



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR NO. 40 OF 2015
(FORMERLY MERU HCCR NO. 81 OF 2010)

REPUBLIC.....PROSECUTOR

- VERSUS -

ROBERT KIMATHI.....1ST ACCUSED

PETER GITONGA.....2ND ACCUSED

JOHN MICHENI.....3RD ACCUSED

J U D G M E N T

1. On the 17th January, 2011, the state lodged information in this court charging Robert Kimathi Mate, Peter Gitonga Njagi and John Micheni Makunyi (hereinafter "*the Accused*") with murder contrary to section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. It was alleged that on 20th November, 2010 at Marembo village within Tharaka Nithi County, the Accused murdered Zakaria Njoka. The state paraded ten (10) witness to prove the information.

2. Rosemary Gatakaa (PW1) recalled how she went for some casual work with her brothers Godfrey Njoka ("*the deceased*") on the 19th November, 2010 at around 6 am .They worked for two (2) hours and the deceased left to go and work at Basiliana's home. Later at 6 pm, PW1 went to a nearby market and found the deceased being beaten with seven people who were known to her. These were the three accused and four (4) others whose names she gave. They were using sticks, a metal rod and stones. The second accused picked a big stone and dropped it on the deceased. She ran to her home and called two of her other brothers, Mutwiri and Mwiathi. When they came back to the scene, they found the deceased already dead and there was no one at the scene. They went home and reported the incident to their father (PW3) and an Assistant Chief of an adjoining sub-location. The following day the body was taken by the police and she identified the body for postmortem on 4th December, 2010 at the Chuka District Hospital Mortuary. In cross-examination, she told the court that while the 1st and 2nd accused used sticks in beating the deceased, the 2nd accused used a stone. That she was at the scene with Mwiathi Mati (PW2) and that she was aware that the Accused had purchased land from their father.

3. Jacob Mwiathi (PW2) recalled how the deceased came to call him from his home on the 19th November, 2010 at 6 am to go to Kaborio's home for casual work. He however, did not accompany him. He went to church at 9.00 a.m. and left at 4 am for his home on his way home at about 6pm, he heard noises from a bush and followed the 3rd Accused there. At the scene, he found the deceased tied with a rope and being beaten by among others, the three (3) Accused with sticks. He went home and found his brother Mutwiri whom he told what he had seen. They decided to look for PW1 with whom they went

back to the scene but found that the deceased had already passed on. On their way back home, they met their father PW3 whom they told what had befallen the deceased. In cross-examination, he told the court that the other four (4) people who were beating the deceased with the Accused were at home at the time he was giving testimony. He stated that there were many people at the scene at the time he reached there. PW3 was Zakaria Nkari Thambura, the father of the deceased who however, passed on before he could complete his testimony.

4. Dennis Kaaria Julius (PW4) recalled that on the material day, he together with David Murimi (PW5) and the deceased went to till the land of Felia Karimi Ciathua at 8.00a.m. At 3 pm, Stephen Kathama, Nkoroyi Kibuthia and Mutembei Ciarario came and asked them the direction to the home of one Elias Mukanga. On being given direction, Mutembei Ciarario jumped on the deceased and tied him. The other two joined and started assaulting the deceased. They were later joined by the Accused persons who were armed with bows and arrows. All the six (6) beat the deceased and took him to River Kithonge. He did not follow to see what transpired. In cross-examination, he stated that although he had witnessed the assault, he did not make any report to the police. Murimi Njeru (PW5) reiterated what PW4 had told the court. In cross-examination, he stated that it is PW1 who came to look for him after a week to go and write a statement.

5. Dr. Justus Mutuku Kitili (PW6) carried out the postmortem for the body on 4th December, 2010 at Chuka District Hospital Mortuary. The body had multiple bruises on the scalp, chest, abdomen and on the upper and lower limbs. The fifth (5) rib was broken. There was injury on the head with subdural haematoma. He formed the opinion that the cause of death was cardiopulmonary arrest due to severe head injury. He produced the Postmortem Report as PExh 1. Joseph Rugendo Iringo (PW7) was the Assistant Chief of Riathika sub-location. On 19th November, 2010 at about 10.00 pm, he received a call from PW2 informing him that people had killed the deceased. The following day, he accompanied the father of the deceased, PW1 and PW2 up to the scene and confirmed the death. He informed the Assistant Chief of Marembo Sub-location who called the police to collect the body. Justus Japari M'Ithiga (PW8) the Assistant Chief of Marembo Sub-location confirmed receiving a call on 20th November, 2010 from PW7 whereby informing him about the incident. called officers from Chuka Police Station who came and collected the body.

