



CRIMINAL LAW
COMMON
INTENTION

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.25 OF 2008

JOSEPH MBURU NJAU.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

The accused person JOSEPH MBURU NJAU is charged that jointly with another not before court, they murdered Martin Mwangi Kimani *alias* Amingo (the deceased) on 10th February, 2008 at Kaiti Sub-location, Laikipia West District.

It was the prosecution evidence that on the day in question, the accused confronted the deceased and demanded to know why the latter had insulted his (the accused person's) wife. The deceased apologized and explained that he was drunk. That explanation notwithstanding, the accused tried to hit the deceased but the latter ran away towards his home. The accused gave chase and sought the help of his (the accused person's) son, Maina.

P.W.1 Michael Kabue Ngaranga (Kabue) who was following these events, went after the deceased and the accused. When he got to the deceased person's home, he saw the accused person's son, Maina cutting the deceased using a *panga*. As Maina cut the deceased, the accused stood by asking the deceased why he was with his wife. Maina also threatened Kabue who ran away.

Both Kabue and the accused called **P.W.3 Raymond Wachira Gatanga**, the area Assistant Chief to report the incident. Upon the Assistant Chief arriving at the scene, the deceased died. The body was moved to the mortuary where Dr. Kiuria conducted a post-mortem examination. He noted multiple deep cut wounds on the neck, above the buttocks and right thigh. In the doctor's opinion, the cause of death was severe hemorrhage and transection of the spinal cord.

In his sworn defence, the accused recalled that on the fateful day, he had gone to see the Assistant Chief over the issue of Internally Displaced Persons (IDPs) as well as to report that the deceased had insulted his wife and son, Maina. The Assistant Chief undertook to summon the deceased. Back to his home, the accused prepared to go to church. On the way, through to deceased person's *shamba*, the deceased confronted him and told him that he had directed that the path through his *shamba* should not be used. The accused was accompanied by his last born son. The deceased pushed the accused who fell down in the process.

The accused person's last born son screamed for help. The accused asked Kabue who was around why the deceased had attacked him. As he spoke to Kabue, he heard screams from the deceased person's home. The accused and Kabue ran and upon getting to the scene, he found the deceased lying on the ground with a leg injury. Kabue and Maina were about to fight but he separated them. He then called the Assistant Chief, who in turn called the police. That is the evidence presented in this trial.

It is clear from it that the accused and the deceased were neighbours. Prior to the date in question, there was no disagreement between them or their families. They only disagreed over a path traversing through the deceased person's land. It is also in evidence that the deceased insulted the accused person's wife. The reason for the insult is not clear. It is further a fact that the accused and the deceased met and the issue of insult came up.

The point of departure in the evidence of the prosecution witnesses and that of the accused is who was the aggressor? While the prosecution witness – Kabue – who no doubt was at the scene maintained that it was the accused who tried to hit the deceased, the accused was categorical that the deceased pushed him and he fell down.

What is important is that the deceased ran away towards his home. It is again not in doubt that as he ran to his home, the deceased was attacked by the accused person's son, Maina who inflicted the fatal injuries on the deceased. Maina disappeared after this and is to date still at large.

The issue for determination is whether the accused jointly with another (not before court) with a common intention and with malice aforethought caused the death of the deceased. This calls for the consideration whether the accused person took part in the commission of the offence of murder in terms of **section 20, 21 and 22 of the Penal Code.**

The East African Court of Appeal in **Wanjiru d/o Wameri Vs. Republic** 22 EACA 521 defined common intention as follows:

“Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

In **Njoroje Vs. Republic** (1983) KLR 197 at P 204 the Court of Appeal stated that:
“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in 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.”

Many years before the above decision, it was stated in the case of **Republic Vs. Tabulayenka s/o Kirya** (1943) EACA 51 that:

“The common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the assault.”

Finally, to demonstrate how a common intention would arise, I wish to borrow an example used by the Court of Appeal for Eastern Africa in **Republic Vs. Ramji Hirji and 2 others**, Criminal Appeals Nos.32, 33 and 34 of 1946:

“If the two persons, A and B agree together to inflict a sound beating upon C who has offended them and in the course of their joint assault A, seeing a knife handy picks it up and cuts the throat of C, it would clearly be grossly unfair to hold B, who had never contemplated anything more serious than a beating, equally responsible with A for the killing unless there is clear evidence that B actively associated himself with the use of the knife, for example, by counseling A to use it, or by

holding the victim whilst A cut his throat.”

According to Kabue, the only eye witness, the accused tried to hit the deceased before the latter ran away. As the accused gave chase, he called out for his son, Maina to help him get hold of the deceased. Both Kabue and the accused, the former stated, arrived at the scene only to find Maina cutting the deceased. The accused stood by as Maina cut the deceased. When Maina also threatened to cut Kabue, the accused told him not to.

I reiterate that there is direct evidence that the accused did not inflict the fatal injuries on the deceased. That his son, Maina did. By asking Maina to get hold of the deceased, or by simply standing by as Maina cut the deceased, did the accused form a common intention with Maina?

It is clear that the accused only sought Maina’s help to apprehend the deceased. There is no evidence that he knew Maina had a *panga*. He did not encourage Maina to cut the deceased or actively participated in the attack by holding the deceased as Maina inflicted the cuts or by counseling Maina to use the *panga*.

I come to the conclusion that Maina was solely responsible for the death of the deceased. He went beyond what the accused had asked him to do. This fact is buttressed by the accused person’s conduct immediately following the attack. He called the Assistant Chief and P .W.2 Francis Kamau Mwangi, the brother to the deceased to report the incident. If shared with Maina, common intention he, like Maina would have fled.

For these reasons, I find no evidence against the accused linking him with the injuries that caused the death of the deceased. He is acquitted and shall be set free unless lawfully held.

Dated, Delivered and Signed at Nakuru this 17th day of March, 2011.

**W. OUKO
JUDGE**