



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 74 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

HENRY MURIUNGI BUNDI ACCUSED

JUDGMENT

The accused person, **Henry Muriungi Bundi** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 2/11/2012, at Kithoka Village, Kithoka Location, North Imenti, murdered **Peter Ndumba**. The prosecution called a total of 6 witnesses in support of their case. Accused testified on oath and called 2 witnesses. The prosecution was led by Mr. Mulochi while the defence was led by Mrs. Ntarangwi.

PW1 Polly Gatwiri Kathurima, a resident of Kiruai recalled that on 2/11/2012, about 11.30 a.m., she was working in the *shamba* when the children whom she had left at home called her and informed her that somebody had entered their grandmother's house. She went to the house and found somebody under the bed of her in-law's Joyce Gakii (PW3) and John Mathiu (PW2). She called out to her mother-in-law who was also in the *shamba* but her father-in-law arrived first and she informed him that Peter Ndumba (deceased) was under their bed; that PW2 told Ndumba to come out which he did. PW1 noticed that Ndumba was bleeding from the nose and had a *panga*; that when outside the house while talking to Ndumba, Damaris Gakii followed by Henry Mwangi arrived and Damaris claimed that the *panga* which Ndumba had was hers; that PW2 asked Ndumba to hand over the *panga* and Damaris left with the *panga*; that Henry Muriungi (accused) then alleged that he was following Ndumba because he had stolen his blanket. It is then they told accused to wait at the gate and they took Ndumba to the gate as they tried to intervene in the dispute; that accused then hit Ndumba with a stick on the head; that Ndumba ran and entered Jane Karuga's (PW4) house. PW1 said she went away and later in the evening, was informed that she was required to record a statement. She knew both the accused and Ndumba (deceased) as friends.

PW2 John Mathiu, testified that he was in his *miraa shamba* on 2/11/2012 when he heard the children crying and PW1 calling for the mother. He rushed to the house and so did his wife Joyce Gakii (PW3). PW1 informed them that somebody had entered the house. He entered the house, found Peter Ndumba under the bed. He noticed that Ndumba was bleeding and had a *panga* in the right hand and that the left hand was injured. He managed to remove him and when outside the house, he met Damaris who asked Ndumba to return her *panga* which he did and she left; that Muriungi arrived and asked that Ndumba return his blankets. PW2 told accused that they could not fight in his home and they all went to the road. He tried to intervene in the dispute but Muriungi hit Ndumba with the stick he had on the head and he fell. PW2 decided to go and call the Assistant Chief and while another person went to call Ndumba's wife because he was injured. Upon returning, he found Ndumba about 500 metres from the scene.

PW3 Joyce Gakii, reiterated what PW1 and 2 told the court. She added that accused had entered their

house; that Damaris arrived claiming that Ndumba had her *panga* while accused denied that he stole his blanket. It is then they removed the two upto the road; that while at the gate, accused continued to hit Ndumba who then ran into the home of Karuga. She later followed him to Karuga's home because accused had followed Ndumba. She saw Ndumba lying on the ground. They told accused not to leave Ndumba in Karuga's home and he pulled Ndumba by the legs upto the road and he continued to beat him. Police went to their house about 7.00 p.m. enquiring about what had happened.

PW4 Jane Cheptanui Karuga was at her home on 2/11/2012 about 11.00 a.m. when she heard noises and then she saw 2 people soon after. Ndumba was ahead while Henry Muriungi (accused) who had a stick was behind him; that Ndumba ran towards her stone house where the door was open; that accused followed him but stood at the door. She followed them, entered the house and found Ndumba trying to look for a place to hide in the dining but she told him to get out. She tried to enquire what the problem was; that Ndumba refused to get out but instead lay on the floor; that he was covered in blood. PW4 told accused to go and take his person out which he did as he hit him with the stick he had; that accused held Ndumba by the legs and pulled him out; that at the door, accused stepped on Ndumba's ribs and hit him on the ribs. PW4 told accused to remove Ndumba and he pulled him to the road; that Ndumba held onto her gate and refused to be pulled further and that accused took a piece of wood from where she had kept some, hit both Ndumba's hands, he let go and accused pulled him to the field near Antony Mputhia's gate where he abandoned Ndumba; that Ndumba got up, moved a few steps and fell down. Later, PW4 went to her house and cleaned the blood stained cushions. She went where Ndumba was again, found the wife had come; that accused came there again and told Ndumba's wife to move aside so that he could finish him. She said that Ndumba was injured on the head, hands and whole body.

