



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**ATMERU**

**Criminal Case 54 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PHILIP MURIUKI AMBAO.....1<sup>ST</sup> ACCUSED**

**JOHN MUTUMA M'ABURI.....2<sup>ND</sup> ACCUSED**

**BONFACE MUKARIA M'ARERIA.....3<sup>RD</sup> ACCUSED**

**JAMES GICUNUKU M'IMUNYA.....4<sup>TH</sup> ACCUSED**

**HARRISON MUSYOKA MATI.....5<sup>TH</sup> ACCUSED**

**JUDGEMENT**

The five accused persons Philip Muriuki Ambao, John Mutuma M'Aburi, Boniface Mukaria M'Areria, James Gicunuku M'Imuna and Harrison Musyoka Mati are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 16<sup>th</sup> day of August, 2008, at Antubetwe Kingo Location in Meru North District, in Eastern Province, jointly with others not before court murdered Jacob Kinyua.

The prosecution called seven witnesses. The facts of the prosecution case were that a group of people invaded the home of the deceased at about 2 am and set his maize crop which he had harvested and dumped on the compound in his home; his store for harvested food, and his kitchen on fire. They

also set upon the deceased and one Kalii Ikiugu, PW5 with pangas cutting them severely on various parts of the body. Police Officers among them PW2, were escorted to the scene by the wife of the deceased PW4, Grace. They found the deceased and Kalii still alive and they carried them to hospital. The deceased was declared dead on arrival at the Hospital. Kalii was however admitted and treated. At the hearing, Kalii had a paralyzed and stiff right hand and deformed shoulder due to injuries suffered during the incident. The P3 form filled in his respect was an exhibit in this case and revealed that PW5 suffered very severe injuries which left his right hand paralyzed.

The accused persons were all put on their defence. Each put forward an alibi as their defence. It was however not disputed that the 1<sup>st</sup> accused was the Sub- Area of the area where the incident occurred. It was also not disputed that the accused persons all came from that area and that they all knew the deceased before this incident.

I have considered the evidence which was adduced by both the prosecution and the defence. The accused persons are charged with murder. It is the duty of the prosecution to adduce evidence to prove its case against the accused persons beyond any reasonable doubt.

Section 203 of the Penal Code defines murder as follows:

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

The prosecution must adduce evidence to prove beyond any reasonable doubt that the accused persons committed an act; in this case, that they cut the deceased all over his body causing him deep cuts and fractures on the head, the upper and lower limbs; and that the injuries caused excessive bleeding which in turn caused the deceased death. Those injuries were the findings of the Doctor at post mortem as per the post mortem form.

There are five accused persons in this case all facing the same information. The prosecution has to show that the accused persons had formed a common intention to cause the deceased death or grievous harm, or had formed a joint intention to execute an illegal purpose in the execution of which the deceased suffered injuries from which he died. If such is proved, it matters not that only one or some of the persons in the common intention actually inflicted the injuries on the deceased. Each of them in the common intention will be considered to have committed the offence. Section 21 of the Penal Code deals with common intention and provides:

**“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.”**

The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197**, at page 204, considered the meaning 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 against 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 endeavours to effect the common object of the assembly... Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (Cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault Rep vs Tabulayenka s/o Kirya (1943) 10**

## EACA 51.”

The principles set out in the cited case and under section 21 of the Penal Code give guidance to this court on the bases upon which this case will be determined.

The case for the prosecution hinges upon the identification of the accused persons by Grace PW4, Kalii PW5 and Isaac Meme PW6. It also hinges on the dying declaration made by the deceased to his daughter Habiba Nkatha, PW3.

PW4, 5 and 6 were asleep within the compound when the incident occurred. PW4 was sleeping in the main house together with the wife of PW6, his step son and another. PW5 was sleeping in the store which was used as a granary for storing food harvested from the farm. PW6 was sleeping in a makeshift shed used as a kitchen and he was sharing that room with his father the deceased and a young man called Paul. The wife of PW5, one Paul and a woman who spent the night in same house as PW4 were not called as witnesses.

