



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 37 OF 2015

(Formerly Nakuru Criminal Case (Murder) No. 57 of 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

DANIEL NDUNGU MAINGO.....ACCUSED

J U D G M E N T

1. The Accused herein, **Daniel Ndungu Maingo** was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that, on the 10th day of June 2013 at Kamore Village in Naivasha Municipality within Nakuru County, jointly with another not before court, he murdered **John Njoroge Gathige**. He denied the charge and was represented by Mr. Mburu F. I.

2. Through six witnesses, the prosecution presented the following case. The deceased was a vegetable trader residing at Kenton area, close to Kamore Village where the Accused lived with his wife. The Accused's wife was also involved in the grocery business and was often seen in the company of the deceased. Their relationship had the appearance of a love affair. On the evening of 10th June, 2013 the two were together at a place known as Flyover. They visited a local bar while a *boda boda* rider, **James Muigai Kariba (PW1)** was on hand, on prior arrangements by the deceased, to take the pair home afterwards.

3. After some time in the bar, the couple boarded **PW1's** motor cycle to go home. On the way, the lady received a phone call and it was decided that she be dropped home before the deceased. However, as **PW1** navigated a rather bumpy part of the road, the two customers who were drunk jumped off but fell down. The woman fled the scene screaming, as two men accosted **PW1** throwing him off his motor cycle, one of them saying in reference to the deceased who lay on the ground that:

“We want this man, your passenger who has spoilt our home for years.”

Then the Accused drew close while armed with a panga, declaring to the deceased who was too drunk to rise from the ground:

“You have interfered with my homestead long enough.”

4. Fearing for his life, **PW1** ran away leaving the motor cycle at the scene. He summoned local persons who accompanied him back to the scene, but it was too late. The deceased had been slashed on the head

and succumbed to the injury.

5. The Accused's home close by was immediately visited and he was taken to scene. At the home, he uttered words to the effect that:

“I have killed John (deceased) and nobody should question my children. John has taken my wife.”

He repeated words to similar effects at the murder scene. He was escorted to Magumu Police Station even as Naivasha police were notified. They visited the scene and collected the body of the deceased. The lady passenger whom the prosecution indentify as the wife of the Accused had meanwhile disappeared.

6. On 17/6/2013, a post mortem examination was conducted on the body of the deceased at Naivasha District Hospital. There were several deep cuts on the head noted. The doctor concluded that death was due to **“Severe brain/head injury with haemorrhage secondary to trauma.”**

7. The Accused gave a sworn defence statement and called his two teenage sons, **J. K. (DW1)** and **M. N. (DW2)** as witnesses. The defence case is that the Accused is a resident of Kamore village. That his wife of about 30 years with whom he has eleven children is called **Jane Njeri**. He said he did not know the deceased or that he had an affair with his wife. On the material date after his day's activities, he retired in his house by a fire as **DW1** and **DW2** studied.

8. His wife who traded in vegetables, was in the kitchen. Suddenly a large group of boda boda cyclists invaded his home. They ransacked the home before they carried him shoulder-high to a scene by the road, some 500 metres from his home, where a body lay. He was accused of killing the man but he denied the accusation. Police were called to the scene and arrested him. His wife disappeared on that night and her whereabouts remain unknown.

9. There is no dispute that the deceased was attacked early on the night of 10th June 2013 within Kamore area; that the scene of attack was close to the home of the Accused; that the deceased succumbed to the head injuries sustained in the attack. The question that needs to be determined is the identity or identities of the assailants.

10. Two related pieces of direct and indirect evidence were relied on by the prosecution to connect the Accused with the murder of the deceased. The first direct piece relates to the alleged presence of the Accused, his actions and words he uttered at the scene of murder. The second is circumstantial and involves the alleged relationship between the deceased and the wife of the Accused in an illicit love relationship.

