that some people were uprooting her rice on the said plot. This was confirmed by the said Leah Wanjiku in her evidence to this court in defence of the accused in this case. This clearly shows that she sent her son (the accused here) not to chase the birds as she alleged but to chase whoever was uprooting her rice and probably do more. She was of course not happy of what was taking place and that is why she went to Administration Police

Camp to report the incident and at the said Administration Police Camp she met the father of the deceased (Douglas Maina Kangangi) and the evidence tendered by the said Douglas Maina Kangangi (P.W.2) in this respect in my view was significant in the prosecution case. He told this Court that Leah Wanjiku found them at the Administration Police camp furious and uttered the following words:

“today somebody will die.”

The witness further told this Court that the lady then made a call on her mobile and directed whoever she was calling to then start their journey. It is clearly discernible from the circumstances of this case that the accused was left behind by the mother to mobilize the youths and prepare for an attack against whoever was in the rice field which they eventually carried out as witnessed by P.W.1 and P.W. 4. The witnesses told this Court that youths numbering 10 to 20 came armed with pangas and sticks and confronted them as they worked on the disputed parcel. The fact that they went armed with pangas and sticks showed that they had common intention of causing harm to the accused for destroying rice crop which D.W. 2 believed to be hers.

17. In considering this element of common intention this Court is guided by the authority in the case of **DICKSON MWANGI MUNENE & ANOR -VS- R [2014] eKLR** where the Court of Appeal made the following observation:

“Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although a common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of crime showing a pre-meditated plan to act in concert.....”

18. It is evident from the above legal definition and the authority cited that in order to prove their case and secure a conviction the prosecution must prove that the accused had;

- (a) A criminal intention to commit the offence jointly charge with others.
- (b) That the act committed by one or more of the perpetrators in respect of which it is sought to hold the accused guilty, even though it was outside the common design was a natural and foreseeable consequences of effecting a common purpose.
- (c) That the accused was aware of this when he agreed to participate in that joint criminal act.

The accused in this case and the youths who attacked the deceased and the people he was with, appears from the evidence of P.W.1, P.W. 2, P.W. 3 and P.W. 4 that they had a premeditated plan to carry out an all-out attack against the people uprooting his mother’s crop in the disputed land. There is evidence that there was a land dispute over the parcel and the dispute was protracted as the matter had been taken to a civil court. D. W. 2 admitted that his son (accused) was involved in the transaction that gave her the right to possess and utilize the disputed parcel. Both must have understandably felt angry when informed by P.W. 5 that a group that included the deceased was uprooting her rice. They should have however, followed the right legal channels to channel their grievances like reporting the incident to the Police. It may be true that the deceased may have been doing wrong by uprooting the rice in the disputed portion but the accused and his group definitely had no right to take the law into their hands in the manner they did.

19. The prosecution submitted that apart from the accused person herein identified by P.W. 1 and P.W. 4, one other suspect identified physically by P.W. 1 was still at large and this shows that the accused person acted with others not before court but all appear to have had a common intention of harming the deceased and his group for the reasons aforesaid.

20. The other element that the prosecution was required to prove in this case was *mens rea* or malice aforethought . Under **Section 206** of the **Penal Code** “*mens rea*” is defined and illustrated as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or cause grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be cause;

(c) An intent to commit felony;

(d) An 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.”

In the case before me the intention of the group of youths led by the accused person herein going by the testimony of P.W. 1 and P.W. 4 went to the disputed rice farm armed with stones, pangas and sticks. There is no doubt in my mind that contrary to what the defence submitted that the accused was alone and unarmed at the time he visited the disputed parcel, he was armed and indeed in a group or a gang that was intent at terrorizing the deceased and whoever else was in the rice field uprooting the rice. The accused was as I have already found out above aware that some people were in their paddy destroying the crop therein. The evidence of P.W. 1 and P.W.4 is significant in this regard. This Court finds that the actions that were attributed to the accused and his gang constituted malice aforethought. P.W. 3 Peter Ngigi Njagi a good Samaritan who was passing by found the deceased stuck in the mud and injured. This witness was in my considered view independent and had nothing to do with the work of uprooting the crop that was going on. He had no idea what had taken place and why the deceased was in that condition. But the important fact that came out of his evidence is the ill intention of the gang that attacked the deceased and left him for dead in the mud. That action in my view coupled with the brazen attack using pangas, stones and sticks clearly established and proved that the accused and his gang harbored malice or bad intentions towards the deceased and his group. P.W. 1 testified that the group attacked him and robbed him before he managed to flee. P.W. 4 testified that he was threatened and that they even threatened to torch his motor bike but as he ran for his life he saw the deceased being attacked with stones, pangas and sticks. This in my view established that the assailants intended to cause grievous harm to the deceased and indeed caused serious injuries to the deceased from which he later succumbed to.