PW4 told the court that when the attackers invaded their home, they broke a window to the mud walled main house. She said that she peeped through the broken window and was able to identify four people with the aid of light from a huge fire which the attackers lit to burn the store, the kitchen and the harvested maize heaped in the compound. PW4 said that she saw Muriuki, the 1<sup>st</sup> accused, Muasi, identified as the 3<sup>rd</sup> accused, John, identified as the 2<sup>nd</sup> accused and Musyoki Njuguna who she identified as the 4<sup>th</sup> accused. PW4 said that she saw Gacunuku running away from the scene. She identified him as the 5<sup>th</sup> accused. PW4 stated that John, Muasi and Musyoka (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused) beat and cut up the deceased with pangas and rungu after Muriuki the 1<sup>st</sup> accused hit him once.

Regarding the identification of the accused persons by PW4 I found the following. When PW4 was pointing out the accused persons in court, and as she stated their names, the names she associated with them did not tally with those on the filed information. I will demonstrate. The one PW4 identified as Gacunuku is the 5<sup>th</sup> accused whose names as per the information is Harrison Musyoka Mati. The one she identified as Musyoka Njuguna was the 4<sup>th</sup> accused who as per the information is James Gichunuku M’Imunya. The person she identified as Muasi is the 3<sup>rd</sup> accused who according to the information is named as John Mutuma M’Aburi. There was therefore inconsistency between the persons identified by name in the evidence of PW4 and the names associated with them in the filed information. It is difficult to place any reliance on PW4’s evidence of identification given the glaring confusion in the names.

PW5 on his part identified only the 1<sup>st</sup> accused as the person he was able to recognize during the attack. PW5 testified that he was not able to identify the rest of the attackers and said the reason for that was because he did not know them before. PW5 was a victim of the attack and he therefore had a very close encounter with the attackers, yet he was only able to identify one person out of those he saw at very close quarters as they attacked him. It was important for the prosecution to establish whether PW5 had seen the 1<sup>st</sup> accused before this incident. PW5’s evidence was contradictory on this point. PW5 started by saying that he was new in the area and that he had gone to see the deceased for a job. He said he had never gone there before. Then regarding whether he had seen any of the accused persons before, PW5 said that he had seen him at the deceased person’s home on an earlier visit long before the date of the incident.

I was not impressed with the evidence of PW5 regarding whether he had seen the 1<sup>st</sup> accused before the material day. If he had seen him before then his evidence of identification could have been that of recognition. The principle applicable in such circumstances is well settled. I am guided by the case of **Cleaphas Otieno Wamunga Vrs. Republic 1989 KLR 424**, the Court of Appeal stated (which reinforces our finding) as follows:-

***“The 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 the 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. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery C.J. in the well known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg 552 where he said:*

*‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’ ”*

If he had not seen him before, then his evidence would have been that of dock identification which would be rendered worthless since the Police did not conduct identification parades for him to identify the 1<sup>st</sup> accused. This principle is demonstrated in the Court of Appeal case of **GABRIEL KAMAU NJOROGE -V- REPUBLIC [1982-88] I KAR 1134** holding 2 where the Court held:

**“a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”**

Regarding the quality of the evidence of PW5, I find him unreliable since he contradicted his own evidence and remained non committal whether or not he had seen the 1<sup>st</sup> accused before this incidence.

PW6 was a son of the deceased and was sleeping with his father and one Paul in the makeshift kitchen on the night of the attack. PW6 described the kitchen as made from twigs all round the walls and thatched with nylon plastic paper and grass. This witness said that he was very sick and throughout the attack he did not leave his corner where he was sleeping. He said that even after the kitchen was set on fire he remained on his corner.

PW6 said that from his corner he was able to see and recognize 3 people who entered the kitchen where he was in the cause of the attacks. He first gave the names of Muriuki Njuguna, and Muasi. He later changed and gave the names of John, Muasi and Njuguna. PW6 said that the three entered the kitchen to look for him because they heard his father calling him as he was being attacked. Despite giving their names, PW6 did not identify who he saw at the scene in court. His evidence as regards identification of the three people he saw at the scene is therefore worthless.

As regards the dying declaration the law as applies to this is settled. The Court of Appeal in the case of **MICHAEL KURIA KAHIRI -V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)** observed:

**“There is no doubt that the appellant’s conviction by the superior court was dependent on the deceased’s statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.”**

The deceased made a dying declaration as to the persons who injured him to PW3 after the attack. During the attack, PW 4 and 6 were at the scene and they claim they heard the deceased pleading for his life and calling out the culprits by name. PW3 said that she found her father severely injured lying outside their kitchen. PW3 said that her father was still conscious and was able to talk to her. PW3 testified that her father gave her names of four people who attacked him, and which people she claimed to know. She gave the names as Muriuki the Sub Area, Musyoka, John, and Mukalia alias Muasi. She identified these

people as the 1<sup>st</sup>, 5<sup>th</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused respectively.

