



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL CASE NO. 69 OF 2009

REPUBLIC.....PROSECUTOR
VERSUS

BENSON MWANGI MBURU.....1ST ACCUSED

MERCY WANJIRU NDUNGU.....2ND ACCUSED

MARTIN KANGETHE MWANGI.....3RD ACCUSED

J U D G M E N T

Benson Mwangi Mburu, Mercy Wanjiru Ndungu and Martin alias Ng'ethe Wakari alias Ngethe Mwangi Katonye, being the 1st, 2nd and 3rd Accused persons are before this court on the information of the Honourable Attorney General dated 19th December 2008 to face a charge of Murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the offence are that on 23rd November 2008 at Muthithi Location in Murang'a south, within Central Province, the three accused persons jointly with others not before court murdered John Ngugi Mwaniki.

The prosecution's case is supported by the evidence of eight (8) witnesses. Mary Muthoni (P.W.3), the deceased's mother told this court that on 23rd November 2008, she was at home when Mercy Wanjiru, (2nd accused) in company of Benson Mwangi (1st accused), Ng'ethe Wakari (3rd accused) and others visited her homestead. It is the evidence of Mary Muthoni that Mercy Wanjiru, demanded for her to get out of the house. When she got out of the house, P.W.3 said she saw Benson Mwangi (1st accused) and Martin Kangethe (3rd accused), holding John Ngugi Mwaniki, deceased. P.W.3 alleged she was told by the 2nd accused that the deceased had stolen her galvanized pipes worth Ksh.200,000/=. P.W.3 alleged that the 2nd accused told her to pay her the money in order for her to save the life of the deceased. P.W.3 stated that the accused persons assaulted the deceased with wood and clubs when she told them she had no money. P.W.3 claimed that she pleaded with the 2nd accused in vain to give her time to enable her sell a portion of her land to raise the money. P.W.3 said she reported the incident to Kegode Police patrol base. In cross-examination P.W.3 admitted that she told the Police that she was called out by some boys. It became apparent that P.W.3 did not tell the Police that the 2nd accused was the one who called her. P.W.3 further admitted that the allegation that the deceased was beaten outside her house was missing from the statement she recorded with the Police. It further became apparent from P.W.3's

statement recorded at the Police Station that she did not state that the 2nd accused had hired some youths to eliminate the deceased for stealing her pipes. Mary Muthoni also told this court that when the police arrived they followed the direction the crowd took while she remained at home. Her statement recorded with the Police indicates that she closely followed the Police to *Ngaburi Trading Centre* where he saw the Police carry the naked body of her son. Eunice Muthoni (P.W.5), a daughter-in-law of P.W.3 told this Court that she was in her house on 23rd November 2008 when at 7.00 p.m. she heard the 1st, 2nd and 3rd accused persons and some people calling out the name of her mother-in-law (P.W. 3). P.W.5 claimed she heard those people telling P.W.3 that they had brought the deceased to P.W.3 in order for her to pay the 2nd accused a sum of Ksh.200,000/= being the value of the pipes the deceased is alleged to have stolen from the 2nd accused. P.W.5 claimed she heard P.W.3 tell them to take the deceased to the Police. She further averred that she heard the 2nd accused tell the 1st and the 3rd accused to do the job they were hired to do. P.W.5 said she saw the trio assault the deceased before taking him to *Ngaburi Trading Centre*. It is the evidence of P.W.5 that the accused persons were armed with clubs. In cross-examination, P.W.5 stated that she recorded in her statement with the Police that at the material time she was with her parents-in-law (i.e. P.W.3 and P.W.6). She said the recorded statement was not true because they each live in separate houses. Mwaniki Njoroge (P.W.6), the deceased's father, told this court that on 23rd November 2008, the 2nd accused sent her grandchild to summon him to meet her. P.W.6 said he went and met the three accused persons. The trio were allegedly holding the deceased. Mwaniki said he was told to pay to the 2nd accused Ksh.200,000/= for the pipes allegedly stolen by the deceased so that the deceased could be released. P.W.6 said he saw seven (7) people holding the deceased. P.W.6 told the 2nd accused to report her complaint to the Police. Mwaniki claimed he overheard the 2nd accused tell those holding the deceased to complete the job they were given. P.W.3, P.W.5 and P.W.6 claimed they each saw the 1st and 3rd accused persons armed with sticks. P.W.6 booked a report with Muthithi Police post before leaving for his home. In cross-examination, it emerged that P.W.6 did not record with Police that the accused persons were armed with sticks and neither did he say he saw them assault the deceased. Corporal Vincent Dado (P.W.4) said that on 23rd November 2008 he received a phone call from a member of the public informing him that the deceased had been hijacked by members of the proscribed Mungiki sect. P.W.4 mobilized other Police officers to visit *Ngaburi Trading Centre* where the deceased was being held. On their way, the Police met P.W.3. Before entering the trading centre, the police encountered a group of youths gathered outside a bar within *Ngaburi Trading Centre*. The Police took cover to observe what was happening. P.W.4 said they saw someone lying down while being surrounded by a group of about ten people. Some were holding that person while others were kicking. At this juncture, P.W.4 said the Police fired in the air. People ran for their dear lives. P.W.4 managed to arrest one suspect i.e. Benson Mwangi Mburu (1st accused) who was holding a club. The Police took that suspect and the victim to the police post. The duo was handed over to the O.C.S. Maragua Police Station. P.W.4 said he witnessed the 1st accused assault the deceased. P.W.4 said the deceased's mother, Mary Muthoni (P.W.3) did not mention the names of the suspects. C.I.P. Stephen Kavita (P.W.8) stated in Court that he took over the investigation of the case from Maragua Police Station. P.W.8 stated that the recorded statement indicates that the deceased was murdered by members of the Mungiki sect. P.W.8 alleged that upon interrogating the witnesses, they confirmed that two of the suspects (i.e. 1st and 3rd accused) were members of the proscribed sect and that they had been hired by the 2nd accused. P.W.8 produced the stick allegedly used by the 1st accused as an exhibit in evidence. The stick was examined by the Government Chemist and was found with no blood stains. Dr. Chris Kimathi Mugambi (P.W.1) did a post-mortem on the deceased's body and formed the opinion that the cause of death was severe head injury secondary due to a blunt force trauma.