11. Concerning the latter evidence, **PW1** the *boda boda* rider based at Flyover described how the passenger couple in question were often seen together, though he did not know that the lady was the Accused's wife. Regarding the material night, he said that the deceased had approached him at 8.30pm while in the company of the woman asking to be dropped home after he had had a drink. The man's destination was Kenton while the lady's was Kamore.

12. After the couple had patronised a bar and were ready to go home, they returned to **PW1** to drive them home. He said the deceased was quite drunk at the time while the woman was slightly inebriated. **PW1** reiterated his evidence in cross-examination but conceded that he did not know the relationship between the woman and the Accused. In re-examination he stated interalia that:

“Yes I knew deceased well as customer. This was the second occasion to take the lovers home.”

13. **Josam Kagwi Chege (PW2)** a resident of Kenton and cousin to the deceased said he knew Accused as a local farmer. He testified that he was attracted to the scene by screams and on arrival found the deceased's wounded body on the road. With *boda boda* operators and others who came to scene he proceeded to the **“home of the lady customer of the cyclist” (PW1)**.

14. He further stated that:

“The lady was not there but the man, her husband was there outside the house.....I knew the wife of the Accused. She was a trader in vegetables. I had not known that she had an affair with John (deceased) but both were business people.”

During cross-examination he admitted that he did not know the name of the Accused’s wife but that *boda boda* people led the way to the home of **PW1**’s lady passenger.

15. Steven **Kung’u Githumo (PW3)** a village elder, received a call concerning the murder at 9.30pm and soon was joined in his home by fellow villagers and also the wife to the deceased. Together, they proceeded to the scene where body lay. He notified the chief who instructed him to make a report to police authorities. He said he knew the Accused well because earlier on the two had been members of the same investment group. **PW3** was forthcoming concerning the relationship between the Accused’s wife and the deceased.

16. In cross-examination he asserted that:

“Yes I know his (Accused’s) wife for 10 years. I do not know they have several children. Wife was a trader buying greens and selling. She even used to buy (produce) from me. The deceased lived several metres away. The Accused’s wife and the deceased were frequently together, buying things. Their relationship could have led one to believe they were lovers. I saw them buy stuff together, ride on one motorcycle. Deceased was younger than the Accused.”

17. In addition to the foregoing is the evidence of words allegedly uttered by the Accused at the scene, and which I will deal with in detail later in this judgment as I draw my final conclusions on the matter. That is, a lament that the deceased had interfered with the Accused’s family by taking his wife. The Accused for his part, asserted in his defence firstly, that this wife was home on the material night, but secondly that the Accused did not know the deceased or that his wife had an affair with the deceased. Inexplicably however, his wife disappeared after his arrest, did not visit him while in custody, while on his part he did not enlist the help of police to trace the missing wife.

18. Turning now to the second piece of the prosecution evidence, there is direct evidence by **PW1** that he saw the Accused, accompanied by another man described as younger in the light of his slow-moving motor cycle approaching the dislodged couple of pillion passengers. At the time, he was headed to the lady passenger’s home at Kamore. Admittedly the assault happened on a road close (500metres) to the Accused’s home but in the night. **PW1** said he saw the attackers in the light beam of the motorcycle. According to **PW1** the younger man forced him off the cycle stating that:

“We want this man, your passenger who has spoilt our home for years. By the time the lady passenger had fled but the deceased was “too drunk” to rise from the ground.

19. Similar words in reference to the motive of attack were uttered by the person described by **PW1** as an “older man”. He had a panga. Moments before the attack the lady passenger had picked a call and remarked that her children were complaining about her delay in bringing food home. **PW1** identified the old man as the Accused with whom he was familiar.

20. In cross-examination he maintained that the attack was carried out by the Accused and a young man, his son. He stated in cross-examination that:

“He (Accused) crossed with a panga in front of my cycle. Suddenly the two passengers jumped out.....The young man was behind the old man. I cannot identify him (former).”

