



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 109 of 2006

REPUBLICPROSECUTOR

VERSUS

PETER MBUGUA MBOGO.....1ST ACCUSED

EVANSON NGANGA MBUGUA.....2ND ACCUSED

JOHN NDERITU KAMIRU.....3RD ACCUSED

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JUDGMENT

PETER MBUGUA MBOGO, EVANSON NGANGA MBUGUA, and JOHN NDERITU KAMIRU were charged with the offence of **MURDER** contrary to **section 203** as read with **Section 204 of the Penal Code**. They are said to have murdered **GEOFFREY NGOIYA MBOGO** on 11th September, 2006.

In an endeavour to prove the case, the prosecution called eleven (11) witnesses.

PW 1, Michael Nganga Ngoiya, testified that he was in the same car with his brother, Albert (**PW 6**).

When they reached the place next to their home at Waguthu, in Kiambu **PW 1** saw the three (3) accused persons on the road. According to **PW 1**, there were about five (5) people, including the accused persons. His evidence was that he identified them because the headlights of the vehicle were on.

When **PW 1** asked the first accused what was wrong, the said accused dared him to come out of the car, so that all those in the car could be finished.

According to **PW 1**, he was stabbed by the first accused, using a spear. He was stabbed on the head.

After **PW 1's** wife screamed, the deceased, who is the father to **PW 1**, rushed to the scene. **PW 1** saw the first accused stab the deceased, using the spear.

PW 1 did not see the third accused assault the deceased.

During cross-examination, **PW 1** admitted that in his written statement, he had indicated that he had seen four (4) people on the road. But he added that there were actually more people on the road. The four he cited, were those whom he recognised.

During the attack, **PW 1** was injured in the right eye, amongst other parts of the body. Subsequently, the injured eye had to be removed surgically.

The accused persons suggested that **PW 1** may not have been able to see clearly, as his eye had been injured. But **PW 1** was insistent that he had been able to recognise the accused persons before his eye was injured.

PW 2, John Ngige Njenga, rushed to the scene after he heard screams. He followed the deceased until the hospital, where the deceased was admitted.

According to **PW 2**, it was dark on the night of the incident.

PW 3, Samuel Kimani Ngoiya, was at home, when he heard the sound of his father's car. He then heard the car stopping before it reached home.

As he approached his father's home, he noticed that his father's vehicle was parked on the road. The vehicle was parked near the home of the first accused, who is an Uncle to **PW 3**.

PW 3 saw his father, (the deceased), lying down. The deceased had injuries on the head, neck, hands, the back and on both thighs.

PW 3 helped to take **PW 1**, **PW 6** and the deceased to the Kiambu District Hospital.

However, **PW 3** made it clear that he did not witness the assault on his father and on his brothers.

PW 4, Mbugua Mbogo, is one of the people who identified the body of the deceased, for purposes of post-mortem examination. **PW 4** is an older brother of the deceased.

PW 5, Peter Rugano Kuria, was 14 years old when he testified. Therefore, as at the date of the incident giving rise to this case, he was 12 years old.

On the material day, he was with his grandmother, Grace Muthoni Ngoiya (**PW 10**). When they were on their way, walking from the shops, towards home, **PW 5** saw the first accused hurrying past them.

PW 5 also saw the second accused passing by.

And as the path which **PW 5** and **PW 10** were about to take was dangerous, they decided to try and follow-up the two accused persons.

According to **PW 5**, the first accused entered into his house, and then came out with two items which were wrapped in a newspaper. One item was long, and the other one was short.

The first accused crossed the road, and called after his dogs. But **PW 5** did not see the third accused come out of his house.

Later, as **PW 5** was doing his homework inside **PW 10's** house, he heard the sound of his grandfather's car, arriving. Next, **PW 5** heard people shouting.

PW 5 followed his grandfather out of the house, to where they found the vehicle parked. As the lights from the vehicle were on, **PW 5** identified the three (3) accused persons, together with Benjamin Njoroge, Samuel Njuguna and Karumbi.