Dr. Gacheri Kathiri (PW5) of Meru Hospital produced the post mortem report prepared by **Dr. Makandi** (PEXNo.1). Dr. Makandi was of the opinion that cause of death was severe injury to head, chest secondary to an assault.

CPL Boniface Otieno (PW6) was the investigations officer in this case. He received information about the murder from members of public, preceded to the scene, found Ndumba had been taken to hospital. He learnt from the scene that accused and deceased had fought over a blanket. He observed deceased who had fresh wounds on the face and head; that on 8/11/2013, the accused was taken to the station by his uncle.

When called upon to defend himself, accused testified on oath that on 2/11/2012, his blanket was stolen and he was informed that it is Peter Ndumba who stole. He met Ndumba on his way to the shop, asked him about the blanket but he denied stealing; that PW4 appeared and alleged that Ndumba was a thief; that PW4 chased Ndumba who entered PW2's house. He went away to the shop and heard screams when at the shop; that he was in company of Tirus Mwenda and Zachary Maingi; that the screams emanated from PW2's house. They went there and found PW1, PW2, PW3 and PW1 beating the deceased and that Ndumba was lying outside PW2's house. Accused told them to stop beating Ndumba because he had also stolen from him but he was doing nothing to him; that they dragged and left him on the road; that deceased had a cut on the head but he did not see who cut him but that Damaris and Gituma had *pangas*; that he left deceased on the road and went to the father's land at Rwerera when he was informed that he was wanted by police and he went to police station where he was arrested.

DW2 Pius Munene testified that on 2/11/2012, he was at a shop with accused, Zacharia Maingi and other people. He reiterated what accused told the court that on hearing screams, they went to Gituma's (PW2) home, found PW2, pw3, PW1 and PW4 beating the deceased. He tried to intervene but PW2 hit deceased on the forehead; that they had *pangas* and sticks and blocked them from entering PW2's home.

DW3 Zacharia Maingi repeated what DW1 and 2 stated that he was with the 2, they heard screams, went to PW2's home where they saw the deceased being removed from the house, was bleeding and had injuries and they continued to beat him i.e. PW1, PW2, PW4, and Kirinya; that PW2 had a *panga* while others had sticks; that he went to the compound to stop them but was chased; that they then pushed him to the road; that Ndumba's wife then came and by then Ndumba was unconscious. He denied having gone to record a statement with police, nor did he report the incident anywhere.

In her closing submissions, Mrs. Ntarangwi, Counsel for accused submitted that it cannot be proved who inflicted the injury on Ndumba's head; that accused never used a *panga*; that Damaris should have testified to clarify where the deceased got the *panga*; that PW4's evidence should be treated with caution because she disturbed the scene of crime by washing the cushions; that the 20-30 people present at the scene did not record statements; that deceased's wife was not called as a witness; that if deceased was alleged to be a thief, more people must have been involved in assaulting him. Counsel urged that the prosecution failed to resolve the contradictions in the prosecution evidence.

In reply, Mr. Mulochi Learned Counsel for the State submitted that their case had been proved beyond any doubt because PW1, 2, 3 and 4 saw accused assault the deceased; that the offence was committed in broad daylight; that DW2 and 3 never reported anywhere about what they witnessed if at all.

In a murder case, the prosecution has the duty to prove the following ingredients beyond any reasonable doubt:

- 1. death of deceased;**
- 2. that accused caused the death through an unlawful act or omission;**
- 3. that accused possessed malice aforethought or an intention to cause grievous harm or death.**

The death of the deceased is not in dispute. The post mortem was conducted by Dr. Makandi who made his findings in the post mortem report and was of the opinion that the cause of death was severe head and chest injuries secondary to assault. Both the prosecution witnesses and the defence claim to have seen the deceased being injured. The question is who inflicted the injuries on the deceased.

