



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 106 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

VICTOR MBOTE KANYATTA..... ACCUSED

JUDGMENT

The accused, **Victor Mbote Kanyatta** alias **Kangethe** is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 10th December 2012 at **Gitambaa Village, Kiambu County** he murdered **Lukas Njenga**. He denied the charge when he was arraigned in court on 15th January 2013.

The prosecution's case against the accused is that he together with two others not before court assaulted the deceased using crude weapons including a panga, sticks, piece of wood and a jembe handle. The deceased subsequently died as a result of the injuries inflicted on him.

PW1, Rosemary Waceke Wanjiru testified that on 10th December 2012, while at her gate at Ruiru, Gitambaa village she woke up and on looking towards deceased's house which was not far from her house she saw about three people who looked like they were quarreling. That when she moved closer, she saw three men whom she could recognize beating the deceased who was then lying on the ground. It was her testimony that she heard them telling the deceased to produce the phone and the cap. She identified Kangethe as one of the men who was telling the deceased to produce the items. She said that she asked them why they were beating him and Kangethe responded by saying "*this dog should bring the cap and the phone.*"

She further stated that she saw Kangethe with about 10 sticks which he used to beat the deceased; that one of the men held a panga and the other had a jembe handle. She described one of the sticks as having nails and was burnt on one side. PW1 told the court that she called the deceased's friend called Muthoni who came and engaged the three men in argument as to why they were beating him. She threatened to call the police if they did not stop beating him. On hearing that, Kangethe threw the piece of wood down and left. She identified Kangethe as the accused in the dock and shown a piece of wood [MFI.1], she identified it as the one she had seen the accused use to hit the deceased.

PW1 further testified that when the three left, the deceased told Muthoni to call his sister; that Muthoni took the deceased to hospital when his sister took too long to arrive. That at that point she (PW1) went back to her house. She later learnt that the deceased had passed away at Nazareth Hospital. The witness stated that the deceased was seriously injured in the beating and that she observed as she was only one or two metres away. On being cross-examined on the identity of the accused and the two others, she stated that she recognized the other two by appearance but that she was familiar with the accused whom

she identified by the name Kang'ethe which was his popular name in the village.

PW2 was Anastacia Muthoni. She testified that on the 10th December 2012 she was called by Rosemary Wacera (PW1) called her at around 6a.m. to inform her that Lukas Njenga was being beaten. That she went to the plot where he lived and found Kang'ethe and two other men beating up Lukas whom she stated was her boyfriend. She stated that her house was only 200 metres away and she recognized Kangethe and two others who were beating Lukas. She named the two others as Wachira and Kakuma. She was categorical that she saw Kangethe hit the deceased on the head using a piece of wood. She further stated that she intervened by holding Kangethe's hand then she took her phone and called the police. That when they saw her calling, Kangethe dropped the piece of wood and they ran away.

PW2 further told the court that the deceased told her to call his sister and gave her a paper from his pocket on which his sister's number was written. That after making the call, she saw that the deceased was bleeding from the forehead and ears. She then called a taxi and took him to Nazareth hospital. That the deceased's sister Lucy Wangui (PW3) met them at the hospital and she took the deceased to Thika Hospital. Muthoni said that she left for home from where she later learnt through a phone call from Lucy Wangui that the deceased had died. She stated that the deceased's sister told her that when they took him to Thika Hospital they found the doctors were on strike and they returned him to Ruiru. That she joined them at Ruiru where they went to Ruiru Police Station to make a report. On being cross-examined, PW2 was categorical that she found the deceased being beaten by Wachira, Kangethe and Kakuma and that she spoke to Kangethe as he was the one she knew most. She denied that she did not tell the police that she did not know their names. She said that she came to know them when they were doing construction next to their plot. In re-examination, she stated that she saw Kangethe using the piece of wood shown to her in court. That she gave the accused's name when giving her statement.

Lucy Wangui, the deceased's sister testified as PW3. She stated that on the material day 10th December 2012 while in her house in Ruiru, she received a call from Muthoni (PW2) who informed her that her brother was being beaten by some people. Muthoni asked her to rush to take him to hospital but after a short while she called again to tell her to go straight to Ruiru so that they meet at the hospital. PW3 stated that upon reaching the hospital she found her brother being treated but after a short while the doctor advised them to take him to Thika Hospital. On reaching Thika hospital however, he was denied admission as the doctors were on strike. They returned him to Nazareth hospital where he died later the same day. She testified that they were advised to take the body to Ruiru Police Station on their way to Kenyatta University Mortuary. It was photographed at the station. PW3 testified that Muthoni told her that Kang'ethe, Kakuma and another person beat the deceased. She later identified the body for the post-mortem to be done.