PW 5 saw the first accused spear the deceased on his chest. Meanwhile, the second and third accused were said to have attacked the deceased using pangas.

During cross-examination, **PW 5** said that there was moonlight on the material night.

PW 6, Albert Mbugua Ngoiya, is a brother to **PW 1**. He had accompanied **PW 1** who had gone to meet his wife (**PW 7**) from the shopping centre. The three (3) of them came back towards home, in the vehicle belonging to the deceased. The registration of the vehicle was given by **PW 5** as **KVF 178**.

When they got near the gate to the home of first accused, **PW 6** saw the following persons on the road;

- (1) Peter Mbugua – first accused
- (2) Evans Nganga – second accused
- (3) Benjamin Njoroge
- (4) Veronica Mugure
- (5) Kariuki Njuguna
- (6) Nderitu Kamiru – third accused.

Through the lights of the vehicle, **PW 6** noted that the first accused was armed with a spear, whilst the other men had pangas, save for Njuguna who had a slasher.

PW 6 said that he and **PW 1** were attacked with the spear and pangas.

PW 6 also saw the first accused, using a spear.

During cross-examination, **PW 6** said that he had not known of any disagreements between his late father and the accused persons, prior to the incident.

PW 6 said that although it was dark, there was moonlight.

PW 7, Catherine Njeri, used to sell fruits at Ngara, Nairobi. On the material day, she sold fruits as usual, and left Ngara at about 7.30p.m. She boarded a matatu, and also phoned her husband (**PW 1**) to collect her from Muchatha.

PW 1 and **PW 6** went in their father's car, to pick up **PW 7**.

Near the home to the first accused, **PW 7** saw more than 5 people standing on the road. She identified four (4) of those people, as the first and second accused, together with Samuel Njuguna and Benjamin Njoroge.

The first accused had a spear, whilst the others had pangas.

According to **PW 7**, she did not see the third accused at the scene.

The persons on the road attacked **PW 1** and **PW 6**, causing **PW 7** to scream. Her screams attracted the deceased. When the deceased arrived at the scene, **PW 7** saw him being assaulted by the first accused.

The witness identified the deceased as **GODFREY NGOIYA**.

PW 8, Dr. Zephania Kamau, examined the first accused. He assessed his age at 56 years.

The doctor noted injuries on his left fore-head, left elbow and on the left hand. The first accused informed the doctor that the scars were from injuries which the deceased inflicted on him, on the material day.

PW 8 also examined the second accused, who complained of pain in the right ear, and headaches on the right side of his head.

The doctor also examined the third accused. His age was given as 33 years. He had scars on the left eye-brow and on the left cheek-bone. He said that he had been attacked by two men, namely Samwel Kimani and Leonard Njoroge. The alleged attack was on 30th September 2006.

When **PW 8** examined **PW 1**, he found that he had a scar on the fore-head. **PW 1**'s right eye had been removed at the Kenyatta National Hospital, following an assault on him.

And when **PW 8** examined **PW 6**, he found that the witness had a scar on either side of his head, as well as on the forearms.

PW 9, Dr. Johansen Oduor, is a pathologist, working at the office of the Chief Government Pathologist. He produced the post-mortem report prepared by Dr. Ndiangui.

The report showed that the deceased had multiple injuries, on the upper lip; the right cheek; and on the frontal part of the face.

He had a fracture of the skull and multiple superficial bruises. The cause of death was the head injuries with multiple cut wounds.

PW 10, Grace Muthoni Ngoiya is the widow. On the material day, she was at their local shopping centre, in the company of her grandson, **PW 5**.

PW 10 saw Peter (the first accused) and Evanson (the second accused) pass by. The two of them emerged from different directions. But they went towards home.

When **PW 10** next saw the 1st accused, he was holding something long, which was concealed in a newspaper.

PW 10 and **PW 5** entered their home.

Later, when there were screams outside, **PW 10, PW 5** and the deceased went out. **PW 10** walked slowly, behind the other 2. By the time she reached the scene, only **PW 7** and the deceased were present. The deceased had blood all over his body.

