



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Case 47 of 2006

REPUBLIC.....PROSECUTO

R

VERSUS

STEPHEN MWANGI WAITHAKA.....1<sup>ST</sup>

ACCUSED

JOHN KAROKI NJAKIO.....2<sup>ND</sup>

ACCUSED

JUDGMENT

The two accused persons, Stephen Mwangi Waithaka and John Karoki Njakio (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> accused) are jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 12/6/2006 at Stadium area in Nanyuki, Rift Valley Province, murdered Robert Kinyua. Both accused persons denied the offence.

The prosecution in support of its case called a total of four witnesses. Both accused persons gave sworn evidence in their defence and the first accused called one witness.

The brief facts of this case are as follows: Simon Kariuki (PW1) was in his house on 12/6/2006 at about 9.00 p.m. when he heard noises outside. He went out, found fellow tenant Mwema. The 1<sup>st</sup> accused who was his landlord was also outside with his wife. He noticed somebody seated near the water tap; whom the 1<sup>st</sup> accused alleged that the person tried to steal his goats. PW1 said that the 1<sup>st</sup> accused was armed with a panga and club (rungu) and hit the person at the tap on the head asking why he came to the plot. The man claimed to have come to look for one Boniface. The 1<sup>st</sup> accused handcuffed the man and threatened to kill him despite the tenants telling him not to. The 1<sup>st</sup> accused told the tenants that there were other people with the stranger were outside the compound but PW1 did not see the other people. The 1<sup>st</sup> accused took the person outside the compound. The tenants called both the police and chief but they did not come. PW1 went to sleep. Next morning, he found that the said person outside the compound and was dead. PW1 said that the incident took about 2 hours, and there were no electric lights outside but there was moonlight. He said that the deceased was drunk and did not have anything in his possession except tobacco. PW1 denied having taken part in beating the deceased nor did other tenants of the plot except the 1<sup>st</sup> accused.

PW2, Charles Mungaria, a brother to the deceased identified the deceased's body to the doctor on 4/7/06 for purposes of post mortem. P3, Dr. Mathaiya Njau of Nanyuki District Hospital performed post mortem on the deceased. He found that the deceased had a penetrated sharp wound on the forehead, bruises to the chest wall, a fractured mandible which was separated from the main jaw, the body had suffered severe blood loss, a fracture of the frontal bone, front bone of the head, intra cranial haemorrhage, injury to the brain following the penetrating wound. The Doctor formed the opinion that the cause of death was brain injury with intracranial haemorrhage. The post mortem report was produced in evidence as PEx.1. He also examined the 2<sup>nd</sup> accused persons and found him to be fit to plead while the 1<sup>st</sup> accused was examined by Dr. Mukuhi who also found him to be fit to plead (PEx.2 & 3).

PW4, David Milimo Kikalaba is the Assistant Chief of Thingiru Sublocation in Nanyuki. He recognized the two accused as residents of his sub-location, and the 2<sup>nd</sup> accused was a village elder. PW4 received a report of robbery at about 10.00p.m. and that a suspect was arrested and was being beaten. He could not go to the scene because of insecurity in the area. He made the report to the OCS of Nanyuki Police Station. He said one of those who called him was one Salima Ibrahim (DW3). The next day before he went to the scene, he received a call that the suspect had been killed. When PW4 arrived at the scene, he found the deceased had injuries to the head, stomach and there were many stones near him. He found some people at the scene including the 2<sup>nd</sup> accused but 1<sup>st</sup> accused was at his house which was nearby.

When called upon to defend themselves, both accused gave sworn statements and 1<sup>st</sup> accused called one witness, Salima Ibrahim, DW3. the 1<sup>st</sup> accused recalled that he was at home on 12/6/06, about 10.00p.m., he heard screams outside, they emanated from the kiosks which were about 100 metres away and people were shouting '**wezi**' meaning thieves. He went back to his house, heard a loud bang outside and dogs started to bark. Somebody entered the compound and on going to check, met a tenant, Mwema who informed him that there were suspicious people in the compound. He met one person whom he asked what he wanted there and the person started to abuse him. Tenants came out of their houses, started to interrogate the man, and the two men at the gate ran off. The man then ran to the toilet but was removed and taken to the road. The crowd was big and started to beat the person. They called the chief and the OCS but they did not come. When he went to call the OCS it took him about 25 minutes and upon return, he found the deceased already dead. The 1<sup>st</sup> accused denied killing the deceased. As regards PW1's evidence, 1<sup>st</sup> accused said that he had a grudge against him, because PW1's children used to steal from the 1<sup>st</sup> accused and he had reported the matter to the chief. He had wanted PW1 to move out of the plot. He woke up early on 13/6/2006, and went to the Police Station. PW1 told the tenants to shift because the plot would be burnt and he went to report the arson threats and that is when he was arrested and charged.

The 2<sup>nd</sup> accused, John Kariuki, told the court that he was a village elder. On the 12/6/2006, his workman went to buy sugar at 1<sup>st</sup> the accused's kiosk and on coming back, informed 2<sup>nd</sup> accused that he found the kiosk closed, there was a crowd and a dead body nearby. The 2<sup>nd</sup> accused went to inform the Assistant Chief, PW4. He went to the scene, found the body of a male person. Police came for the body and 14 days later police went to his house and asked him to go and write a statement. He denied having been present when the deceased was murdered.

Salima Ibrahim (DW3) said that she was in her house when she heard noises outside. The noise emanated from Mwangi's home. She went to see what was happening and found a crowd, called police to inform them that there were thugs there. She also called the Chief upon going to the scene she was told there had been thieves, two ran off and one caught. She said she did not go near the deceased because stones were being thrown from all directions.

The accused persons were represented by counsel, Ms Njoroge for 1<sup>st</sup> accused and Mrs Ndeda for 2<sup>nd</sup> accused. I have carefully considered all the evidence adduced by both the prosecution, the defences and the submissions by all counsel.

The 1<sup>st</sup> accused was PW1's landlord. They lived in the same plot. The deceased was found in 1<sup>st</sup>

accused's plot at about 9.00 p.m. on 12/6/2006 It was night and PW1 said, there was moonlight. PW1 talked with the 1<sup>st</sup> accused who told him that the deceased had come there to steal his goats. PW1 also told the court how the 1<sup>st</sup> accused's shout of 'thief' made him and other tenants to come out of their houses. The question of identification does not arise. According to PW1, other tenants did not beat the deceased except the 1<sup>st</sup> accused, who PW1 said kept hitting the deceased asking why he came to the plot. The next morning, the deceased was found outside the 1<sup>st</sup> accused's plot, dead and stones found near his body. It seems he was stoned too. Although DW3 claimed that by the time she went to the scene the deceased had long died she contradicted herself and said that she did not go near where the deceased because stones were being thrown. Even if other people stoned the deceased, the 1<sup>st</sup> accused who raised alarm that the deceased was a thief and he started assaulting the deceased. PW1 said that it is those who came from outside the plot who pelted the deceased with stones. Indeed stones were found next to the deceased's body (PW4). PW1 told the court that when searched the deceased only had some tobacco. He was not armed nor was he a threat to anybody to warrant all the violence visited on him. If indeed he was a suspect and could not explain his presence in that plot, the 1<sup>st</sup> accused should have had him arrested or handcuffed and detained him till the next day to be handed over to the authorities. The 1<sup>st</sup> accused and others had no right to take the law into his own hands and injure the deceased.

In his defence, the 1<sup>st</sup> accused alleged that he had disagreed with PW1 because PW1's children used to steal from him. The 1<sup>st</sup> accused was represented by counsel but at no time during the prosecution case and cross examination of PW1 did he make such allegation. Further although the 1<sup>st</sup> accused claimed that he had reported the dispute to the chief, no such question was put to PW4. Raising such allegations during the defence denied PW1 a chance to reply to them. I find that this line of defence was a mere afterthought and it is rejected as untrue.

The Doctor who conducted a post mortem on the deceased found a penetrating sharp wound on the frontal region of the forehead, bruises of the chest wall and the body was blood stained all over the mandible fractured and he had suffered a lot of blood loss. Internally there was a fracture to the forehead (bone) there was intra cranial haemorrhage and injury to the brain. He formed the opinion that the cause of death was brain injury with intra cranial haemorrhage. PW1 saw 1<sup>st</sup> accused armed with a panga, club and stones were found at the scene. These are weapons that could have caused the multiple injuries found on the deceased.

