



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL CASE NO. 52 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PETER KIMARU MUMBI.....1ST ACCUSED
ROBINSON MWANIKI MWANGI.....2ND ACCUSED
JOHNSON MURIUKI KINYUA.....3RD ACCUSED
EVANSON IRUMBI WANG'ONDU.....4TH ACCUSED

JUDGMENT

Peter Kimaru Mumbi, Robinson Mwaniki Mwangi, Johnson Muriuki Kinyua and Evanson Irumbi Wang'ondu, 1st, 2nd, 3rd and 4th Accuseds respectively are before this court on the information OF Honourable Attorney General dated 2nd October 2008 jointly charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The quartet are accused of having jointly murdered Peter Kimaru Josiah on 8th July 2008 at Tumutumu village in Nyeri District within Central Province.

The prosecution's case is supported by the evidence of thirteen witnesses. **Job Kiama** (P.W.9) told this court that on 8th July 2008 at about 6.30 a.m. he was sent to buy some milk from a nearby shopping centre. On his way back home, P.W.9 said he met Peter Kimaru, the 1st Accused herein. Peter Kimaru is said to have told P.W. 9 to rush the milk home and come back to accompany him to visit their grandfather, Peter Kimaru Josia, deceased. P.W. 9 said he did exactly as he was told. P.W. 9 had a ride on a bicycle, the 1st accused had to the deceased's house at Tumutumu Village. P.W.9 said he heard his grandfather (deceased) ask the 1st accused whether he was drunk. At this juncture P.W.9 was stood down when it became apparent that he was terrified on seeing the 1st accused in the dock. P.W.9 was never recalled to continue with his testimony. The other crucial witness who testified is **Allan Kinori Muthoni** (P.W.2) who said that on 8th July 2008 at about 12.30 p.m. he was coming back home from Tumutumu Trading Centre and on the way he met Peter Kimaru (1st accused), a person well known to him. P.W.2 said Peter Kimaru told him he was staying at Kerugoya at the moment and that he had come to

Tumutumu to visit his grandfather (deceased). P.W. 2 said Peter told him that he did not find his grandfather at home hence he decided to take a walk. P.W. 2 said he left for his grandmother's home which was not far from the deceased's homestead. At 1.30 p.m. P.W. 2 said he was outside his grandmother's gate when he saw the 1st accused riding on a bicycle carrying a mattress and something wrapped in a sack, from the direction of the deceased's house. P.W. 2 said the 1st accused just passed next to his grandmother's home without uttering a word. Reverend John Wahome Githinji (P.W. 3) told this court that the deceased was a very close friend to him. He said the deceased called him on 7th July 2008 to request him to get him someone whom he can sell his firewood. P.W. 3 said he managed to get for him Mr. Ngari who agreed to visit the place where the firewood was, the next day. P.W. 3 said he visited the deceased's home on 8th July 2008 at 8.00 a.m. but did not find the deceased. He said he found a bicycle placed next to a granary. The deceased's house was closed. P. W. 3 could not reach the deceased through his cell phone. P.W. 3 went away and came back at 10.30 a.m. but did not find the bicycle. P.W.3 said he used to meet with the deceased when taking and picking children from a nearby primary school. The next day i.e. on 9th July 2008, at about 8.00 a.m. P.W. 3 stated that he met another person by the name Solomon and Peter Kimaru, another deceased's grandson. The duo inquired from P.W. 3 whether he had seen the deceased. P.W. 3 decided to call **Florence Nyokabi Kimaru** (P.W.5) and **John Muriuki Kimaru** (P.W.7). P.W.3 and P.W.5 proceeded to report to the Police who visited the deceased's house. The Police broke the deceased's house where they discovered that the house was ransacked. The deceased's body was found lying in the toilet with head injuries. P.W. 3 said that the 1st accused used to live with the deceased between 2007 and 2008. It is said that the deceased had promised to pay the 1st accused a sum equivalent to that paid to a househelp. The duo are said to have parted ways when the deceased failed to pay the 1st accused. **Waweru Josiah Karinga**, (P.W.4) told this court that on 8th July 2008 at around 10.00 a.m., he met the 1st accused coming from the direction of Tumutumu. P.W. 4 said the 1st accused greeted him. He said the 1st accused was riding on a bicycle carrying a mattress plus something wrapped in a sack. Florence Nyokabi (P.W.5) told this court that she was called by P.W. 3 to inform her about the disappearance of her father the deceased. She rushed home and informed the Police. The Police visited the deceased home. When the home was broken into, P.W.3 said she discovered the deceased's T.V., radio, mattress and other properties were missing. P.W. 5 said that they suspected the 1st accused to be the culprit. The Police managed to trace where the 1st accused lived in Karatina township. The Police arrested the 1st accused at Karatina, took him to his house where they carried out a search. Their search led to the recovery of a T.V. set, radio, mattress, mobile phone, title deeds, mirrors, a bunch of keys and beddings which P.W.5 identified them to belong to the deceased. **John Muriuki** (P.W.7) told this court that he found inside the deceased's house a Safaricom bag containing the I.D., voter's card and a conductor's badge of the Robinson Mwaniki. P.W. 7 forwarded those documents to the Police who in turn swung into action and arrested Main Robinson Mwaniki Mwangi (2nd accused). Samuel Githua (P.W. 12) told this court that on 8th July 2008 at about 8.30 a.m. he visited the deceased's house to borrow some saw dust. P. W. 12 said he did not find his grandfather (deceased) at home but found Peter Kimaru (1st accused). P.W. 12 said the 1st accused told him the deceased had gone to visit somebody in hospital. P.W. 12 said the 1st accused was wearing gloves while a young boy was leaning on a bicycle on the road side next to the deceased's homestead. Dr. Lucy Wangui Ng'ethe (P.W.6) produced the postmortem report he prepared on the deceased's body. In the aforesaid report, P.W. 6 formed the opinion that the cause of death was massive blunt trauma to the head with resultant extradural, subdural and intercerebral haemorrhages.

