



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 71 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MBUGUA NJUGUNA.....ACCUSED

JUDGMENT

1. Simon Mbugua Njuguna is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. It is alleged that on 7th day of May 2009 at **Kiwanja Village**, in **Kasarani Division, Nairobi County** he murdered **Gilbert Nyaga Njue**.

2. It is the prosecution's case that on the fateful night at around 10p.m. the deceased Nyaga Njue was on his way home in Kiwanja area when he was accosted by the accused and two others and accused of having stolen a wooden door from a house within the village. They beat him senseless and left him for dead. His body was found the following day and a report was made to the police who after due investigation charged the accused with murder. When arraigned in court on 26th September 2011 the accused denied the charge.

3. For the prosecution to prove a charge of murder, it must demonstrate the following:-

- i. The death of the deceased and the cause of such death.
- ii. That the accused committed the unlawful act which caused the death of the deceased; and
- iii. That in causing such an unlawful act, the accused had malice aforethought.

4. The death of the deceased is not disputed. PW1 Samuel Kinungi Njenga testified that on 7th May 2011 at around 10p.m., he saw the deceased whom he knew as his mother's man friend being chased and seriously assaulted by the accused and one other person; and, that the following morning he received a report of the death of the deceased. PW3 Evanson Nthiga Gichohi (a cousin to the deceased) identified the deceased's body at the city mortuary on 8th May 2009. Dr. Johansen Oduor a government pathologist who conducted the autopsy testified as PW5 and produced the post-mortem report [Prosecution Exhibit No.1] confirming the death of the deceased. He offered expert testimony that the deceased sustained multiple bruises on the face, upper limbs and chest, fractured ribs, collapsed lungs and extensive bleeding in the skull. He concluded that the deceased died of multiple injuries due to blunt force trauma. From his evidence, it is clear that the deceased's death was a result of an unlawful act.

5. Who then caused the unlawful death of the deceased? The prosecution called 6 witnesses to testify to both the unlawful death and to link the accused person to the death of the deceased. The main witnesses are Samuel Kinungi Njenga (PW1) and Irene Wambui Muthoni (PW2). They both describe the events of the material night when the deceased was beaten to death. PW1 testified to having been at the scene of crime and having seen the accused and one Kori assaulting the deceased on the allegation that he had stolen a door. PW2 on the other hand testified to having been told by PW1's mother that the accused was assaulting the deceased. They both knew the accused by virtue of being related and being neighbours.

6. When put on his defence, the accused elected to give an unsworn statement. He denied killing the deceased. He acknowledged that the deceased was his sister's boyfriend and that on the material date he heard a commotion outside and when he checked, he found the deceased being beaten by a mob and he assisted his sister and her two sons in rescuing the deceased. He said that the deceased was being lynched by members of the public because he had stolen a door and that he left him being escorted to the place where the owner of the door was. That he learnt that the deceased had passed on the following day.

7. The accused alleged that he had been framed in this case by his nephews over a land dispute and that was why he was arrested on 31st August 2011 although the offence was allegedly committed in May 2009. He alleged that he had asked his nephews to relocate to their deceased father's land which was their rightful inheritance as he was not willing to share his parents' land with them. He also alleged that when he was arrested the police charged him only after he declined to give them a bribe of Kshs.200,000/- which they had demanded. The issue of the land dispute was also raised on behalf of the accused in submissions by defence counsel. She argued that the accused was framed by his sister and her sons in order to disinherit him while in custody.

8. I have given careful consideration to the accused's statement as well as the submissions by learned defence counsel. I consider the accused's statement to be no defence at all. Weighed against the law and the totality of the evidence on record, it amounts to a mere denial and an attempt to deflect the murder charge he faces by alleging a frame up based on an alleged family land dispute.

9. It may very well be that there was bad blood between the accused and his relatives namely PW1, his deceased sister Muthoni, and her other son Easton Njuguna Njenga. This may explain why they made statements to the police. The converse may also be true: that the accused's relatives knew something about the accused's involvement in the death of the deceased but chose not to report instantly owing to the familial relationship but later reported when the relations had gone sour. However, I consider both propositions immaterial as the guilt of the accused can only be established through credible evidence and the prosecution must prove the case beyond reasonable doubt regardless of how or why the incident came to be reported. The presence or otherwise of ill will between the accused and his sister and her sons would not obliterate a crime if one was committed. The evidence of such witnesses would only be adjudged on the basis of its credibility and the law.

10. The key issue in this case is whether the prosecution has proved that the accused did indeed murder the deceased. The law requires the prosecution to prove beyond any reasonable doubt that the accused was connected to the death of the deceased. This should emerge from a careful analysis of the prosecution evidence.

11. As stated before, the main witness in the case is Samuel Kinungi Njenga who testified as PW1. He told the court that he knew the deceased well as he was his mother's man friend and frequented their home. He testified that on the fateful evening the three of them (his mother, the deceased and himself) had supper at his mother's house before the deceased left. He also knew the accused very well. He was his mother's brother and therefore his Uncle.

12. PW1 testified that the deceased called him on his mobile phone some ten minutes after leaving his mother's house. He called twice but PW1 ignored the calls because the deceased was drunk when he left. That about 15 minutes later, PW1 heard screams and on stepping outside with his mother to find out what was happening, they saw people running. On following them they saw one Peter Kori and his Uncle Simon chasing the deceased while shouting "thief, thief". He said that Kariuki [the deceased] fell down

and that Kori and Simon told him that Kariuki had stolen a door. He testified that Kariuki was badly assaulted by Simon and Kori. The witness stated that his mother told him and his brother to go back to the house.

13. He further stated that the following day while on his way to work, he learnt that the deceased's body had been found lying at Kiwanja Primary School field. The witness said that he decided to return home and on the way called Kori to enquire why they killed Kariuki. He said that Kori told him that they had left Kariuki with the owner of the door. That he then proceeded to the field where he identified the body to be that of Kariuki. According to him, Simon Mbugua (the accused) used an iron bar to assault the deceased while Peter Kori used a whip. The witness said that he was able to identify the accused and his accomplice because there was moonlight. He said he was at the scene for about 20-30 minutes.

14. I have no doubt in my mind that PW1 recognized the accused. This is because although the incident is said to have happened at 10p.m., there was moonlight. According to PW1 and PW2's testimony too, the incident happened quite near their respective houses. Further all the witnesses attest to the fact that both the accused and the deceased were very well known to them. PW1's testimony however leaves many questions unanswered. At the time of the incident, PW1 was a grown man. He was aged 23 the time he testified on 15th February 2012 meaning he was 20 at the time of the incident in 2009. Yet in his testimony he says that after witnessing the serious assault on the deceased, their mother told them (together with his brother) to go back into the house and sleep. They obliged.

15. The following morning, he went about his business working as a matatu tout until he was called by someone who informed him that the deceased's body was lying near Kiwanja Primary School. His reaction according to his testimony was to call Kori whom he had seen assaulting the deceased in concert with the accused. He asked Kori why they had killed Kariuki (the deceased) and Kori denied. PW1 then went to see the body which he confirmed to be Kariuki. His reaction thereafter is even more puzzling. He did not give information to the police that he had witnessed his Uncle Simon (the accused) and his step Uncle (Kori) assaulting the deceased. PW1 wrote his statement with the police on 1st September, 2011. That is a whole two years after the incident. One then wonders why he kept the information to himself for that long. Was he really an eye witness?

16. Another disturbing issue is that he states in his testimony that he saw the accused using an iron bar to assault the deceased while Peter Kori used a whip. PW4 who was the investigating officer contradicted this testimony by telling the court that the iron bar was recovered from the house of Kori. I did not have the benefit of observing the demeanour of PW1 and so I have no impression on whether or not he was a truthful witness. He had testified before my brother Ombija J. who began the trial and heard both PW1 and PW2. I would therefore look out for corroborating evidence to his testimony.

17. PW2 Irene Wambui Muthoni testified that on 7th May 2002 she was asleep in her house at about 10.00p.m. when she heard some noise. That she went to check and found Dorcas Muthoni who informed her that Kariuki (the deceased) was being assaulted by Mbugua and warned her not to go too near the scene. She returned to the house. Later, Dorcas Muthoni told her to go and tell Mbugua to stop assaulting Kariuki (deceased) but instead take him to the police. She told the court that she did not go. The following morning, she learnt from some school children that Kariuki had died and his body was lying at the gate of Kiwanja Primary School. She passed by to see and proceeded to go to work. On cross-examination, the witness stated that she did not go to the place where the noise was coming from. She was told by Muthoni whom she said was her sister-in-law that there was a fight.

18. The testimony of PW2 appears to be largely hearsay. She came out when she heard a commotion. She says that she found Dorcas Muthoni who told her that Kariuki was being assaulted by Mbugua. In her own words, she did not go near the scene even after being implored by Dorcas Muthoni (the deceased's woman friend) to go and ask Mbugua to stop assaulting the deceased. She states that she learnt of the death of the deceased the following day while on her way to work and proceeded to go to work.

19. I find the testimony of PW2 suspect. In her statement to the police given on 18th May 2009, she states:

“I do recall on the 7th day of May 2009 at around 10.00p.m. I was asleep when I heard a commotion outside the house. I woke (sic) up and went out and found one Dorcas Muthoni standing near a mango tree I talked to her and asked her what was happening as I had seen Mbugua beating Kariuki (Nyaga) beating him with a whip...”(emphasis added)

In her testimony in court, she testified that when she went out she found Dorcas Muthoni who informed her that Kariuki was being assaulted by Mbugua and warned her not to go near the scene. She told the court that she did not go near. It is my conclusion that PW2 twisted her evidence before court to make it hearsay. Whatever the case, she cannot then be treated as a truthful witness and in the absence of corroborative testimony, she cannot be relied on.

20. PW3 Evanson Nthiga Gichomi was a relative of the deceased and an identifying witness. He identified the body at the city mortuary on 8th May 2009. No. 72536 Cpl. Daniel Muita of Kiamumbi Police Station testified as PW4 that he arrested the accused on 3rd August 2011 in Gatundu and escorted him to Kiamumbi Police Station. He was in the company of Silas M’Mkunu and was directed to the accused’s house by one Eston Njenga, a relative of the accused.

21. In the course of the trial, during the hearing on 3rd April 2014, the court was informed by learned prosecution counsel that the Investigating Officer Cpl. Ndungu had passed on the previous week. The prosecution then applied to recall Cpl. Daniel Muita who had earlier testified as PW4 to testify on behalf of Cpl. Ndungu the investigating officer. In that capacity, PW4 told the court that he was familiar with the case as he had taken over the file from Cpl. Ndungu when he (Cpl Ndungu) was transferred to Embu Police Station. He was satisfied upon taking over the case, that there was sufficient evidence to sustain a charge of murder against the accused. He produced a metal crow bar [Prosecution Exhibit No.2] said to be the murder weapon recovered from the house of Kori the accused’s step brother who was said by PW1 to have been seen assaulting the deceased together with the accused. PW4 identified the accused in the dock.

22. In cross-examination, the witness told the court that there were eye witnesses to the incident. One was Dorcas Muthoni Njuguna who had since passed on while others were Eston Njuguna and Samuel Njenga [PW 1] both nephews of the accused and a Mr. Wanyama who declined to testify despite having recorded a statement. Irene Wambui Muthoni (PW2) was yet another witness though the investigating officer couldn’t tell whether or not she was a relative of the accused.

23. In analyzing the evidence on record it is clear to me that the accused was present at the scene on the material night. PW1, PW2 and the accused himself state so through their various accounts of the events of the night. PW1 states that the deceased had just left his mother’s house that night. That when they heard a commotion, they came out and he saw the accused and Kori chasing and beating the deceased. The accused on the other hand stated in his defence that he was at the scene where he saw his sister (Dorcas Muthoni) and her two sons (PW1 & one Eston Njenga) trying to rescue the deceased from a lynch mob and that he also intervened to rescue him. That thereafter he left him being escorted by the mob to the owner of the door which he had allegedly stolen.

24. I find the testimony of PW1 and PW2 believable only to the extent of placing the accused at the scene. Other witnesses who would have corroborated the evidence of PW1 that he saw the accused beating the deceased were his mother Dorcas Muthoni (now deceased) and his brother Eston Njuguna Njenga. Dorcas Muthoni recorded her statement to the police on 18th May 2009. In that statement, she told the police that the deceased was her boyfriend and that she saw her brother (the accused) and her step brother (Kori) assault him on allegations that he had stolen a door. That was shortly after the deceased had left her house. In her statement, Dorcas Muthoni stated that she first concentrated on informing the deceased’s family and attending the deceased’s funeral. That is why she did not immediately inform the police.

25. Dorcas Muthoni however passed on in the course of the trial and so did not testify as a witness and neither was her statement produced in court. It is on record that during the proceedings on 30th October,

2013 prosecution counsel intimated to the court that he would be making an application for her statement to be produced by the investigation officer. However the prosecution closed its case before seeking to have her statement admitted. Eston Njuguna Njenga on the other hand recorded his statement with the police on 9th September 2011 as D3. Although his statement corroborated the statement of PW1 in material aspects, he was not called to testify as a witness.

26. The investigating officer in the case passed on before testifying. Cpl. Ndungu who had earlier testified as PW4 stepped into his shoes. He produced a crow bar which he told the court was the murder weapon. He however testified that the same was recovered from the house of another suspect one Kori. The investigating officer however was unable to link the murder weapon to the suspect independent of the testimony of PW1 which as I have found is not credible.

27. My conclusion is that I have not found sufficient evidence in this case to directly link the accused to the death of the deceased. It does appear from the investigation file that the investigation was luck lustre. It took the police two years to record statements from witnesses who were at the scene on the material night. One Kori who was consistently mentioned by the witnesses and from whose house the alleged murder weapon was recovered was never arrested and charged. The prosecution on the other hand did not endeavor to present all the witnesses who had recorded otherwise useful statements to the police.

28. In the premises, I find that the prosecution has not provided sufficient evidence to prove the case against the accused beyond reasonable doubt. I acquit him of the charge and order that he be set at liberty forth with unless otherwise lawfully held.

Judgment delivered and dated at Nairobi this 25th day of February, 2015

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk
.....: Accused
.....: For Accused
.....: For the State