Whereas PW1, 2, 3 and 4 told the court that the deceased was injured about 11.00 a.m. to noon, DW1-3 talked of hearing screams about 4.00 p.m. while DW2 and 3 talked of an incident that occurred about 5.00 p.m. The Investigations Officer in this matter PW6, told the court that he received a report about an assault at 4.50 p.m. By the time he went to the scene, the body of Ndumba was already removed because he had been taken to Hospital. I had occasion to see PW1, 2, 3 and 4 testify in this court. Their evidence as to the occurrences of the said date was materially consistent. I believe they told the truth that this incident occurred early in the day about 11.00 a.m. to noon. It was in broad daylight. Their evidence was that Ndumba ran into PW2 and 3's house, hid under their bed. He was being pursued by accused. Ndumba was removed from that compound, accused chased him as he assaulted him, he ran into PW4's house where accused again followed him. PW4 threw Ndumba out and accused continued to assault him and later dragged him out of PW4's home. That evidence was very consistent. If there were any inconsistencies, they were very minor. Ordinarily even witnesses at the same scene will make different observations to the same event. The courts have appreciated the fact that discrepancies are inevitable especially where several witnesses testify. However, if the discrepancies are of such a nature as to cause doubt in prosecution evidence, then the case will not have been proved to required standard. See Njuki & Others b Rep (2002) 1 KLR 771 (782) where it was held"

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

In this case, if there are any few discrepancies, the court will overlook them.

The defence faulted the prosecution for failing to call material witnesses in this case. PW1, 2 and 3 mentioned one Damaris as having followed Ndumba to their home claiming that the *panga* that Ndumba

had was hers and that indeed the *panga* was released to her and she left them. The Investigations Officer told the court that the said Damaris declined to record a statement. It is the duty of the prosecution to call all relevant witnesses to prove their case and also assist the court arrive at a fair decision. It is irrespective of the fact that the witnesses may have given evidence adverse to the prosecution case. In this case, when Ndumba entered PW2's home, he was being pursued by the accused as per PW1, 2 and 3's evidence. Ndumba was removed from PW2's home and it is the accused who continued to assault and chase him for allegedly stealing his blanket. There is no evidence that the deceased had had any spat with Damaris. All that Damaris wanted was the *panga* that Ndumba had picked from her home which she took and left. In my view, failure to call Damaris as a witness is not fatal to the prosecution case.

The other witness that was mentioned is Cecilia, Ndumba's wife. PW2 said that in fact, it is him who sent for Cecilia because Ndumba was injured. In fact, the defence admits that Cecilia came to the scene after the deceased was already injured. She did not witness the incident. All that she would have told the court was hearsay. Cecilia is said to have disappeared from the area. Indeed, DW3 confirmed that Cecilia has not been seen in the area since. In my view, Cecilia's evidence would not have added any value to the case as it would have been hearsay.

Mrs. Ntarangwi also submitted that there were over 20-30 people present at the scene who never recorded statements. DW2 and 3 claim to have been present but they never recorded any statements or reported anywhere that they witnessed the incident. As observed earlier, the prosecution could not call everybody at the scene of crime as a witness but it did call only relevant witnesses. As noted, some are not even willing to come to testify like Damaris and probably Cecilia who cannot be found. The defence was that Cecilia may have told the court what Ndumba told her before he died, but in the same breath, DW2 said by the time Cecilia arrived at the scene, Ndumba could not talk. Ndumba was Cecilia's husband and she should have been keen to come and tell the court what happened or what she witnessed. Failure to call Cecilia did not weaken the prosecution case.

The defence urged the court to treat PW4's evidence with caution because she told the court that she washed the cushions which had been stained by Ndumba's blood when he entered her house. PW4 is an ordinary person who may not have known that her action of cleaning her cushions was interfering with the scene of crime. Had she known that, she may not have even told the court about it. Her innocent act of washing cushions is no good reason not to believe her. PW4's evidence was materially corroborated by PW1 and 3 that Ndumba ran to her house but accused followed him there, removed him by force and took him back to the road where he continued to assault him despite people telling him to stop.