PW3's statement to the police gave two names each of the accused persons. PW3 disowned the double names in her statement and said that she only gave the Police the single names her father had told her. It is clear that the Police interfered with the names given by PW3 in her statement. I will get back to this later.

PW4 was at the scene of the attack and her evidence is that she heard the deceased pleading with the attackers not to harm him. PW4 testified she heard the deceased saying

**“Muriuki don't kill me..... Muasi please don't kill me you are my neighbour, Njuguna and John don't kill me.”**

PW 6 was also at the scene at the time of attack. He too said that he heard his father calling out names of his attackers. PW6 testified that he could not recall all the names because he was very sick. He said that those he could recall were Muriuki, Njuguna, John, and Muasi.

The evidence of dying declarations should be treated with great caution. In this case, due to absence of reliable evidence to corroborate the dying declaration by the deceased, I have treated the evidence with great caution. PW3 was absent at the time of incidence. That means what the deceased told her was of great significance. PW3 said that the deceased gave her the name of one Muriuki the Sub Area. She told the court that she knew the Sub-Area both by name and by title. She spoke with her father face to face soon after the incident. He was conscious and able to talk. The fact he was conscious long after the attack was confirmed by PW2 and 7 Police Officers who were the first to visit the scene of incident soon after it happened. For the Sub-Area there is no likelihood of a mistaken identity both by the deceased who saw him at close quarters as he and others attacked him. There could not be a possibility of mistaking who the deceased meant by Muriuki the Sub-Area. The 1<sup>st</sup> accused was widely known by virtue of being the area Sub-Area. On the other hand I considered the circumstances of identification under which the deceased saw his attackers. There was a huge fire which aided the identification. From the evidence of eye witnesses the attackers were not in a hurry. They spent a considerable time burning structures and cutting up PW5 and the deceased. Unlike PW4 and 6, the deceased had a close encounter with the attackers. He also knew the 1<sup>st</sup> accused before. He therefore recognized the 1<sup>st</sup> accused rather than identify him.

I considered the identity of Muriuki the Sub-Area as described to PW3 by the deceased. I am satisfied that the statement of the deceased qualifies as a dying declaration. It was made at the point of death and it can be inferred that the deceased was driven only with the desire to say the truth about the identity of who caused the death of the deceased. I am satisfied that the evidence of dying declaration as against the 1<sup>st</sup> accused was strong, reliable and safe enough to sustain a conviction against him.

The other names mentioned by the deceased as narrated by PW3, 4 and 6 was unreliable and cannot be used to base a conviction. Reason for this is the fact he mentioned only one name. Apart from the name of the 1<sup>st</sup> accused and his title which together are capable of pinpointing the identity of the 1<sup>st</sup> accused without any possibility of a mistake, those of the others are different. Their names are common names-John, Njuguna, Muasi and Musyoki. They could refer to anyone. Without evidence that could give an assurance that the names could only be associated with the accused persons, the names are meaningless.

Regarding common intention, the evidence of eye witnesses is clear that the attack on the deceased was carried out by many people whose actual number could not be ascertained from evidence. Due to the amorphous evidence of identification regarding the other accused persons except the 1<sup>st</sup> accused, I find that the others who executed the attack with him remain unknown.

It is important to mention that the prosecution did not call other witnesses who were at the scene at the time of attack. Since an effort was made to bring many other eye witnesses, I will not draw an adverse inference against the prosecution.

For all the reasons I have given herein above, based on my findings as above, I have come to the conclusion that the prosecution was able to prove the charge against the 1<sup>st</sup> accused beyond any reasonable doubt. The charge against the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> accused was not proved. I give the four the benefit of doubt and acquit them for this offence. For the 1<sup>st</sup> accused, I find him guilty of murder contrary to section 203 of the Penal Code and convict him accordingly.

**DATED SIGNED AND DELIVERED THIS 7<sup>th</sup> DAY OF JUNE, 2012.**

**LESIIT, J  
JUDGE.**