Later, the deceased was taken to Kiambu District Hospital.

During cross-examination, **PW 10** said that prior to the fateful day, there had been no enmity between the family of the deceased and the family of his step-brother, who is the first accused herein.

However, **PW 10** said that the children "did not rhyme."

PW 11, Ag. Inspector Gesana Kiribu, produced the O.B. from the Karuri Police Station, for the period between 22nd August 2006 and 4th October, 2006.

The officer brought the original Occurrence Book, together with copies of the same. After the defence counsel compared the copies to the original, the court released the original back to the officer, for safe-keeping.

Although the O.B. was produced at the request of the first and second accused persons, they did not

raise any issues about the contents of the reports.

After the accused persons were put to their defences, the first and second accused persons gave unworn testimonies whilst the third accused gave a sworn defence.

The first accused said that he had a brother named Godfrey Ngoiya Mbogo, whose home was 20 metres from his.

He said that Godfrey was not just a brother but also a good friend.

On 11th September 2006, the first accused said that at about 8.00p.m, he was waiting for his wife, who had gone to the market, to buy foodstuffs.

DW 1 heard a vehicle stop outside his gate, and went out to check on it. He heard his wife's voice calling out for help, saying that she was being beaten.

When he reached out, he saw **PW 1** kicking the basket which his (**DW 1's**) wife had been carrying. **DW 1** also saw **PW 6** fighting with the second accused.

According to **DW 1**, there were about four (4) other people at the scene, although he did not recognise them. When **DW 1** inquired what was happening, he was attacked by one of the 4 people. He ran away, back to his house.

On the next day, he reported the incident at Karuri Police Station, but he was locked up. He was shocked to learn that his brother, Godfrey was dead.

The second accused (**DW 2**) is a son to **DW 1**. He used to operate a shop which was within his father's compound.

On the material night, he saw **PW 1** and **PW 6** attacking his mother, who had just come from the market. **PW 1** and **PW 6** had come out from their car, when **DW2's** mother as walking along the road. They stopped their car, alighted, and attacked her.

DW 2 went to rescue his mother, and attacked **PW 6** with blows and kicks. Then **DW 1** arrived and attacked **PW 1**.

DW 2 went to Kiambu Police Station, to report. However, as his shirt had some blood stains, the police locked him up, suspecting that he was a thug.

On the next day, **DW 2** was shocked to learn that Godfrey Ngoiya Mbogo, his Uncle, was dead.

The third accused (**DW 3**) said that on 11th September 2006, he heard **PW 1** exchanging insults with **DW 1** and **DW 2**.

According to **DW 3**, the deceased (Godfrey) was also present.

DW 2 slapped **DW 3**. Because of the slap, **DW 3** went to report at Karuri Police Station. All these happened on the morning of 11th September 2006.

Later that evening, at about 8.00p.m. **DW 3** heard **PW 1** calling out to the first accused, daring him to go and kill them. Thereafter, **DW 3** heard a lot of noise as a fight erupted outside their gate. He did not leave his house.

On 30th September 2006 **DW 3** was taken to Karuri Police Station, by **PW 3** and his friend Njoroge Kimiri. They blamed him for recording a statement which those 2 considered to be bad for their case.

But on 2nd October 2006, **PW 10** asked the OCS, Karuri Police Station, to set him free. As a result, **DW 3** was set free, on the following day.

PW 10 did confirm, in her evidence, that she secured the release of **DW 3**.

On 14th November 2006, **DW 3** was re-arrested when he went to “finish recording” his statement.

DW 4, James Njoroge Karuri, testified on behalf of, or as a witness for the third accused.

He is a brother to that accused. He was present at the Karuri Police Station when **PW 10** asked the OCS to release **DW 3**. It was the evidence of **DW 4** that **PW 10** told the OCS that **DW 3** was not involved in the murder of her husband, Godfrey.

DW 4 added that **DW 3** was released by the police, 10 days after the murder. However, he was re-arrested about 14 days after that.