I have considered accused's defence. Although the prosecution witnesses testified that this incident occurred between 11.00 a.m. to 12.00 noon, accused steered clear of that allegation and instead talked of seeing Ndumba being assaulted at PW2's house at 5.00 p.m. There is no doubt that the accused had alleged that Ndumba stole his blanket. Though he alleged that PW4 is the one who told him about Ndumba stealing his blanket and that PW4 called Ndumba a thief and started to beat him, yet the defence had occasion to cross examine PW4 but at no time was that allegation raised. I believe the said allegation was an afterthought.

The defence witnesses totally contradicted themselves as to who was present at PW2's house and who was armed with what. DW1 said PW2 and Damaris had *pangas* when assaulting deceased. DW2 said that the people at PW2's home were armed with sticks, later he said the people were armed with *pangas* and sticks. He said he saw PW1-4 and one Kirinya assault deceased. It seems he never saw Damaris as accused alleged. As for DW3, he saw PW1-4 and Kirinya, son of PW2 and that only PW2 had a *panga*. Again, he does not seem to have seen Damaris at the scene. DW1 did not seem to have seen Kirinya at the scene. In the end, who was armed with a *panga* and who was present at PW2's home assaulting the deceased if at all?

In addition to the above contradictions, though the three witnesses claim to have gone to PW2's home together, DW2 says he saw PW2 hit deceased on the forehead yet DW1 denied knowing who cut the deceased on the forehead.

It is not in doubt that the accused was alleging that the deceased stole his blanket. According to DW1, his blanket had been stolen that day. DW3 however told the court that he had heard of the loss of the blanket a week earlier. From this contradictions, I have serious doubt whether this incident ever occurred and if DW2 and 3 were present, if at all. I can only come to the conclusion that DW2 and 3 merely came to assist their friend and neighbour to try and get out of this serious quagmire. In my evaluation of the defence witnesses were not truthful and the defence was unconvincing.

Mrs. Ntarangwi raised issue with the injury that Ndumba had received before entering PW2's home. There is no evidence that accused was armed with a *panga* or a sharp object. Unfortunately, the doctor did not specify in the post mortem what was the likely weapon used to inflict the injuries on Ndumba. However, I believe a blunt object can cause an open injury too depending on the nature of the object and the force used. For example, I believe a piece of wood used on the head can cause an open injury and even cause a fracture. It is accused who chased Ndumba into PW2's home. He continued to assault him with a stick even after he left PW2's home and entered PW4's home. At PW4'S home, accused continued to assault Ndumba with a stick or piece of wood. It is immaterial what weapon was used to inflict the injuries on Ndumba, I find that it is the accused who inflicted them. Further to the above, it is accused who came chasing Ndumba to PW2's home and he was in a better position to explain how Ndumba received the injury on his head before coming to PW2's home.

Malice aforethought is defined under Section 206 of the PC as an intention to cause grievous harm or death. In the instant case, the accused chased Ndumba to PW2's house, Ndumba was removed from that house and accused continued to assault him. Accused chased Ndumba to PW4's house, removed him as he assaulted him. If indeed Ndumba had stolen accused's blanket, once he removed him from PW2's house, he should have taken him to the Police Station for the law to take its course. But accused's persistence in assaulting Ndumba only meant one thing, that accused intended to cause Ndumba grievous harm or cause his death, which he did. I find that accused had the intention to cause the death of Ndumba and malice aforethought flows from his actions. Even though the defence seemed to suggest that this was a case of 'mob' injustice yet there is no evidence of anybody else having assaulted Ndumba together with accused, since I dismissed accused's allegation that it is PW1-4 who assaulted Ndumba.

After a careful consideration of all the evidence on record, I am satisfied that the prosecution has proved its case beyond any doubt that it is accused who with malice aforethought, caused the death of Ndumba. I find him guilty as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF JULY, 2016.

R.P.V. WENDOH

JUDGE

21/7/2016

PRESENT:

Mr. Mulochi for State

Mrs. Ntarangwi for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused