



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 58 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

BENARD GITONGA.....ACCUSED

JUDGEMENT

The accused, Bernard Gitonga is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63, Laws of Kenya).

The particulars of the offence were that Bernard Gitonga on the 17th day of April 200 at Ciakariga Location in Tharaka District within Eastern Province murdered Stephen Kiria Mwenda.

Section 203 of the Penal Code prescribes that any person with malice aforethought causes the death of another person by unlawful act or mission is guilty of murder.

The ingredients for malice aforethought are set out in Section 2006 of the Penal Code and are 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 the death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not; although that knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, only a wish that it may not be caused;*
- (c) 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.*

If any of these grounds are found in the evidence preferred by the prosecution, then malice aforethought on the part of the accused would have been established. This was the evidence of the prosecution.

PW1 was **Maria Mukoruguru** the wife of the deceased. Her evidence comprises of the events of three

days, the 16th April 2006, the 17th & 18th April 2006.

The evidence of 16th April 2006 describes the visitation by the accused together with his brother, Njeru to the house of the deceased. They accused the deceased of being a bad man, a witch, who had refused to part with their land, and threatened to pull him out of his, but for the intervention of PW1 that they rather kill her, but not their uncle, her husband.

The accused and his brother kept vigil on the deceased house for a long time that night, and the presence of their wives and sister in the end persecuted him to leave the deceased home.

PW1 testified that she knew the accused and his brother as they were persons she lived with.

The second leg of PW1's evidence relates to events of 17th April 2006. Her husband, the deceased had gone to report the incident to the Ciakariga Police Post, but he returned home. PW1 was informed by terrified wananchi that Kiria also know as Stephen Kiria had been killed. She found the accused, his brother Njeru and one Muthomi Kirema at the scene with stones in their hands. They boasted to her that "she had denied them entry into her house the previous night, and that she could now go and report as her husband, the deceased, had died."

Although she was scared she reported the incident to Matiri A.P Camp but because one of the officers was sick, they asked her to go home, and return the next day. She never returned to her hut that evening, fearing the accused.

She spent the night at the home of Mwithi, a Village Elder.

The third part of PW1's evidence is that of 18.04.2006 accompanied by A.P from Matiri A.P Camp, they went to the scene of the murder, but only to find the deceased's body had been moved (by the accused and his a compliances) and had it buried in the bush in a place unknown to her.

Due to traveling distance, the body was not exhumed on 18-04-1006, until the next day when it was taken to the Meru District General Hospital Mortuary.

PW2, Benjamin Mwithi, a sub – area village elder of Ciakariga village corroborate the evidence of PW1, that PW1 went to his home on 18/04/2006, and informed him that the accused, and his brother Njeru had killed her husband. In the company of PW1 some Police Officers from Matiri Police Station and one Peter Kiira found the freshly dug grave. As a village elder, he went to the home of the accused, but found neither his brother Njeru nor the accused.

In cross – examination, PW2 testified that they found the grave upon following a trail of blood.

PW3 was Peter Kiura Kamwara. His evidence corroborated that of both PW1 and PW2. He was informed of the killing of the deceased, by the deceased's daughter, Teresa. He assisted in recovering the body by discovering a freshly dug grave. He informed the court that there was a dispute relating to land.

PW4 was Chief Inspector Rugut. He corroborated the evidence of PW1 as to the events of 17.04.2006. After receiving information from the area chief that a person had been killed and buried in a hill, he proceeded to the area and found that the deceased had been buried in a grave of 3 feet. As it was late, 7.00p.m they left the scene and obtained an order from Marimanit Court to exhume the body on 18th April 2006.

He testified that the body multiple head injuries caused by an object which they suspected to be a panga or sharp object.

PW4 testified that they launched investigations with a view to arresting the suspects who they came to learn were nephews of the deceased. The suspects had moved away from the home, and he accused was

not arrested until two months later (16.06.2006). His accomplices are still at large.

In cross – examination, by Gichunge, PW4 testified that the deceased was attacked along a path, killed and dragged to a hill for burial, about 1 km away from the scene of the killing.

PW5 was P.C. Charles Mutinda Maitha. He was at the Report Office on 17th April, 2006. He received a report from the deceased before his murder that “two guys” Bernard Mbanda Gitonga and Gitonga Mbanda had gone to his home the previous day (16.04.2006), armed with a panaga and a rungu threaded him and cut his roof of iron sheets. PW5 testified that since they were only five officers at the station, and three were patrol, he asked the deceased to go home and return the next day. The deceased never returned. In his place his wife (PW1) came and reported that her husband had been ambushed and killed by the same people. PW1 gave him the names of the same suspects.

PW5 emphasized that the deceased was desperate for assistance, and wanted the police to accompany him, firstly to see the damage and secondly to arrest the culprits. He produced a report (PEXh-1) which the deceased made.

PW6 was Dr. Isaac Macharia who testified on behalf of his colleagues Dr. Titus Muthaa who had carried out the post-mortem on the deceased’s body. The post-mortem revealed multiple deep cuts on the scalp extending down to the skull, with also multiple cuts on the face. The deceased also suffered fractures of the 3rd – 6th ribs, on the left of the chest, and had internal bleeding on the chest, deep massive scalp haematoma, multiple depressed skull and internal bleeding of the brain.

The prognosis of the post-mortem was that the deceased died of severe head injury caused by blunt object (trauma).

In cross-examination PW6 testified from the information given on the record of the post-mortem from that the deceased was beaten and secretly buried, and the body was later exhumed.

On being put to his defence, the accused testified that he did not know who killed the deceased. He made no mention of his visit to the deceased’s home on the night of 16th April 2006, together with his brother, Gitonga Band. His testimony was that he was in his shamba which is about 2km away from the deceased’s home, and had worked in his shamba the whole day with his wife till 7.00 p.m. He had met nobody on his way home, and that he heard of the deceased’s death the next day at about 11.00p.m. He denied any knowledge about the murder, and stated that PW1 (the deceased’s wife) lied in court because of a land dispute he and his family had with the deceased.

The accused complained about his detention for nearly six months without being brought to court.

When cross-examined by Mr. Kimathi, state Counsel, the accused denied that he had fled from the village for 21/2 months before he was arrested and also denied that his brothers had also disappeared from the village following the murder. The accused denied that deceased was his uncle, or had any other relationship with: and not even his neighbor. The accused told the court that his father never told him of any such relationship, and that even though he and the deceased’s children are friends, he had never known that they are cousins. The accused confirmed that he had a land dispute with the deceased, but that he and his brother never went to the deceased’s home on 16th April 2006.

The accused denied that he was a liar, and told the court he did not know where the body of the deceased was buried, and never joined the search for it as he concentrated on working on his shamba on 18th April 2006 as he was escorted to the shamba by his wife, and left there to tend goats. On being asked by Mr. Kimathi, State Counsel made oral submissions to the court.

For the accused, Mr Gichunge submitted that the prosecution witnesses saw the accused commit the offence.

PW1 testified that the accused and two other people murdered the deceased. None of the informers as known in the village were called to testify or recorded statements with the police. There was a land dispute, and the accused could be set up.

PW1 told the court that she rushed to the scene, but did not tell the court why the body disappeared, and was buried in the hill. That it means nobody was present at the time of the murder, otherwise the body could have been guarded until the Police came, that the accused were found at the scene and were not arrested, and this showed a frame up to settle a land dispute through other means.

Counsel submitted that therefore on those grounds, it was unsafe to convict the accused, and urged the court to give the accused the benefit of doubt and acquit him.

Those were the submissions by counsel for the accused. I will consider submissions by the State Counsel in my analysis of the evidence.

ANALYSIS OF THE EVIDENCE AND THE LAW As outlined at the beginning of this judgment, the accused is charged with the murder of the deceased. Murder is the unlawful causing death of another person, with malice aforethought. The prosecution must establish in evidence that the accused had malice aforethought. Malice aforethought is established where any one of the four elements set out in Section 206 of the Penal Code. To repeat, those elements are either:

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

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

(c) intent to commit a felony;

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

The question here is whether the prosecution has established any one of the first three elements of malice aforethought on the part of the accused.

Having considered the evidence particularly that of PW1, (the wife of the accused), I am convicted beyond peradventure that the prosecution has by evidence established three of the four elements of malice aforethought set out above.

Firstly, and as correctly observed by Mr. Kimathi, the accused together with one of his brother (Mbanda Gitonga) went to the home of the deceased, armed with pangas and rungas and threatened to kill him. If PW1 did not come in between her husband and the accused the accused and his brother would probably have killed the deceased on the night of 16th April 2006. Instead they pounced upon and hit his roof of iron sheets (they might have set it ablaze if it was grass thatched). That was certainly an intent to commit a felony (an offence punishable by imprisonment of three or more years).

Secondly, the accused acknowledged in his sworn evidence that there was a dispute over a land boundary between them and the deceased. That is one reason or motive for the accused to kill the deceased.

Thirdly, it was the testimony of PW1 that her husband went to the Police to report the threats of death made by the accused and his brother (Gitonga Mbanda) on 16th April 2006. PW5 corroborated the evidence of PW1, that the deceased made a report (produced as PExh.1) that the accused (Bernard Mbanda Gitonga) and his brother Gitonga Mbanda went to the deceased's home armed with a panga and rungu, and threatened him and cut his iron sheets roof.

PW5 also corroborated the evidence of PW1 that the following day, not the deceased, but PW1 turned up at the stations and reported that her husband had been waylaid and killed by the accused, (giving the same names as the deceased had given them on 17th April,2006).

Fourthly, it was also the testimony of PW1 on being informed by a frightened crowd which was running away from the scene of the murder, that Kirema (step – mother) her husband had been killed, she run to the scene, and found at the scene the deceased (her husband) already dead. In her words-

“ I found the deceased already dead. Other than the deceased there were at the scene, Bernard Gitonga, his brother Njeru and Muthomi Kirema”. These three were standing there. They had stones, all the three. They told me you denied us entry into your house yesterday, you can now go and report. It is Njeru who uttered those words.....Njeru is at home. Muthomi Kirimais at home. They told me to go and report because my husband had gone to report. I did not go. I was afraid”.

Nevertheless PW1 reported the matter to the A.P. Camp, but because it was late, they would not attend to her report immediately.

Fifthly PW1 informed PW2, of the incident, and PW2 corroborated and her evidence and thus made her consistent.

Sixth, Mr. Gichunge raised the question why the body was not hoarded, and disappeared between the 5.30p.m. (On (17th April 2006) and the morning of 18th April 2006 and thus raised doubts as to the guilt of the accused.

The law and the constitution protects and accused from giving evidence which incriminates himself, unless it is given by way of a confession under Section 25A of the Evidence Act, (Cap, 80, Laws of Kenya), and the rules under that section. So that burden remains on the prosecution to prove its case, and the court in analyzing the evidence of the prosecution and that of the accused- As already observed above, PW1 testified that she found the accused with two others with stones in their hands.

- They told her that as she had denied them entry the previous night, she could now go and report- the words uttered by (Njeru Mbanda) who is at large.

- They told her to go and report because her husband the deceased had gone to report but did not live to return home after his report.

Seventh, the evidence of the accused was telling. Despite knowing Benjamin Mwithi (PW2) the Village Elder, he denied any kinship with his uncle the deceased or else why would he be claiming land or be involved in a land boundary dispute with the deceased! The deceased was not a purchaser from the deceased's brother – the father of the accused.

It is clear to me that the accused deliberately, that is to say, with malice aforethought as defined by Section 206 of the Penal Code, referred to above way laid the deceased and battered him to death.

It is of little help to the accused that the crowd returning from the market, and saw him together with his accomplices batter the deceased to death did not standby and guard the deceased's body while PW1 (his wife) went to seek Police help. What man or woman would be so hardy to standby and watch three blood-thirsty thugs, who had battered another man to death? A blood thirsty person would kill another without thinking. He is scared of the evidence that other person would or may give against him, the killer. Such person being merely a member of the crowd would simply ran away, and tell the relatives of the victim concerned of what was happening or had happened.