The accused persons each testified without summoning the evidence of independent witnesses. Benson Mwangi Mburu (D.W.1), the first accused, denied committing the offence. D.W.1 claimed that on the material date he was playing pool in a joint at *Ngaburi Trading Centre*. While playing pool, D.W.1 said, he heard screams. He came out and saw a huge crowd gathered outside the bar. Shortly D.W.1 heard gunshots rent the air. A stampede occurred, D.W.1 fell down and that is when D.W.1 was arrested by Police. The 1st accused said he did not know the deceased. He denied being in possession of sticks. Mercy Wanjiru Ndungu (D.W.2) also denied committing the offence. She said that on 23rd

November 2008, she attended church and came back to do her house chores. At 8.00 p.m. she claimed she was visited by many people who ordered her to open her door. D.W.2 claimed those people forced her to accompany them to the home of the deceased where they found a group of over thirty people gathered outside that homestead. She claimed those people whom she did not know inquired from her whether she was the one whose water pipes had been stolen six months ago. D.W.2 further stated that she had reported to Muthithi Police post about the loss of her pipes. She alleged that the deceased confessed to the crowd having stolen her pipes. D.W.2 said she did not witness anyone assault the deceased. She said the crowd took the deceased to the Police Station upon the request of the deceased's father. She did not accompany those people whom she described as Mungiki adherence to the police Station. She said she went back home where she was arrested the next day. Martin Kang'ethe Mwangi (D.W.3), too, denied the offence. He said the deceased was his neighbour. D.W.3 stated that on 23rd November 2008 he was in Maragua selling second hand clothes. He came back home at 9.00 p.m. In the morning D.W.3 claimed he was informed by a friend of his that the deceased had been taken to the police Station by a mob before his arrival from Maragua. He said he was later arrested at *Ngaburi Trading Centre* as a suspect for the deceased's murder.

At the close of the evidence learned counsels from both sides were invited to make their final submissions. It is the submission of Mr. Njuguna Kimani, learned advocate for the 1st and 2nd accused persons that the prosecution's case was not proved beyond reasonable doubt. The learned advocate pointed out that there were glaring gaps in the prosecution's case which cannot sustain a conviction as against the 1st and 2nd accused persons. It was pointed out that the person who took the blood samples to the Government Chemist for analysis was not summoned to testify and no satisfactory explanation was given why he was not summoned by the prosecution. Mr. Kimani further argued that there was no evidence placing the 1st accused at the scene of crime. Mr. Mwangi, learned advocate for the 3rd accused was of the view that the prosecution had failed to tender evidence linking the 3rd accused with the offence. Miss Ngalyuka, learned Senior State Counsel was of the view that the prosecution had tendered sufficient evidence establishing the case against each accused person beyond reasonable doubt. It is her submission that the three accused persons were placed at the scene of crime and that they participated in the commission of the offence.

I have carefully considered the evidence and the submissions presented by both sides. In order for the offence of murder to be established, the following ingredients must be established. First, the element of *actus reus*.