The arresting officer No. 71611 Cpl. Mwenda Mbaya of CID Ruiru testified as PW4. He told the court that on 10th December 2012 at about 6p.m. he was called by the OCS Ruiru C.I. David Rono and instructed to accompany a reportee one Rosemary Wacheke to Gitambaa to arrest a suspect who was reported to have fatally assaulted one Luka Njenga alias Kangwai. Together with Cpl. Maro and PC Mwatamba they were led to area and to the suspect's house by the reportee in an unmarked police car. They did not find the accused in his house but later found him in the area and arrested him. The witness testified that it was PW1 who pointed out the accused to them. He told the court that at the time of arrest, the accused gave his name as Victor Mbote. He said that Kang'ethe was his popular name and that he did not deny that name at the time of arrest. The witness was categorical that the person pointed out to them and whom they arrested was the accused in the dock.

The pathologist Dr. Johansen Oduor testified as PW5. He told the court that he performed a post-mortem on the body of one Lucas Njenga at Kenyatta University Funeral Home. The body was identified by Lucy Wangui (sister) and David Kimani Ndungu (brother) with P.C. Hamed Hamisi of Ruiru Police Station in attendance. His findings were that the body had blood stained clothes and extensive bruises on the forehead, shoulders, cheeks and a bandaged laceration on the right foot. He noted a bite wound on the upper arm between the elbow and the shoulders. Internally he found extensive haematoma or bleeding on the right side of the skull. The internal organs were normal. He formed the opinion that the cause of death was head injury due to blunt force trauma. He produced the Post mortem report (Prosecution

PC Hamed Hamisi (PW6) the investigating officer in the case testified that he was assigned the case on 11th December 2012. That he escorted the body to Kenyatta University Mortuary and witnessed the Post-mortem the next day. That thereafter he visited the scene of crime and found PW1 & PW2 who showed him the scene. That he found a piece of broken jembe handle and piece of burnt timber which PW1 and PW2 told him were used by the accused and his accomplices to beat the deceased. He said that PW1 told him that the accused used the piece of burnt timber to hit the deceased. That he collected both the piece of timber and broken jembe handle. He produced the piece of burnt timber as Exhibit No. 1. He identified the accused as the person who had been pointed out by PW1 and PW2 as one who was seen beating the deceased and as the one who was arrested.

At the close of the prosecution case the accused was put on his defence. He gave sworn testimony and called two witnesses. He denied that he was Kang'ethe. He stated that his name was Victor Mbote Kanyatta. He produced his national Identity Card No. 27208717 (D.Exhibit No.1) which bears the names Victor Mbote Kanyatta. He stated that he lived in Gitambaa village and had been resident there for only two months and that he worked in a garage in Ruiru town. That on 9th October 2012 he was woken up by his workmate around 8.00a.m. for them to proceed to the garage. That on his way, he saw a person who had been beaten. Subsequently he was arrested the following day and told that he was a murder suspect. He denied any knowledge of the incident. He said he did not know PW1 or PW2; that they were not there when he was arrested.

DW2 was one Daniel Kafena also known as Shaft. He testified that he knew the accused as they lived together in Gitambaa village though each had his own house and that they worked together at Kimunya garage in Ruiru. He told the court that on Sunday morning (9th) he called the accused so that they would go to work together. That on their way they saw a person who had been beaten. That they went to work till evening and came back. That on the second day while on their way back from work, they met two people who turned out to be police officers who stopped them and arrested the accused. He stated that the accused did not fight anybody and that he did not know whether there was a fight at 6.00a.m. since he left with the accused at 8.00a.m.

DW3 was one Clement Njuguna Karanja. He told the court that he lived near Githunguri Secondary School. That on 9th he heard a commotion from a nearby plot popularly called Kumi Kumi. That he later learnt from his son that he had met Victor in the morning who told him that a person had been beaten in the village by villagers. He said he learnt later from another mechanic called Job that Mbote had been arrested because of that incident. He said that he could vouch for the accused's character as he had known him for 3 years; that the accused was brought up in Kwa Michael near his (PW3's) mother's home. The witness stated that he did not know whether Mbote fought with the deceased. He said that he used to hear about the deceased whom he stated was a jail bird.

The accused is charged with the offence of murder. The prosecution must therefore establish three elements namely:-

- 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 committing such an unlawful act, the accused had malice aforethought.

In this case, it is not in doubt that a person, one Luka Njenga died as a result of an unlawful act of assault. PW3 took the deceased to hospital in critical condition and later identified his body at the mortuary. The post-mortem report exhibited in court showed that the deceased sustained serious injuries – extensive bruises on the forehead, shoulders, cheeks and right foot. His clothes were blood stained. It is not in doubt that the injuries inflicted upon him were grievous and indeed fatal. The question before this court is who actually committed the heinous crime. PW1 and PW2 are said to be the two eye witnesses who linked the accused to the offence. It was their report to the police that led to the arrest of the accused. Their evidence therefore is central to this case. The case as it were must turn on the credibility of these two witnesses.

PW1 stated that she saw a group of people who appeared to be quarrelling and that upon a closer look, she saw that three men were beating the deceased. It was her testimony that she recognized the man who was being beaten as Lukas who lived in the same Gitambaa village with her. From her evidence, it is apparent that the witness knew the deceased well as she even knew his girlfriend (PW2) whom she called and alerted that the deceased was being attacked. In her statement to the police she said that she saw a group of about 5 people standing near the compound of the deceased and on approaching she saw that three people were beating her neighbour Lukas. She told the police that she immediately recognized one of the assailants as Kangethe and that she could recognize the other two by their faces although she did not know their names.

I find gaps in the testimony of PW1. She states that she saw the deceased being brutally wounded by the accused and two other accomplices. From her statement and testimony before court, it appears that the only action she took was to call the deceased's girlfriend, also a neighbour. Nowhere does she indicate that she raised an alarm for the neighbours to come and stop the attack and save the deceased. Her testimony is that when PW2 arrived at the scene, PW2 intervened and threatened to call the police. It was also the evidence of PW1 that she saw the accused using a piece of wood to assault the deceased. She says that the piece of wood was burnt on one side and had building nails. She identified (MF1.1) shown to her in court as the piece of wood she had seen. The investigating officer (PW6) testified to having recovered the piece of wood at the scene. It was also his testimony that he was led to the scene and shown the piece of wood by PW1.

From the description of the scene said to be Gitambaa village by PW1, PW2 and DW3, it appears that the area was well populated. The question which lingers in the court's mind is why PW1 did not raise an alarm and why no mention is made of the presence of any other person at the scene. I closely observed the demeanour of PW1. She appeared guarded in her testimony only insisting that she saw the accused assail the deceased. When referred to her statement to the police in cross-examination, this witness stated that she was illiterate and did not know how to read and write, stating only that the statement was written down by a police officer while she only narrated the facts. This is despite her youthful age of 26 years. On this issue I formed the opinion that she was not entirely truthful.

The other critical prosecution witness in this case was PW2. PW2 was alerted by PW1 that the deceased (whom she stated was her boyfriend) was being assaulted. That was about 6.00am. She stated that she intervened by holding the accused's hand to try and stop him from beating the deceased. PW2 told the court that the three men were armed with crude weapons including the burnt wood which the accused was using, and sticks, a jembe handle and a panga. From her testimony, PW2 painted the picture of a most vicious attack on the deceased. What is puzzling however is how she intervened by holding the accused's hand to stop him from continuing to hit the deceased without exposing herself to any danger. The accused did not even push her away to release his hand. In her testimony he just continued hitting the deceased. She says that when she threatened to call the police, the accused dropped the wood and the three assailants ran away.

PW 2 further states in her testimony that she knew the other two assailants as well. She names them as Wachira and Kakuma. However in her statement to the police, she had stated that she only knew them by their faces. When confronted (in cross-examination) on this apparent discrepancy, she was evasive only stating that she was not the one who wrote the statement but that she narrated the facts while the police wrote down the statement. It was apparent to the court that the identity of the assailants was an afterthought.

