



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 68 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

1. VICTOR NTHIGA KIRUTHU.....1ST ACCUSED

2. JAMES NYAGA GITEMBA.....2ND ACCUSED

JUDGMENT

1. The accused persons **VICTOR NTHIGA KIRUTHU**, hereinafter the 1st accused, **JAMES NYAGAH GITEMBA**, the 2nd accused are charged with one count of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are as follows:

“On the 30th day of October, 2010 at Rwani village Kamaguna sub-location, Maragua Location, Gatue Division, Tharaka North District within Eastern Province, with others not before court, murdered DAVID MUNYAMBU NKANDI.”

2. The prosecution called seven witnesses. The facts of the prosecution case are that the deceased invited his daughter PW4, his son-in-law PW1, to assist him plant green grams in his land. He also hired Susan PW5 and Mary Muthoni PW2. As the five worked on the deceased's shamba six men appeared all armed with pangas. These were the 1st accused Victor Nthiga, the 2nd accused Nyaga, DW3 Josephat Maregi, DW4 Stanley Kithinji, one Catherine Nthiga and one Nthetha Kirema.
3. The six surrounded the deceased and the 1st accused told him that it was his last day to see the sun. The 1st accused struck first by cutting the deceased on the neck. The 2nd accused cut him next on the shoulder or hand. Then all six set upon the deceased, cutting him all over the body. He died on the spot. The cause of death was severe neck and head injuries secondary to trauma.
4. The accused persons have denied the charge. The 1st accused in his sworn statement stated that it was the deceased and PW1 who found him, 2nd accused, DW3, DW4 and two others planting on his side of the land. The deceased asked him why he was planting on that land. The 1st accused stated that the land was his.
5. The 1st accused stated that the deceased then attacked him with a panga which he was carrying. The 1st accused stated that when he blocked the panga the deceased had, the deceased picked a

- stone and hit him on the forehead and he started bleeding. The 1st accused stated that as a result of the bleeding he could not see clearly but that in order to protect himself, he just waved his panga vigorously, severally and in speed. He said that he could not tell on which parts of the deceased body he cut.
6. The 1st accused stated that he noted the deceased had been pierced by a piece of wood and that he moved him away from it before leaving the land. The 1st accused said that no one else was involved in the fight except him and the deceased.
 7. The 2nd accused stated that the 1st accused had asked him to help him plant green grams on his shamba on the material morning. He stated that he reached the shamba at 6 a.m. They were five of them planting to help the 1st accused when the deceased and PW1 arrived. The two spoke to each other after which the deceased walked over to the 1st accused and asked him why he was planting on that land. The 2nd accused stated that the 1st accused answered that it was his land and told the deceased to return to his land. That is when the 1st accused was attacked by the deceased.
 8. The 2nd accused stated that the deceased hit accused on the chest and head with the flat side of a panga. That the 1st accused, who had a panga cut the deceased with force on the upper arm. The 2nd accused stated that on seeing the fierce panga fight between the two he decided to run away from the scene and never returned.
9. DW3 and 4 both gave the same story. They stated that they were helping the 1st accused plant green grams on his land. Their evidence was that they saw PW4 call her husband PW1. After they spoke, PW1 went over to the deceased and spoke to him. Soon thereafter the deceased went over to the 1st accused and after telling him not to work on the shamba the deceased attacked him. DW3 and 4 both said that the accused and deceased fought between themselves and no one intervened.
10. DW3 and 4 testified that they all ran away from the scene leaving the accused and deceased to fight it out.
11. The accused persons are charged with murder contrary to **Section 203** of the **Penal Code**. That section defines the offence as follows:

“Any person who of malice afterthought causes death of another person by an unlawful act or omission is guilty of murder.”

12. The prosecution has to prove that the accused persons inflicted injuries on the deceased unlawfully, as a result of which he died, and that at the time they inflicted the injuries, both had formed the intention to cause death or grievous harm to the deceased.