21. This witness fled the scene and went in search of help. It would seem that other persons arrived at the scene before his return and particularly the *boda boda* men who in the company of **PW2** took the Accused from his home to the scene of murder. Thus upon return to the scene, **PW1** found the Accused at

the scene. There was light from torches and motor cycles. **PW3** said there was moonlight and light from torches.

22. According to **PW1**, on the second occasion he saw the Accused at the scene, and heard him state:-

“I am the one who murdered John. He has interfered with my home for 3 years.”

PW2 was one of the people who accompanied the *boda boda* cyclists from the scene of murder to the Accused’s home. He stated that the group met the Accused outside his house, but the wife was not home.

23. The witness (**PW2**) said he heard the Accused state at his house that:

“I have killed John (deceased) and nobody should question my children. John has taken my wife.”

The witness knew the Accused’s wife, and his description of her mutual trade with deceased matched that of **PW1** and **PW3**. **PW2** maintained this evidence in cross-examination denying that he and others dragged the Accused from his house where he was asleep with his wife.

24. On the face of it, **PW3** arrived at the scene after the Accused had been frog-marched by the members of public to the murder scene. **PW3** described the scene at the road, but seemingly, did not go to the Accused’s home. He said in cross-examination that he did not know where the Accused was arrested, but added that the Accused’s wife was not present at the scene.

25. The investigating officer **PC Jared Mose (PW6)** who was one of the first officers to visit the scene after midnight, confirmed that he met **PW1** at the scene and that he identified the Accused as the assailant. He further stated that the ***“group had already arrested the accused who was at the scene..... guarded by villagers.”*** He repeated the latter statement in cross-examination and described the home of the Accused as being some 300 metres from the scene of murder.

26. **PW1** in my considered view had ample opportunity on the two occasions to observe the Accused and to hear him speak. He was familiar with him and not a stranger. If there was any doubt regarding his identification of the Accused at the initial attack, it was completely resolved on the second occasion when **PW1** found Accused under arrest at the scene where he confessed to the murder.

27. Although the Accused and his witnesses claim to have been at their home the whole evening, they surprisingly asserted that they never heard the commotion on the road, which even drew people like **PW2** from Kenton which from witness accounts was further from the scene. The Accused however confirmed that *boda boda* men found and arrested him outside his house where he had gone to inquire after he heard dogs barking.

28. The Accused evidently stated an untruth when he asserted that though his wife was present at home on the material night, nobody interfered with her. The assertion is unbelievable for two reasons. **PW2** stated that the *boda boda* men were intent on visiting the home of the “woman passenger” but she was not home. According to **PW1** the lady passenger had fled the scene as soon as the attackers appeared.

29. From the prosecution evidence which I found credible regarding the actions and utterances of the Accused at the scene, in the presence of **PW1** and **PW2**, as well as evidence by **PW3**, one must conclude that in all likelihood, **PW1**’s woman passenger was the Accused’s wife. She fled the scene immediately the attack began and could not have been at home as the Accused and his sons purport.

30. Because, if she was not the lady involved, she would have followed the Accused to the road after his arrest and remained behind to take care of the home. Her sudden vanishing on the material night to date is confirmation that indeed she had something to do with the attack on the deceased, being as **PW1** and **PW3** stated related to him as his paramour.

31. That too explains the Accused's nonchalant attitude towards her three-year disappearance. He admitted in his evidence that he had not even reported her as missing to police. That is peculiar for a man wedded to his wife over 30 years and has several children with her. I think the second untruth is that the Accused did not know the deceased. That is unbelievable for persons who were literally neighbours, and the fact that he referred to the deceased as 'John' on the material night. It is a great pity that the Accused dragged his teenage sons, **DW1** and **DW2** to support his obviously false account.

32. Besides, from the evidence of **DW1** and **DW2** they were all studying in separate rooms from the Accused at the material time. They could not tell if their father left the home at any point. The fact that the Accused's wife had received a call from a "son" moments before the attack, may confirm, as **PW1** asserted that another man, possibly one of the Accused's adult sons, was involved in the attack.

