REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 6 OF 2006

REPUBLIC...PROSECUTOR

VERSUS

NANA M'AMERU..1ST ACCUSED
JACOB MWITHALIE..2ND ACCUSED
KIBIKU M'IKIAMBA...3RD ACCUSED

JUDGMENT

The accused persons **Nana M'Ameru, Jacob Mwithalie** and **Kibiku M'Ikiamba** are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 19th day of March 2005 at Kabati Location in Meru North District they jointly with others not before the court murdered John Mugambi.

The prosecution called 5 witnesses. These were PW1 Fredrick Kamenchu, a young man and a son of PW4. There was also PW2 Stanley M'Muguongo a neighbour of the deceased, PW3 Lucy Kario wife of the deceased and Peter Karomo an uncle to the deceased. The last witness was the investigating officer,PW5. The case for the prosecution was that the deceased person was frog matched by the three accused persons with the 1st and the 2nd accused carrying slashers and the 3rd accused carrying a small panga. They met with three others who had sticks. These were Daniel, Mwenda and Kaburu. The three accused persons set upon the deceased with the slashers and the panga and inflicted multiple cuts on his body before walking away. According to the doctor's opinion at the post mortem, the cause of death was cardiac arrest due to massive haemorrhage and spinal injuries from multiple cuts on the neck, back and left arm.

The accused persons gave sworn defences. The first accused put forward an *alibi* defence. He said that on 19th March 2005, the date in issue, he went to Antubetwe to look after his father who was said to be sick and that he stayed there the whole day and returned home at 7pm. He said he learnt of the deceased death when he went to a canteen in the evening. He pointed out in his defence that all the witnesses are from the same family.

The 2nd accused also denied the offence and put forward an *alibi* as his defence. He said that at 9am on the 19th March 2005 he was at Laare having left Mutuate at 7am that day. He said that he stayed at his place of business at Laare up to 6.30pm when he proceeded to Paradise Hotel where he reached at 7.30pm. He says he got the news of the death of the deceased while at the bar. He says that the three, that is, Daniel, Mwenda and Kaburu who were implicated with the murder paid Kshs. 300,000/= to the family of the deceased and that that was how they were not charged with this offence.

The 3rd accused also denied the charge and put forward an *alibi* as his defence. He said that on 19th March, 2005 he was in Lwanda where his farm is situated which is 7km from his home. He said that he did not return in his home until 10th January 2006 when he was arrested for the offence. He denied any involvement with the murder and said that he was not with his co-accused during that period.

Mrs. Kaume appeared for the accused persons. In her submissions, she urged that the prosecution had not proved the case against the accused persons beyond any reasonable doubt. That all the prosecution witnesses were members of the same family and wondered why an incident which took place in broad daylight the prosecution could not bring independent witnesses. Mrs. Kaume urged the court to accept the *alibi* defence of the accused persons. She relied on the case of **Kiarie vs. Republic** [1984] KLR 739 where the court held:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."

Mr. Mungai learned State Counsel represented the state. In his submissions Mr. Mungai urged that the prosecution had adduced eye witnesses' evidence of the incident. He also submitted that PW1 and 2 were at the scene and that they witnessed the accused persons cut and wound the deceased on allegations they stole their *miraa*. Mr. Mungai urged that even though the prosecution witnesses were from the same family there was no grudge between the witnesses and the accused and that their evidence is water tight.

The accused persons are facing a charge of murder. The prosecution has to show that the accused persons acted with one common intention to cause death or grievous harm to the deceased. The burden lies on the prosecution to adduce evidence to prove that the accused persons by some act or omission, motivated by malice aforethought inflicted an injury which led to the death of the deceased.

Section 203 of the Penal Code provides:-

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

Section 206 of the Penal Code provides the circumstances which constitute malice aforethought as follows:-

"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."