13. Malice aforethought is an essential ingredient to the charge of murder. The circumstances which constitute malice aforethought are set out under **Section 206** of the **Penal Code** in the following terms:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

14. The prosecution must adduce evidence to establish that the accused, whether together or with others not in court formed a common intention to cause death or grievous harm to the deceased. The prosecution must prove that both accused and others with them had formed one common intention to cause death or grievous harm to the deceased. **Section 21** of the **Penal Code** defines common intention in the following terms:

“21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

15. I have carefully considered the evidence adduced by both the prosecution and the defence together with submissions by Mr. Nyenyire for the accused and Mr. Mulochi Prosecution Counsel for the State.

16. Mr. Nyenyire did not make any submissions except that he said he relied on the defence case. Mr. Mulochi, Prosecution Counsel urged the court to find that the evidence of PW1 to 4, the eye witnesses of the incident was consistent, and without contradictions. Learned Prosecution counsel urged that apart from the accused and deceased who had a land dispute, the rest of the witnesses had no issues and therefore had no reasons to frame the accused persons of this offence.

17. I will begin by setting the record straight. The eye witnesses of this case were PW1, 2, 4 and 5 not PW1 to 4 as Mr. Mulochi submitted. PW3 was the doctor who produced the post mortem Report, P. Exh.1 on the deceased.

18. The accused and the deceased were blood brothers, the deceased being older than the accused. PW1 was son-in-law of deceased, while PW2 and 5 were sisters in law but had no relationship with either the accused or deceased. PW4 was daughter of the deceased and wife of PW1. The other fact is that the land of the accused and that of the deceased shared a boundary.

19. The prosecution case is quite simple and clear. It was the evidence of each eye witness, PW1, 2, 4 and 5 that the two accused, DW3 and DW4, one Catherine Nthiga wife of the 1st accused and one Nthetha Kirema found the deceased working on his shamba assisted by the four of them. The six surrounded the deceased who was working approximately 25 meters from the rest of them.

20. Each eye witness stated that the first to attack the deceased was PW1 who cut the deceased on the neck. The 2nd accused then cut him on the shoulder or hand. That is when the deceased fell down. Upon falling down, each of the six assailants set upon the deceased with pangas cutting him all over the body. He died at the scene of the attack.

21. The defence has disputed that the six intruders attacked the deceased. The 1st and 2nd accused, and DW3 and 4 admit in their statements and evidence respectively that they were present at the scene of the attack. They all admit that the deceased met his death as a result of the incident which occurred that morning. They however dispute that any other one of them except the 1st accused attacked the deceased.

22. There is no dispute that the deceased died as a result of the attack upon the deceased which took place on the material morning. There is no dispute that by the 1st accused that he was culpable for the injuries suffered by the deceased.

23. The issue is whether the incident occurred as the prosecution stated or whether it occurred as the defence contended. Was there malice aforethought proved against any or both the accused person? Was there common intention?

24. I have considered the evidence of the eye witnesses and I have tested their evidence with caution. I am guided by the binding decision from the court of appeal in the case of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC 1989 e KLR** it was held: -

“What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

25. I considered that the incident occurred midmorning and therefore in broad daylight. I also considered the distance from which the eye witnesses viewed the incident. The eye witnesses stated that they were all scattered around the land but were able to see the incident unfold. It was within 25 meters from where the deceased was being attacked according to both of them. The evidence of PW1, 2, 4 and 5 was consistent and corroborative. The assailants were known to the eye witnesses as they were related and also neighbours. The incident also took place in broad daylight. I rule out any possibility of mistaken identity or possibility of error.

26. Since the attack seems to have been a family affair, I did consider the evidence of PW1 and 4 with caution and at the same time sought for corroboration of their evidence from other evidence, even though corroboration was not necessary.

27. I considered PW2 and 5 as independent witnesses. They had no blood relationship with the rest of the witnesses. None of the accused imputed ill will against them or a likelihood of bias or fabrication of evidence. Their evidence was therefore independent. It corroborated the evidence of PW1 and 4 that the deceased was attacked and cut multiple times by six people including both accused, DW3 and DW4.