When placed on their defence, the accused persons tendered the evidence of Peter Kimaru Mumbi (1st accused). He told this court that he was aged 18 ½ years. The 1st accused stated that the deceased used to abuse him sexually. He said he used to sodomise him since he was in class III. He said his mother told him to leave his grandfather's home due to that. He admitted having visited the deceased's home on 8th July 2008 whereupon his grandfather questioned him as to why he told his mother about the alleged sodomy. He said he exchanged bitter words leading to a fight. .D.W 1 alleged that the deceased picked a rungu which he managed to snatch from him. He claimed the deceased then picked a panga with intent of cutting him. It is said a struggle ensued whereupon the deceased slipped and fell down, that is when he managed to escape. The 1st accused said the other accused persons are people he does not know. He

claimed the goods found in his house were given to him by his later grandfather. He said that he did not intend to murder his grandfather.

At the close of the evidence, learned counsels from both sides were invited to make submissions. It is the submission of Mr. Ng'ang'a, learned advocate for the accused persons that there is no evidence connecting the 2nd, 4th accused persons with the offence of murder. The learned advocate was of the view that the offence which the 1st accused may have committed is that of manslaughter as opposed to murder in view of the circumstances of the case. The 1st accused was said to have been traumatized by the acts of sodomy visited on him by his late grandfather. Miss Ngalyuka, learned Senior State Counsel, was of the view that the prosecution has tendered overwhelming evidence sufficient to convict the accused persons.

I have considered the evidence and the submissions presented to this court. In order for the offence of murder to be established two ingredients must be proved. First, the element of malice aforethought must be established. Secondly, the element of *actus reus* must be shown. In the entire case, the names of two accused persons were mentioned by witnesses. Those mentioned are Peter Kimaru Mumbi and Maina Robinson Mwaniki. The names of Johnson Muriuki Kinyua and Evanson Irumbi Wang'ondu, being the 3rd and 4th accused persons were not mentioned by any of the witnesses. It is only fair at this stage to state that since there is no evidence linking them with the offence of murder, then they should be acquitted. Consequently I find them not guilty hence they are acquitted forthwith. They should be set free from custody forthwith unless lawfully held.

Let me now analyse the evidence presented against those who were adversely mentioned as connected with the offence. I will begin with Robinson Mwaniki Mwangi the 2nd accused herein. It is the evidence of John Bernard Muriuki Kimaru (P.W.7) that after the deceased's body was taken by the Police, he went into the house to look for missing things. That is when he found a small Safaricom suitcase containing the I.D., voter's card and conductors badge for one Maina Robinson Mwaniki. That name does not tally with that of the second accused who is called Robinson Mwaniki Mwangi. This difference in names alone has created doubt as to whether the 2nd accused was placed at the scene of crime. The law enjoins the court to always give the benefit of doubt to the accused. It is clear that the prosecution had been challenged to clear the air over this issue when the defence counsel cross-examined P.W.7 intensely over the difference in names. The prosecution failed to take up the challenge. For this reason, I am convinced there is no nexus between the offence and the 2nd accused. He is hereby found not guilty. Consequently he is acquitted hence he should be set free forthwith unless lawfully held.

It is obvious that the only person squarely placed at the scene of crime is Peter Kimaru Mumbi the 1st accused. The evidence of P.W. 2, P.W.3, P.W. 4 and P.W. 5 and P.W. 12 placed him at the scene of crime. The 1st accused admits that he was at the home of the deceased on 8th July 2008. There is no doubt the deceased died as a result of injuries inflicted on him. The postmortem report produced by P.W. 6 indicates that the deceased suffered serious injuries. The postmortem report indicates that the neck muscles that supports the neck were bruised indicating strangulation. The thyroid bone was also found to be fractured. There was haematoma below the skull. There was also a fracture of the frontal bone. There was severe head injury. The kind of injuries indicates that the person who inflicted the same intended to kill or to cause grievous harm. In the circumstances the court will infer that the assailant had malice aforethought. The 1st accused person has stated that he did not intend to hurt the deceased. He alluded that the deceased fell down and accidentally hurt himself when he disengaged himself and fled. The evidence tendered displaced the 1st accused's defence. A fork jembe recovered from the deceased's house had blood stains. The same and the deceased's blood samples were sent to the Government analyst for analysis. Albert Kathuri (P.W. 11), a Government analyst produced a report showing that the blood stains on the fork jembe were of human blood group B, same as the blood group of the deceased. It means the deceased's assailant used the fork jembe to assault the deceased. It is therefore not true that the deceased

slipped and fell down while struggling with the 1st accused. I find the two elements of *actus reus* and malice aforethought to have been established. The circumstantial evidence shows that it is the 1st accused who inflicted those injuries on the deceased and no one else.

In the end I find the 1st accused guilty as charged. He is convicted for murder.

Dated and delivered at Nyeri this 3rd day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a for the accused persons, Mr. Kanyiri watching brief for the family and Mr. Makura is present for the State.

Makura: I do not have the past records of the accused. He should be treated as a first offender.

Ng'ang'a: The first accused person is a young person aged 22 years. He has on several occasions intimated on several occasions indicated that he is remorseful. I pray to this court to be lenient to the 1st accused. I pray for time to do research on further submissions.

COURT: This case is adjourned to 9th June 2011 for further submissions on mitigation.

J. K. SERGON

JUDGE