Secondly, there must be proof of malice aforethought on the part of the accused persons.

On the first ingredient, there is no doubt that John Ngugi Mwaniki, passed away on 24th November 2008. Dr. Chris Kimathi Mugambi (P.W.1), the witness who did the postmortem testified and produced the postmortem report as an exhibit in evidence. In the postmortem report, P.W.1 indicated that the deceased suffered the following injuries:

- ***Bruised anterior chest wall.***
- ***Bruised left shoulder and forearm.***
- ***Bruised left and right shin and knees.***
- ***Blood oozed from the scalp.***
- ***Right temporal parietal haematoma.***
- ***Right temporal skull fracture.***
- ***Bilateral subdural haematoma.***

The Pathologist formed the opinion that the deceased died as a result of head injury secondary to blunt force trauma. It is therefore clear that the deceased died as a result of injuries inflicted on him. He did not die of natural causes but was injured prior to his death. The question which must be answered is who inflicted those injuries upon the deceased. The prosecution has alleged that those injuries were inflicted by the three accused persons. The accused persons have denied doing so. Mary Muthoni (P.W.3) was categorical that on 23rd November 2008 the three accused persons in company of others visited her home. She said she saw the 1st and 3rd accused holding her son, the deceased. It is the evidence of P.W.3 that when she inquired from them as to why they were holding her son as a captive, Mercy Wanjiru (2nd accused) stepped forward and told her that the deceased had stolen her pipes and that she had come to demand that she be paid Ksh.200,000/= being the value of those pipes. P.W.3 stated that those people began to assault the deceased when she told the 2nd accused that she had no money at that time. She pleaded in vain to the 2nd accused to spare the life of the deceased as she looked for the money. P.W.3 alleged that she saw the 1st and 3rd accused assault the deceased using clubs and wood. In cross-examination, P.W.3 stated that the 1st and the 2nd accused are people whom they live in the same village, hence they are persons well known to her. Eunice Muthoni (P.W.5), P.W.3's daughter-in-law stated that she was at home on 23rd November, 2008 when at 7.00 p.m. she heard voices calling out the name of P.W.3. P.W.5 claimed she heard them tell P.W.3 that they had arrested the deceased because he had stolen the 2nd accused's pipes. P.W.5 said Mercy Wanjiru (2nd accused), Benson Mwangi (1st accused), Ngethe Wakari (3rd accused) were armed with sticks. She also claimed that she heard those people demand to be paid Kshs.200,000/= as compensation for the 2nd accused's stolen pipes. P.W.3 further alleged that the 2nd accused told the 1st and 3rd accused persons to do the job they were hired to do when P.W.3 told them to take the deceased to the police. P.W.5 said that she saw the accused persons assault the deceased while P.W.3 went to report to the police. This witness further alleged that she saw the accused take away the deceased towards the nearby shopping centre. In cross-examination, P.W.5 stated that it was getting dark but she was able to see 20 Metres away. In her statement recorded with the police, P.W.5 stated she was at home with her mother-in-law (P.W.3) and her father-in-law (P.W.6). She alleged that her statement was wrong in that her father-in-law was not with them. The other crucial witness in this case is Mwaniki Njoroge (P.W.6), the deceased's father. He told this court that on that particular day he was summoned by his first wife (P.W.3) to rush home.

On reaching home he met the 1st, 2nd and 3rd accused persons holding the deceased. He was told by the 2nd accused to pay Kshs.200,000/= to enable them release the deceased. P.W.6 said that he heard the 3rd accused tell the 1st, 3rd and others to do the job they were hired to do when he told her to take the deceased to the police and that he did not have the money. In cross-examination, P.W.6 stated that the trio was armed with sticks and that he saw them assault the deceased. P.W.6 claimed the people who held the deceased were members of the Mungiki Sect. P.C. Mohamed Abdi Mohamed (P.W.7) was among the police officers who pursued those people who were holding the deceased. P.W.7 claimed those people were members of the Mungiki Sect. The police took cover and Corporal Vincent Dadho (P.W.4) managed to arrest the 1st accused. P.W.4 said the 1st accused was armed with a rungu at the time of arrest. The Prosecution did not tender any evidence on how Benson Mwangi (1st accused) and Mercy Wanjira Ndungu (2nd accused) were arrested. According to the evidence of P.C. Mohamed Abdi Mohamed (P.W.7), the 3rd accused was arrested on the basis of a report made to Maragua Police Station. P.W.7 was categorical that he was not arresting officer. P.W.7 also stated that he did not see the 2nd accused at the scene of crime.