28. I also considered other evidence adduced in this case. PW6 was the area Chief of Karangachini location. He testified that after his Assistant Chief reported to him the incident, he alerted him that the 1st accused had escaped into his location. PW6 testified that as he stood at Karandini market, the 1st accused surrendered himself to him. He took him to the OCS Gatunga Police Station.

29. PW6 testified that after the OCS sent him, he collected the murder weapon from the wife of the 1st accused. It was a panga P.Exh. 2. PW6 stated that the panga was blood stained. Later on PW7 the investigating officer recovered other exhibits. PW7 recovered a T-shirt from the 1st accused P.Exh.5.

30. The analysis of the blood sample of the deceased against the blood stains on the panga P.Exh.2 and T-shirt P.Exh.5 revealed that the blood on the panga was for a female and that on the T-shirt from a male. The investigating officer did not submit the blood samples of the accused persons.

31. The results of the blood analysis are suggestive of other persons having been involved in the assault on the deceased at the most. At the least the analysis does not advance the prosecution case

as the blood on the exhibits was not from the deceased.

32. I did consider the post mortem results of examination on the body of the deceased. He had multiple deep cuts all over the body. The neck was severed leaving a piece of skin holding it to the body. There was a deep scalp cut exposing the skull bone. Multiple deep cuts on the right hand, deep cut on the forearm, deep cut on the upper arm cutting through the bones. The deceased also had multiple deep cuts on the lower limbs with three deep cuts on the thigh, knee joint, lateral side and the leg on the right. He had a deep cut on left leg at the medial aspect of the ankle joint. The doctor noted that the deceased had suffered multiple cuts all over the body.

33. The doctor who performed the post mortem was not the one who produced the post mortem report. However, in my own observation of the multiple cuts all over the body of the deceased onethings are clear.

34. The first fact which is clear is that the injuries could not have been caused by one person aiming blindly with a panga as the 1st accused alleged. The neck was hanging on a piece of skin. There was no way the deceased could still have remained standing after the neck injury of the nature described by the doctor was inflicted. As the eye witnesses said, that was the first injury inflicted on the deceased. The deceased must have fallen down after this injury. That means that the bulk of the injuries were inflicted upon the deceased as he lay on the ground, just as PW1, 2, 4 and 5 described.

35. I found another piece of evidence which lends credence to the prosecution case. This was in the evidence of the investigating Officer, PW7. His evidence was that he went to the scene of the incident. PW7 stated that he found the body of the deceased lying on the ground inside his, the deceased farm. The defence did not, during the cross examination of the Investigating Officer question the accuracy of his evidence in regard to where the body of the deceased was found. The accused persons' defence that the deceased walked over to the farm of the 1st accused was not only an afterthought but a lie.

36. The other issue to decide is whether the prosecution had established common intention. The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197, 204** considered the meeting of common intention and stated as follows:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly.

37. I find that the evidence of PW1, 2, 4 and 5 that the two accused with four others surrounded and set upon the deceased with pangas, cutting him all over the body is credible, truthful and overwhelming evidence against the accused persons. I find that the two accused and their accomplices had formed a common intention to attack and cause either death or grievous harm on the deceased. Each of them was armed with a crude and dangerous weapon. By so arming themselves and setting upon the deceased as they did, I am satisfied that they had formed a common intention to cause grievous harm or death of the deceased.

38. The next issue to determine is whether the prosecution established that the accused had formed the necessary malice aforethought when they inflicted the injuries in question on the deceased. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp

instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

39. When considering whether malice aforethought could be inferred from injuries inflicted on the deceased the court of appeal in **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of1996 (UR)** stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

40. The deceased was cut several times. In fact the doctor described the injuries as multiple deep cuts all over the body. In view of the multiplicity of the cuts, and the deep nature of the injuries inflicted, I am satisfied that the accused persons and their accomplices had the necessary malice aforethought to commit the offence of murder.

41. I have come to the conclusion that the prosecution has proved the charge of murder against both accused as charged. I reject the defence by both accused, find both guilty of the offence of murder as charged and convict both of them accordingly.

DATED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

LESIIT, J.

JUDGE.