33. The timing of the call may also suggest that the perpetrators of the attack were monitoring the movements of their victims. Indeed, **PW1** said he had on a previous occasion taken the two lovers home on his motor cycle. It seemed from the evidence by **PW1** and **PW3** and the words spoken by the Accused that he was, contrary to his assertions, aware of the affair between his wife and the deceased.

34. From the account by **PW1**, it is not likely that the material night was the first time the Accused's wife came late and possibly having consumed alcohol. The Accused struck me as a shrewd old man. It is unlikely that as a husband that he was unaware of the amorous relationship between his wife and the deceased which, according to **PW1** and **PW3** was self evident from their conduct. Even the *boda boda* riders who first arrived at the scene went directly to the Accused's house. So notorious was the relationship. The Accused's denial of such knowledge appears false and futile in light of all the evidence on record.

35. I am convinced, that the Accused, possibly with help from one of his several children, plotted and executed the savage attack that left the deceased dead. The intention was clearly to cause grievous harm or death in order to put a stop to his "interference" with their home through his open love affair with the Accused's wife.

36. The fact, as the Accused claimed that he was too old to have sexual relations with his wife did not mean that he would ignore an affair involving her and another man. Evidently, that the wife turned her attentions to the younger paramour must have caused bitterness and jealousy on the part of the Accused. Any role in the killing played by other culpable persons who have not been arrested does not diminish the Accused's proven culpability. I am satisfied that the Accused with others inflicted the fatal injuries on the deceased.

37. On the facts before me, it would seem, though he denies it, that the Accused had suffered humiliation over a period, before his children and among his fellow villagers, concerning the open illicit affair between his wife and the deceased. His words at the scene say it all. Most possibly, the two lover's last tryst on the night of 10th June 2013 broke the camel's back **PW1** said the woman's son had called her questioning her lateness in taking food home just before the attack.

38. Section 207 of the Penal Code defines killing on provocation by stating that:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

39. Guidance on this score may be found in the English decision of **Bullard -Vs- R [1961] 3 ALL ER 470**. There, **Lord Tucker** stated:-

"It has long been settled law that if on the evidence, whether of the prosecution or of the defence there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said

in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt the killing was unprovoked.”

40. Closer home in the case of **Dato s/o Mtaki -Vs- R [1959] EA 860** the court stated, *inter alia*, as follows:-

“i.

ii. the Judge had himself wrongly considered the question whether the probability of legal provocation had been established and it was not the law in East Africa that for the defence of provocation to succeed, it must appear that the accused was so provoked as to be incapable of forming an intent to kill or cause dangerous harm”.

41. The case of **Kenga -Vs- Republic [1999] 969 (CAK)** is also relevant. There, the Court of Appeal stated:-

“It is a settled principle of law that the accused does not have to prove provocation but only to raise a reasonable doubt as to its existence. There is positive and unrebutted evidence that the Appellant went wild and lost his power of self-control soon as he saw the deceased on his homestead. The visit despite constant warning was totally uncalled for and was at most meant to annoy the Appellant. In our view the act constituted grave provocation on his part as it appeared that the killing of his sister was still weighing heavily on his heart.”

42. In this case, I believe the Accused’s anger had been rising over time and exploded on the material night. Reviewing the circumstances herein, it is my view that it is one that easily falls under the exceptions provided under Section 208 (1) and (2) of the Penal Code to the effect that:-

“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.”

43. In the result, while I find that the Accused did with another cause the death of the deceased, I am of the considered view that the circumstances herein warrant a finding of guilt in respect of the lesser offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I do accordingly enter a conviction for the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code against the Accused.

Delivered and signed in Naivasha this **29th** day of **July, 2016**.

In the presence of:-

For the DPP : Miss Waweru

For the Accused : Mr. Mburu F. I.

Accused : Present

Court Assistant : Barasa

C. MEOLI

JUGDE