It is the evidence of P.W.7 that the 2nd accused was arrested because witnesses had mentioned her name. The 2nd accused avers that she was arrested at home on 24th November, 2008 and that the police did not give her the reasons for her arrest. There is no doubt that P.W.3, P.W.5 and P.W.6 are members of the family of the victim. The evidence of those witnesses place all the three accused persons at the scene of crime. It is stated by the prosecution witnesses that the police managed to arrest the 2nd and 3rd accused persons on the basis that their names were mentioned to the police. Unfortunately, the arresting officer from Maragua Police Station was not summoned to testify. The prosecution was enjoined to establish

beyond reasonable doubt that the 2nd and 3rd accused were at the scene of crime and that the police officer who recorded the first report at Muthithi Patrol Base testified to clarify that indeed, the names of the 2nd and 3rd accused persons were mentioned by P.W.3. That piece of evidence was a crucial link to place the 2nd and 3rd accused persons at the scene of crime. Some serious doubt has been created in my mind. I will give the 2nd and 3rd accused the benefit of doubt.

In short, there is no clear evidence that the 2nd and 3rd accused persons participated in assaulting the deceased. According to the evidence of P.W.4, those involved in assaulting deceased were about 10 people. P.W.4 was categorical that P.W.3 did not give him the names of the suspects. P.W.7 also confirmed that the 2nd accused was not at the scene of crime when the police visited *Ngaburi Trading Centre*. I have taken the trouble to critically analyse the evidence linking the 2nd and 3rd accused persons with the offence of murder and found the same to be wanting because of the Prosecution's failure to fill the gaps as required by their mandate.

Let me now turn my attention to the evidence presented against Benson Mwangi Mburu the 1st accused. There is no doubt that the evidence P.W.4 places the 1st accused at the scene of crime. He was arrested at *Ngaburi Trading Centre*, when the police went to pursue those people were holding and assaulting the deceased. Corporal Vincent Dadho (P.W.4), a police officer who by then was attached to Muthithi Police Patrol Base told this court that on 23rd November, 2008, he and other colleagues pursued a gang of people alleged to be members of the Mungiki Sect and upon reaching *Ngaburi Trading Centre*, they took cover when they saw a group of people gathered. P.W.4 said he managed to see the Benson Mwangi Mburu assault the deceased with a rungu in his possession. The police fired in the air. P.W.4 managed to arrest the 1st accused who was in the process of escaping from the scene. He was then taken to police custody. The police took possession of the rungu recovered from the 1st accused. That rungu was later produced as an exhibit by C.I.P. Kavita (P.W.8). P.W.4 stated that he was able to see the 1st accused assaulting the deceased with the assistance of electric lights. I find that Benson Mwangi Mburu is placed at the scene of crime. I am also satisfied that he was seen assaulting the deceased at *Ngaburi Trading Centre*.

The evidence of the Government Pathologist indicates that the deceased died as a result of severe head injury secondary to blunt force trauma. The rungu which was produced as Pexh.4 could have been the blunt object used to inflict the head injury. I find the element of *actus reus* proved against the 1st accused.

The second element which must be established in order to prove the offence of murder is malice aforethought. The provisions of *Section 206* of the *Penal Code* enumerates the circumstances under which malice aforethought can be deemed to have been proved. First, where there is evidence that the accused had the intent to cause death or grievous harm.

Secondly, that the accused had knowledge that the act or omission causing death will probably cause death and such knowledge is accompanied by indifference.

Thirdly, an intent to commit a felony.

Fourthly, an intention the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

I have carefully considered the evidence tendered and I find that none of the above ingredients were established against the 1st accused. Perhaps the third ingredient could have pinned down the 1st accused but the post-mortem report tends to exonerate him in the sense that the deceased did not suffer a single blow. There is evidence that the deceased was assaulted by many people. The post-mortem report shows that the deceased suffered injuries on the chest, shoulder, forearm and knees. There is no clear evidence that the 1st accused intended to cause death or grievous harm. In the circumstances of this case, I find that the offence of murder was not proved. I am however satisfied that the offence of manslaughter under

Section 202 of the *Penal Code* was established. The 1st accused is convicted for the offence of manslaughter.

In the end, Mercy Wanjiru Ndungu (2nd accused) and Martin Kang'ethe Mwangi alias Ng'ethe Wakari alias Ng'ethe Mwangi Katonye are hereby found not guilty. They are acquitted hence they should be released forthwith from custody unless lawfully held.

Pursuant to the provisions of *Section 179(2)* of the *Criminal Procedure Code*, I convict Benson Mwangi Mburu for the offence of Manslaughter contrary to *Section 202* as read with *Section 205* of the Penal Code.

Dated and Delivered this 15th day of February, 2012.

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J. K. SERGON
JUDGE