6. Cpl Samuel Kirui (PW9) recalled that on 20th November, 2010, he was assigned duties by the DCIO to head a team of police officers to go and make arrests. On the same day, after mid-night they went to Marembo market and the area Chief one Nyama led them to the homes of the Accused whom they arrested. The other suspects had already escaped. Sgt Martin Wanga (PW10) investigated the case. He was instructed by the DCIO to visit the scene on 20th November, 2010 in the company of other officers. At the scene, they found the body and the father of the deceased. The father gave him six(6) names of the suspects. They recovered the body and took it to Chuka District Hospital Mortuary. He drew a sketch plan of the scene which he produced as PExh2 (a) and (b). After recording statements, he charged the accused with the offence of murder. In cross-examination, he stated that he recorded the statement of one Pasiliana Ciathure Daniel. She had denied that the deceased had gone to work at her shamba on 19th November,2010. He admitted that he had not pursued the other four (4) suspects.

7. In his defence, Robert Kimathi the 1st Accused gave an alibi. He told the court that on the material day, he was on his land between 7.30 a.m. up to 4.30 pm when he went to Marembo Primary School for a meeting of the School's Welfare Committee of which he was a member. The meeting proceeded until 5.30 pm when he proceeded to his home in the company of the Head-master of that school. They ate supper together at his home then at about 8.30 pm, escorted the headmaster back to school. He only learnt of the demise of the deceased the following day from PW6. He accompanied PW6 and people who were tilling his land to the scene and confirmed that the deceased was dead. The police came and collected the body while he was there. He was later arrested and was informed that it was in connection with the deceased's death. He denied ever being in the company of the Co-accuseds on the 19th November, 2010 or being at the scene. he produced a letter dated 17th November, 2010 by the Headmaster Marembo Primary School as DExh 1 inviting him for the meeting of 19th November, 2010. According to him, PW1 and PW2 framed him because he had bought their father's land and he had chased their children from school for school fees in 2007/2008. Gitari Mutua (DW2) was the Headmaster of Marembo Primary School. He

confirmed having written the letter DExh 2 inviting the 1st Accused for a meeting of the Sponsors Committee on 19th November, 2010 at 4 pm. That the meeting took place as scheduled and it proceeded up to 6.00 pm after which he accompanied the 1st Accused to his home. After having supper at the 1st Accused's home, the 1st Accused escorted him back to the school before the 1st Accused returned to his home.

8. Peter Gitonga Njagi (Accused 2) told the court that the deceased's father had sold him land and they were therefore neighbours. That on the material day, the deceased's father came to his home at 7.00 am and helped him repair his fence which was in bad condition. That they stayed together up to 7 pm when they parted. That the following day, the father of the deceased came and told him to accompany him to where his son had been killed. They went together and he confirmed the incident. He denied participating in the killing of the deceased. He stated that PW1 had framed him because he had bought her father's land cheaply. As regards PW2, they had disagreed over 15 sacks of charcoal which Accused 2 had refused to replace for PW2. He relied on the statement the father of the deceased had made to the police which was produced as D2 Exh 1.

9. John Micheni Makunyi (Accused 3) told the court that the deceased was his neighbour and he had no grudge against him. That in the morning of 19th November, 2010, he went to buy a donkey at Kanwa. That he returned at about 8 pm. He denied seeing the deceased on the material day. That is on 20th November, 2010 while he was working at a school project with other parents when he heard about the demise of the deceased from PW6. He denied seeing any of his Co-accused on the fateful day. He stated that PW1 had framed him because he had bought her father's land. DW5 CIP Benson Muli appeared and produced the statement made by Nkari Thambura the father of the deceased on 22nd November, 2010.

10. Mr. Kijaru learned counsel for the Accused submitted that the testimonies of PW4 and PW5 contradicted each other as to who jumped on and tied the deceased. That DW5 had denied people working on her farm. I did not understand this submission because, although counsel gave submissions of an alleged long testimony of DW5 alleged to be Feliciano Ciatithwa Daniel, no such witness testified. DW5 was CIP Benson Muli who appeared only to produce the statement of Nkari Thamburi (PW3). I will disregard all those submissions that touch on a non-existent defence witness Mr. Kijaru further submitted that the court should consider the defence of alibi set up by the Accused. That the failure on the part of the prosecution to investigate the alibi left the same unchallenged. Counsel relied on the cases of **Elizabeth Waithieni .v. Republic [2015] eKLR**, **Solomon Kirimi M'Rukaria .v. Republic [2014] eKLR** and **Kiamati Njeru .v. D.P.P [2015] eKLR** in support of his submissions.