I am hesitant to entirely rely on the testimonies of PW1 and PW2 with respect to whether or not the accused is the person who critically assaulted the deceased. They did not strike me as straight forward witnesses. As stated by the Court of Appeal in **Ndungu Kimani Vs. R. (1979) KLR 282:**

“The witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his truthfulness or say or do something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

It appears from the testimony of the police officers involved in the case that no serious investigation was conducted. The arresting officer (PW4) Cpl. Mwenda Mbaya told the court that on 10th December 2012 at around 6p.m, he was detailed by the OCS Ruiru C.I. David Rono to go and effect the arrest of the accused at Gitambaa village. That together with his colleagues Sgt. Kandie, Cpl Maro and P.c. Mwatamba they were led by PW1 to the accused's house. They did not find him there but on searching found him within the village and arrested him. There is nothing in the testimony of PW4 to suggest that he conducted any investigations. His role was limited to effecting an arrest.

P.C. Hamed Hamisi who was the investigating officer testified as PW6. His role however seems to have been limited to escorting the deceased's body from Ruiru Police Station on 11th December 2012 to Kenyatta University Mortuary and witnessing the post-mortem conducted by Dr. Oduor the Government Pathologist. In his testimony he stated that he went to the scene where he found PW1 and PW2 who showed him the actual scene and pointed out to him the piece of wood and broken jembe handle said to have been used to beat the deceased. He collected both but produced only the piece of timber as an exhibit in the case. He stated that he was told by PW1 and PW2 that the accused used the piece of timber to hit the deceased and that he was not sure who used the broken jembe handle in the assault. Other than picking the exhibit from the scene, PC Hamisi appears not to have done anything more although he testified that he went back to the station to continue investigations.

It is not apparent from the evidence tendered in this court that the investigating officer conducted any further investigation. There is no evidence that he sought out other witnesses to corroborate the testimony of PW1 and PW2. Even at the scene, he was shown the actual scene by PW1 & PW2. Although this court has already observed that the scene was within a village with perhaps many residents, the investigating officer did not interrogate any other person to test the veracity of the statements of PW1 & PW2. As observed earlier in this judgment, PW1 did not strike the court as a reliable witness. PW2 on the other hand though more credible in her testimony, cannot be said to be an independent witness. Her account needed to be corroborated.

From the prosecution evidence it is clear that the deceased was viciously assailed by a group of persons. It is also clear from the post-mortem report and the testimony of PW5 that the deceased died of head injury due to blunt force trauma consistent with the vicious assault he was reported by PW1 & PW2 to have suffered in the hands of assailants. However there exists doubt as to who the actual assailants were. Although PW1 and PW2 state that they saw the accused whom they knew as he lived in their neighbourhood, no one else from the neighbourhood was called to verify their claim. No investigation was conducted beyond what PW1 and PW2 told the police.

The accused mounted a defence by giving a sworn statement and calling the witnesses. His statement basically amounted to a mere denial. He insisted that he was not the Kangethe who committed the offence as he was Victor Mbote Kanyatta. I have already addressed this issue. I consider it a mere gimmick as the witnesses clearly stated that Kangethe was his popular name. Even without the issue of the name cropping up, he is the same individual who was identified to have been at the scene and who was arrested. DW 2 on the other hand stated that the accused was his friend and workmate. His evidence was of no material value. He only stated that the accused accompanied him to work at 8.00a.m. The incident however occurred at 6.00a.m. DW3 seems to have been called to attest to the character of the accused. Other than saying that the accused was known to him for reason of being a mechanic who regularly repaired his son's bicycle and that he used to see him in Kwa Michael area where the witness's mother lived, the witness did not convince the court that he knew the accused so well as to vouch for his character.

I do not find it the accused's defence convincing at all. Indeed I consider it a mere fabrication. However, it was the duty of the prosecution to prove the case beyond reasonable doubt. The burden does not shift to the accused to prove his innocence. Further the law demands that where there is doubt, the same be resolved in favour of the accused.

In the premises, I find that the charge against the accused has not been proved to the required standard. I acquit him under Section 215 of the Criminal Procedure Code. He is set at liberty forthwith

unless otherwise lawfully held.

Judgment delivered and **signed** at Nairobi this **30th** day of **October**, 2014.

R.LAGAT-KORIR

JUDGE

In the presence of:

.....:Court clerk

.....: Accused

.....: Counsel for Accused

.....: Counsel for the State