The prosecution is relying on the evidence of four eye witnesses, PW1, 2, 3 and 4. These witnesses were not together. PW1 was herding his father's cows 50 meters from the scene of attack. PW2 and 3 were each at their homes when they heard screams and went out to investigate. PW4 was working in his shamba and saw the entire episode right in front of his eyes.

The account by each of the four witnesses was consistent, corroborative and forth right. I heard the witnesses and had occasion to examine their demeanor. They impressed me as honest, sincere and worthy of belief. The four described the attack on the deceased. They were consistent as to the weapons each of the accused was armed with. They said that the 1st and 2nd accused had slashers, while the 3rd accused had a small panga. The sequence of attack was also consistent that it was the 1st accused who first struck the deceased, followed by the 2nd and then the 3rd accused. The variation in their evidence was on the parts of the body the deceased was cut. While PW1 said the 1st accused cut the deceased on the neck, PW2 and 5 said it was the back. The variation was minor and inconsequential. The doctor's evidence shows that the deceased had multiple cuts all over the body described as multiple cuts on the neck, back, left arm and left and neck and left arm almost amputated with only pieces of skin holding them to the body. The witnesses account of the parts of the body of the deceased they saw the accused cutting is consistent with the findings of the doctor.

The accused persons have contested the evidence of identification against them. They have challenged the fact that all eye witnesses were members of the same family. It is true that all the eye witnesses are members of the deceased family. It does not raise eye brows because it is clear that the incident occurred near the home of the deceased and naturally the people who were near were his family members.

The defence did not put questions to the witnesses in cross examination, challenging the genuineness of their evidence. Neither was it put to them that they were lying, or fabricating the evidence against them. More importantly, there was no suggestion put to the witnesses of an existing grudge between any of them and the accused. The only fact which was conceded was that the three accused had assaulted the deceased five months before the date of this incident; and further that the case against the three was with the Police.

I find the issue of the witnesses being relatives and therefore unreliable was an afterthought in my view.

The accused persons were well known to the witnesses being fellow villagers. The incident took place in broad daylight. There was nothing obstructing the view of the scene of attack from any of the witnesses. From the witnesses account of the incident, the accused were not concerned with onlookers and they went on with their work unperturbed.

The accused put forwardalibi as their defence. As their counsel Mrs. Kaume submitted, the accused assume no burden of proving that their alibi is true.

I have considered the alibi defence by each of the accused persons. I find that the evidence by the prosecution was very strong and watertight against them. They were seen in broad moon light. They made no attempts to hide. After the incident they walked away in different directions. I have no doubt that the eye witnesses correctly identified them as the ones who attacked and seriously wounded the deceased.

In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

"when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

I find that the prosecution has proved that the accused had formed the necessary malice aforethought to cause the accused death or grievous harm.
The prosecutionmust adduce evidence to show that the accused persons were acting in concert to accomplish a common purpose with a common intention. Section **21** of the Penal Code defines what common purpose is in the following words.

"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 **NJOROGE VS. REP [1983] KLR 197,** considered the meaning of common intention and stated as follows at page 204.

"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."

In the instant case, the prosecution called evidence which demonstrated that the three accused set upon the deceased after they frog matched him to the scene where they executed their plan. Their common intentions can safefly be inferred from their presence, actions and failure of any of them to disassociate himself from the assault on the deceased.

The accused have in their defence stated that there were three others culprits mentioned in the evidence of the eye witnesses and that the reason they were not before the court was as a result of compensation they gave the family of the deceased. True there were three other men armed with sticks who watched as the accused executed the assault on the deceased. These came later and were not seen doing anything to the deceased. It is obvious the conspiracy may not have involved. Whether they were party or not does not exonerate the accused for their actions.

Having carefully considered the entire evidence adduced in this case, and having analyzed and evaluated it, I find that the prosecution has proved its case against the three accused beyond any reasonable doubt. I find that the alibi defence put forward by the accused cannot stand. I reject it in total find the accused guilty of murder contrary to section 203 of the Penal Code and convict them accordingly.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF DECEMBER, 2011

LESIIT, J.

JUDGE