After **DW 4** testified, the defence closed their cases. I thereafter summed-up the evidence for the assessors. After giving due consideration to the evidence tendered, the assessors returned a verdict of “Not Guilty” for all the three accused persons.

This court has evaluated all the evidence on record. I have also taken note of the verdict pronounced by the assessors. I now make the following findings;

(a) The accused persons were not strangers to the family of the deceased. Most of them were close relatives. They also

lived in close proximity to one another.

(b) Whilst **PW 2** testified that it was a dark night at the material time, both **PW 5** and **PW 6** said that there was moonlight.

(c) **PW 1** testified that the vehicle in which he had been travelling together with **PW 6** and **PW 7** had the registration number **KBF 178**. However, **PW 6** gave the registration as **KVF 178**. The difference in the said registration number remained un-explained throughout the trial. As the vehicle belonged to the father of those two witnesses, it is strange that they did not cite the same registration number.

(d) According to **PW 1**, there were about five (5) people at the scene. The three (3) accused were part of that group.

PW 5 saw six (6) people, including the three (3) accused. The other three (3) people included Benjamin Njoroge, Samuel Njuguna and Karumbi.

PW 6 saw six (6) people, including the three (3) accused. The other three (3) included Benjamin Njoroge, Veronica Mugure and Kariuki Njuguna.

In other words, although both **PW 5** and **PW 6** saw six (6) people, the identities of those people was not the same.

(e) **PW 1** said that the 3rd accused did not assault the deceased, but **PW 5** said that the said 3rd accused also assaulted the deceased.

On her part, **PW 10** exonerated the 3rd accused from any role in the murder.

In effect, from the testimony of the prosecution witnesses, there was doubt about the involvement of the 3rd accused in the murder of the deceased.

(f) The number of persons who were at the scene of crime; their identifies and the roles they played are not clear, from the evidence tendered.

(g) The registration number of the motor vehicle in which **PW 1, PW 6** and **PW 7** had been travelling in, immediately before the incident is not clear.

(h) None of the prosecution witnesses led any evidence to show that the accused persons had any reason for wanting to attack the deceased. They said that there had been no grudges or grievances between the family of the deceased and the accused persons.

(i) The deceased was said to have been attacked when he went out from his home, to go and intervene in the scuffle involving his children and the accused persons. It therefore appears that the deceased was not targeted.

(j) In the O.B. Number 3/11/9/2006, the name of the deceased was cited as GODFREY NGOIYA MBOGO. However, the accused persons are said to have murdered GEOFFREY NGOIYA MBOGO: that is the name cited in the Information containing the charges which were levied against the accused persons.

The Post-mortem report indicated that the deceased whose body Dr. Francis M. Ndiang'ui examined at the City Mortuary, was GODFREY NGOIYA MBUGU.

(k) In effect, there were three (3) sets of names. The prosecution did not lead any evidence or submissions to explain the discrepancies between the 3 sets of names. It is thus not even clear what are the correct names of the deceased.

The accused persons were charged with the murder of someone other than the person whose body was examined post-humously, by the pathologist.

(l) When Dr. Zephania Kamau examined the three (3) accused persons, he found that each had sustained injuries. Those injuries are consistent with the defences of the 1st and the 2nd accused persons, who testified that they had been attacked by the sons of the deceased, on the material night.

That suggests that there might have been a fight involving the 1st and 2nd accused, on the one hand, and the sons of the deceased on the other hand.

In other words, there was no pre-meditated attack on the deceased.

For all those reasons, I find and hold that the prosecution failed to prove, beyond any reasonable doubt, that the deceased was murdered by the accused persons. I am in agreement with the verdict returned by the Assessors, that the accused are Not Guilty.

Accordingly, the charge against each of them is dismissed. I acquit the accused persons, and order that they be set at liberty forthwith unless they are or any of them is otherwise lawfully held.

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FRED A. OCHIENG
JUDGE

Dated, Signed and Delivered at Nairobi, this 20th day of May 2013.

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A. M. MSAGHA
JUDGE