21. I have considered the defence contention that in the melee that ensued, it was difficult or inconceivable for P.W. 4 to identify the accused as one of the people who attacked the deceased. I am however, convinced that given that the offence took place in broad day light at around 10.00 a.m. in the morning and the fact that P.W. 1 also positively identified the accused person, there is no possibility of mistaken identity. This is strengthened by the fact that the evidence have been laid before me showing that the accused was motivated to attack the deceased and his group for uprooting his mother’s rice on a disputed parcel.

22. The accused has submitted that the medical evidence tendered did not clearly establish the cause of death of the deceased. I have evaluated the evidence tendered by Dr. Godfrey Njiru (P.W. 8) who carried out post mortem examination on the body of the deceased. He tendered the post mortem report as Prosecution Exhibit 1 which he stated in evidence that he signed on 4th July, 2013. In his findings he noted that the deceased had suffered the injuries which I have already noted above. The deceased was pale due to loss of blood as a result of cuts inflicted on him. The doctor noted of course that upon opening of lungs he noted that the deceased was also suffering from a chronic pneumonia but he was emphatic even under cross-examination that the cause of death was sudden death due to a serious injury which was a fracture on the bone of the skull. He told this Court that the chronic problem he noted on the lungs of the deceased could not have caused the sudden death of the deceased and that the deceased in this case died of a sudden death as stated above. It is therefore not correct to say that the evidence of the

medical expert was of no value to the prosecution case. The report in my considered view corroborated the sort of injuries that P.W. 1 and P.W. 4 saw being inflicted on the deceased when the gang that included the accused herein attacked them. This Court is satisfied beyond reasonable doubt that the attack on the deceased person witnessed by P.W. 1 and P.W. 4 caused the death of the said person and the accused person in this case cannot escape culpability as evidence show that he was one of the culprits if not the one leading the gang that attacked the deceased.

23. The accused person and his witness who was her mother struck me as unreliable witnesses and only interested in covering up the serious crime committed. The accused came to defend himself with a written script which I did not find convincing. He told this Court that Kwibota village is just 6 metres away from the scene of crime which was a rice field. If that is the case, P.W. 5 need not to have called them on mobile alerting his mother (D.W.2) that some people were uprooting her crop. He also said that he screamed when he was attacked and that the villagers came and rescued him and he saw his mother come as well. But the mother told this Court that she found the accused unconscious contradicting the accused who had said he saw his mother come. It was also inexplicable how a group of 9-10 people could attack the accused with sticks and pangas and exhibit no physical injury at the end of the ordeal. D.W. 2 stated that he saw no physical injury anywhere. There was also no medical document to back up the allegations made by the accused and his witness. The defence put forward in my view was clearly a futile attempt to cover up a serious crime that had been committed and connected to the accused herein.

24. I found the accused and his witness to be evasive especially when cross-examined on the evidence tendered. The mother to the accused (D. W. 2) for example, blatantly denied knowledge of Douglas Kangangi (father to the deceased and P.W. 2) under cross-examination when she had testified in chief that she had met the said person on the material date at the chief's camp. It was also obvious that she was concealing the truth because this is a person with whom they had had a protracted dispute over the rice farm. The demeanor of the accused and his mother (D.W.2) as I observed did not exhibit any confidence or credibility in what they told this Court.

25. This is contrasted with the prosecution witnesses who in my view were steadfast and I found them truthful. They had no reason to falsely implicate the accused. The accused was clearly placed at the scene of crime by the evidence tendered. In fact in his own defence, he placed himself squarely at the scene and indicated that there was a "struggle" and a "fight" that ensued but only tilted the narrative in his favour by saying that the fight was between the villagers and the group that was destroying the rice crop. The only inference that can be drawn from the evidence tendered in totality is that the accused mobilised a group of youths from his village to attack the deceased and his group for destroying his mother's paddy. The evidence against the accused is overwhelming.

In the end I find that there is sufficient evidence tendered in this case which establishes beyond reasonable doubt that the deceased died through unlawful and voluntary actions perpetrated by the accused person and other culprits who had a common intention to harm the deceased person which they did with fatal consequences. The accused is under **Section 215** of **Criminal Procedure Code** found guilty of the murder of EVANS KIARIE MAINA (the deceased) and is hereby convicted under the provisions of **Section 203** as read with **Section 204** of the **Penal Code**.

Dated and delivered at Kerugoya this 27th day of July, 2016.

R. K. LIMO

JUDGE

27.7.2016

Before Hon. Justice R. Limo J.,

State Counsel Omayo

Court Assistant Willy Mwangi

Accused present

Interpretation: English-Kikuyu

Wagechi holding brief for Maina for accused present.

Omayo for State present.

COURT: Judgment signed, dated and delivered in open court in the presence of Wangechi for the accused and Omayo representing the State.

R. K. LIMO

JUDGE

27.7.2016

WANGECHI: I have instructions to mitigate. He is a young man with a young family. He is a first offender. He is remorseful and prays for leniency from this Court.

COURT: I have considered the mitigation. Unfortunately the Court's hands are tied. The law provides for only one sentence which I have to invoke. The accused is hereby sentenced to death. 14 days right of appeal.

R. K. LIMO

JUDGE

27.7.2016