11. On her part, Ms Ndombi for the state submitted that the testimony of PW6 proved the death of the deceased and the cause thereof. That the evidence of PW1, PW2, PW4 and PW5 proved that the death of the deceased was caused by the unlawful act of the three (3) Accused persons. That the said witnesses had witnessed the three join others in assaulting the deceased to death. As to whether there was malice aforethought, the Accused assaulted the deceased with the intent to kill him. Counsel urged that the Accused be found guilty and be convicted accordingly.

12. I have carefully considered the evidence on record and the submissions of Counsel. The issues for determination are; whether the prosecution has proved the death of the deceased and the cause thereof; whether the death was as a result of an unlawful act on the part of the Accused persons and if so, whether there was malice aforethought.

13. On the first issue, PW6 testified that on the 4th December, 2010 at Chuka District Hospital Mortuary, he conducted a postmortem on the body of one Njoka Zakaria. According to the postmortem report dated 4th December, 2010 and produced as PExh 1, the body was identified by PW1 and PW3, The body had bruises all over and a head injury. He formed the opinion that the cause of death was cardio pulmonary arrest due to subdural haematoma (blood clots in the brain) caused by severe head injury. In this regard, the prosecution had proved beyond reasonable doubt the death of Njoka Zakaria and the cause thereof.

14. The next issue is whether the death was as a result of an unlawful act on the part of the Accused persons. PW1 told the court that on the 19th November, 2010, after finishing doing some casual job at the

home of Paul Kaborio she parted with the deceased at 9.00 am when the deceased went to do another casual job at the home of Basiliana. Later that evening at about 6 pm, she found the deceased at a nearby market tied and being assaulted by seven (7) people with sticks, a metal rod and stones. Amongst those assaulting the deceased were the three (3) accused. She was at the scene with PW2 who told the court that on that date at about 6 pm while leaving church, he found seven (7) people beating the deceased. He also identified all the seven (7) who included the three (3) Accused. Both were in agreement that there were other people around the scene but it is the seven (7) whom they saw assault the deceased.

15. PW4 and PW5 corroborated each other's testimony that on 19th November, 2010 they were with the deceased at the home of one Felicia Karimi Cianthua tilling her land as from 8.00 a.m. At 3pm, six (6) people, including the three (3) Accused came to where they were, tied the deceased, started beating him and took him towards River Kithonge. All PW1, PW2, PW4 and PW5 were categorical that they saw the three (3) accused amongst the seven (7) people who assaulted the deceased to death.

16. The defence of the three (3) accused was of alibi. The 1st Accused stated that on the material day between 4 pm and 6pm he was at Marembo primary School attending a School Sponsor Committee meeting. He called DW2, the headmaster who corroborated his testimony. DW2 told the court that he was with the 1st accused all through until after 8 pm. Accused 2 on his part told the court that he was not at the scene where the deceased was murdered. He was at his home mending/repairing his fence the whole day with Nkari Zakaria, the father of the deceased. He produced as D2 Exh 1 the statement which Nkari Zakaria gave the police which indicated that they were together upto 7 pm. Accused 3 on his part told the court that he went to Kanwa Market, some 18 kilometres away to buy a donkey. He arrived back home at about 8 pm in the evening. All the three (3) Accused feigned ignorance of the incident on the 19th November, 2010. That they knew of it the following day from PW6, the Assistant Chief. They pointed a finger at PW1 as the one who framed them because of a grudge she had with them. That she was unhappy that they had bought land from her father cheaply.

17. The evidence of PW1, PW2, PW4 and PW5 was consistent and corroborative of each other. PW4 and PW3 told the court how they saw the Accused persons in the company of others grab the deceased from the home/land of Felicia Cianthua at 3 pm and PW1 and PW2 stated how at 6pm they saw the deceased being killed by amongst others, the three (3) accused near Marembo market. This court did not have the advantage of seeing any of the prosecution witnesses testify. However, three issues arise. Firstly, all the prosecution witnesses who were eye witnesses (PW1, PW2, PW4 and PW5) were all relatives. Although they testified that there were other people who witnessed the killing of the deceased there was no independent witness who was procured by the prosecution to testify. Secondly, one such important independent witness would have been the person on whose land the deceased, PW4 and PW5 were said to have been tilling, from where the deceased is said to have been grabbed at 3 pm on the 19th November, 2010 to go and meet his death. The name of that person was given as Basiliana by PW1, while PW10 called her Pasiliana Cianthure Daniel. PW4 and PW5 called her Falisia Ciathure. To my mind the names must have been referring to one and the same person. Thirdly whether the offence was on the 19th November, 2010 or 20th November, 2010 as laid in the information before court.