Was malice aforethought proved? Under **Section 206** of the **Penal Code** malice aforethought is defined as:-

**“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.”**

PW1 told the court that the 1<sup>st</sup> accused continued to hit the deceased despite the fact that the deceased was drunk and not armed. The 1<sup>st</sup> accused had even handcuffed the deceased. The deceased was therefore not a threat to anybody. The 1<sup>st</sup> accused even refused to call the person that the deceased denied he had

come to see i.e. one Boniface. The 1<sup>st</sup> accused was in a position to arrest the deceased in the state he was in even with the help of all those who came to the plot and hand him over to the police but did not. The 1<sup>st</sup> accused's actions formed the necessary ingredients for malice aforethought. He injured the deceased with intention of causing him grievous harm. By raising alarm he raised the wrath of the mob who inflicted the infamous '**mob justice**' on the deceased.

The defence counsel submitted that failure to call the investigation officer was fatal to the prosecution case, Mr. Nyakundi, counsel for the State was of a different view and referred the court to the case of **Silas Cristus Obura alia Professor v Rep CRA 102/07**. In the above case the Court of Appeal held that failure to call an investigating officer as a witness did not lead to an automatic acquittal but that it was good practice to call investigating officer and that each case had to be considered on its own special circumstances. Again in **Reuben Gitonga Nderitu Nderitu v Rep CRA 349/2007**, the Court of Appeal reiterated the position in the earlier case that it is not mandatory to call the investigating officer as a witness unless there is an allegation that he would have said something adverse to the prosecution case. The 1<sup>st</sup> accused's counsel raised issue with the prosecution's failure to call the investigating officer just because he should have come to explain why he charged the 1<sup>st</sup> accused. In my view, there is evidence on record sufficient to show why the 1<sup>st</sup> accused was charged even in the absence of the investigating officer's evidence.

In **Bwaneka v Uganda (1967)EA 768**, the court observed that it was the duty of the prosecution to call the police officer who investigated the case and that failure to do so was unsatisfactory. It was not held that it was a mandatory practice. Each case will depend on its own special circumstances.

**Section 143** of the **Evidence Act** provides that there is no particular number of witnesses required as proof any fact unless a provision of law specifically provides so. In this case, PW1 was the only witness to the incident. Other persons were the 1<sup>st</sup> accused's wife and another tenant. We were not told whether the tenant still lives in the same plot. Those who came from outside the compound were not known. DW3 said she did not go near because stones were being thrown all over and she did not see anything. The testimony of PW1 was clear, he confirmed to the court what he meant, those who threw stones were from outside the plot but not tenants of the 1<sup>st</sup> accused. I am satisfied that PW1's evidence was cogent and truthful.

The Investigating Officer was not called as a witness. There is no evidence adduced by the prosecution as to why the 2<sup>nd</sup> accused was in the murder of the deceased. The only mention of the 2<sup>nd</sup> accused is by PW4 who found him at the scene where the deceased's body lay on the next morning. The 2<sup>nd</sup> accused was not the only one there but there were other onlookers. There is no evidence that the 2<sup>nd</sup> accused was at the scene when the deceased was beaten. In his defence, he has explained what he did. It was the duty of the prosecution to demonstrate that the 2<sup>nd</sup> accused took part in the offence and had malice aforethought. The prosecution failed, to prove both '**mens rea**' and '**actus reus**' against the 2<sup>nd</sup> accused. I find no evidence connecting 2<sup>nd</sup> accused to the death of the deceased and he is hereby acquitted of the offence of murder under **Section 322(1)** of the **Criminal Procedure Code**.

In the end, I am satisfied beyond any doubt that the 1<sup>st</sup> accused was the one who arrested the deceased in his plot, started assaulting him on suspicion that he was a thief, and attracted other neighbours when he shouted that there was a thief. The man was unarmed and the 1<sup>st</sup> accused's actions cannot be justified. I find him guilty of the offence of murder contrary to **Section 322(2)** of the **Penal Code**.

As for 2<sup>nd</sup> Accused, the prosecution miserably failed to prove the case against him. He is acquitted of the offence of murder and is set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 18<sup>th</sup> day of June, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

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**PRESENT:**

Mr. Kairu holding brief for Ms Njoroge for the 1<sup>st</sup> accused

Mr. Wambayi holding brief for Mrs Ndeda for the 2<sup>nd</sup> accused

N/A for the State

Kennedy – Court Clerk