In this case, the terrified crowd informed PW1 that Kirima had been killed PW1 ran to the scene. She found the accused together with his accomplices standing over the deceased with stones in their hands. I doubt that the stones were for stoning the deceased. He was already dead. He was not killed by stoning. According to the evidence of PW4, Chief Inspector James Rugut, the deceased body had multiple head injuries, accused by an object which they suspected to be a panga or sharp object. PW6, the Doctor, corroborated the evidence of PW4, as to the injuries suffered by the deceased.

The deceased had multiple deep cuts on the scalp extending down to the skull. The deceased also had multiple cuts on the face, and fractures of the 3rd – 6th ribs on the left chest. There were also multiple depressed fractures of the skull and internal bleeding of the brain.

The doctor's prognosis attributed the cause of death to severe head injury caused by blunt object.

In summary, the evidence of the prosecution showed that the accused had a dispute of a land boundary with the deceased. The accused and two others visited the home of the deceased on the eve of his murder. They demanded that he comes out of his house. It was only the intervention of his wife, PW1, which prevented the accused from making forcible entry into the deceased's house. The accused might as well have killed him on the night of 16th April 2006.

Frustrated, the accused and his accomplices vented their anger and frustration by cutting the deceased's iron sheets, the roof the deceased's house. Scared for his life, the deceased made an early journey to Ciakariga Police Patrol Base where he met PW5, PC Charles Mutinda Maitha and reported the visit and threats by the accused and his brother Gitonga Mbanda and reiterated or corroborated the evidence of PW1 as already outlined. PW5 emphasized that the deceased was really in need of assistance, first for the Police to go and see the damage of his iron sheet roof, and to have the culprits arrested.

It was therefore no surprise to PW5 that instead of the deceased turning up on the 18th April 2006, it was the wife (PW1) who turned up and reported that her husband had been killed and that the suspects were the accused and his brother and a third person.

It is of course correct to say that none of the witnesses saw the accused kill the accused or cause the grievous injuries to which the deceased succumbed and died. It was however the testimony of PW1 that when she reached the scene at about 5.30p.m she found the accused, her brother Gitonga, Mbanda and another person Muthomi Kirema, standing next to the body armed with stones.

The stones may have caused the dents on the skull, but not the deep and multiple cuts on the scalp, penetrating to the skull. Those are most likely to have been caused by the sharp object, which PW4 suspected to have been a "Panga" or machete.

Now, what inference does one draw from finding three men standing over or near a deceased body with stones? Or what inference does one draw from evidence that the three men told PW1 in the words of Gitonga Mbanda "you refused us entry last night now you can go and report".

In my humble view there can only be one inference, we intended to kill your husband last night, we failed, you can now see he is dead, you may instead go and report to the Police. Who, would you report, as the most probable killers of the deceased, your husband? There is no doubt in my mind, the killers are the three men you found standing by the body of the deceased, and who gloated that they had achieved what they intended to do the previous night but for your thwarting their efforts.

It was the evidence of PW5 that the accused was arrested (on 16.06.2006) two and half months after the deceased's killing. The other suspects both nephews of the deceased had moved away from their homes. The accused and his accomplices were fugitives from justice; they would not ran away from their homes if they were not.

Finally, it was the evidence of the accused that the deceased was no uncle or kin of his. He denied killing him. I watched the accused keenly while giving his evidence. He was both evasive on his evidence, and I formed the opinion that he knew the deceased was uncle, he knew he had killed him. So he did not care about the mourning of this wife (PW1) and her family on the 18th June 2006. He told the court he carried on tilling his land and tending his goats. That was in my view, a complete lie. He and his accomplices had run away from their homes after the event.

I have therefore no doubt that the prosecution has proved its case beyond any reasonable doubt. I

therefore convict the accused of the charge of murder of the deceased.

There is only one punishment for the offence of murder, death. I therefore sentence the accused to death as by law provided.

Dated and signed at Nakuru this 18th of February, 2011.

M.J ANYARA EMUKULE
JUDGE

Delivered at Meru This.....day of2011

J. LESIT
JUDGE