18. When testifying in court on 30th January, 2014, PW10, the investigating officer is recorded to have told the court as follows:-

"I am the investigating officer in this case. I know Dennis Kaaria (PW4). I know Pasiliana Ciathure Daniel. I recorded her statement. I am not calling Pasiliana Ciathure Daniel. She said that no one went to work in her shamba. She denied the deceased went to work at her shamba on 19/11/2010. I did not call her though she recorded statement because the statement was not assisting the prosecution case."(Underlining mine)

19. To this court's mind, that was an admission by none other than the investigating officer that at least an independent but crucial witness was not called because she would have given to give evidence that was contrary to his case. It should be recalled that the prosecution case was that the deceased was attacked while tilling the land of this lady at around 3pm, beaten by amongst others, the Accused persons and dragged away. That admission by the investigating officer about what Pasiliana Ciathure told him and on

the principle that the prosecution should call all crucial witnesses, casts serious doubts on the testimonies of PW4 and PW5. If the said Pasiliana told the police that no one was tilling her land on the 19th November, 2010, where then did the three (3) accused drag the deceased from in terms of the testimonies of PW4 and PW5?

20. Secondly, while the testimonies of PW1 and PW2 point towards seven (7) people who allegedly assaulted the deceased, those arraigned in court are all brothers. The other four (4) were said to be roaming free at the time PW1, PW2, PW4 and PW5 testified. There was no explanation as to why the others were not pursued. This however, would not be taken to a defence to the charging of the three (3) Accused. Thirdly, although the testimonies of all the prosecution witnesses was that those who participated in the killing of the deceased on the 19th November, 2010 were seven (7) in the information dated 23rd December, 2010 charging the Accused, the prosecution gave the particulars of the offence as follows:-

"1. ROBERT KIMATHI MATE 2. PETER GITONGA NJAGI 3. JOHN MICHENI MAKUNYI:

On 20th day of November, 2010 at Marembo village, within Tharaka Nithi County within Eastern Province murdered ZAKARIA NJOKA"

According to the Postmortem Report (PEXh 1) as supported by the testimonies of PW1 and PW2, the deceased was assaulted and died on 19th November, 2010. The information charged the accused with murdering the deceased the following day, 20th November, 2010. The information was never amended before the prosecution closed its case or at all.

21. This leads this court to the defence of alibi that was proffered by the Accused. In the case of **Uganda .v. Sebyala & Others [1969] EA 204**, the court quoted a statement from a Tanzanian Criminal Appeal No. 12 D 68 of 1969 wherein it was stated thus:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution when the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

22. In the case of **Kiarie .v. Republic [1984] KLR 739** the Court of Appeal held:-

"An alibi raises a specific defence and an accused who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

Further section 309 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya provides:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence to rebut it."

23. Part of the evidence adduced by the Accused was a letter written on 17th November, 2010 by DW2, the headmaster of Marembo Primary School inviting the 1st Accused to a meeting on the 19th November, 2010 at 4 p.m. The headmaster himself appeared and testified. Accused 2 produced the statement of Nkari Thamburi to show that they were together on the material day from 7.00 a.m. to 7 pm. Accused 3 also said he was in Kanwa and Makanyaga market throughout the day and only returned at 8 pm. All these were not challenged. No application was made to rebut this evidence. Further, all the accused were at the scene on 20th November, 2010 when the police went to collect the body. PW10 stated that he was in the company of other police officers, if the father of the deceased (PW3) gave him names of those who had committed the offence. There was no explanation why these accused who were at the scene were not arrested then.

24. To this court's mind, the issues raised above, to wit, the doubt as to the land which PW4 and PW5 were tilling with the deceased on 19th November, 2010, the failure to produce independent witnesses, the evidence showing that the offence was committed on the 19th November, 2010 yet the information laid before this court is to the fact that the Accused committed the offence on 20th November, 2010 and the failure to challenge the alibi proffered by the Accused; casts doubt on the case of the prosecution. I will resolve that doubt in favour of the Accused persons. Accordingly, I find them not culpable and acquit them of the offence of murder.

DATED and Delivered at Chuka this 13th day of December, 2016.

A. MABEYA

JUDGE