



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Case 40 of 2008

REPUBLIC.....PROSECUTOR

Versus

**PETERSON KARANI NJOGU
JULIUS MUTHIE MUCHEMI alias MWANA.....ACCUSED**

J U D G M E N T

Peterson Karani Njogu and Julius Muthie Muchemi *alias* Mwana, hereinafter referred to as “*the 1st and 2nd accused*” respectively have been tried on an information charging them with murder contrary to *section 203* as read with *section 204* of the penal code. The particulars that informed the information were that on the 25th day of May, 2008 at Kibingo village in Kirinyaga District within Central Province, the two accused jointly with others not before court murdered one, Nicholas Karimi Mwangi hereinafter “*the deceased.*” The two accused returned a plea of not guilty to the information and their trial ensued before me.

During the trial, a total of 9 witnesses testified on behalf of the republic. The totality of their evidence as captured by this court was as follows:-

PW1 Rebecca Mukami Karimi was the wife of the deceased. On 25th May, 2008 at about 11 a.m whilst at home with the deceased the accused came in the company of 3 others and asked her to call the deceased from the house for them. When the deceased came out the accused held him. The 2nd accused then made a call requesting for a motor vehicle. Whilst waiting for the motor vehicle, the accused suddenly started assaulting the deceased with sticks. After 5 minutes the motor vehicle came and the deceased was forced into its boot by the accused and was driven off. At about 2 p.m she went to Kerugoya police station and reported the incident. The police officer who attended to her thereat informed her that the deceased was in bad shape and had been referred Kerugoya District Hospital. She proceeded to the hospital and found him admitted and unconscious. The following day in the morning she went back to the hospital only to find that the deceased had passed on.

Cross-examined by Ms Mwai, learned counsel for the accused, she responded that five people had come to the plot and when the deceased came out they seized him and started assaulting him at the gate. Among them were the accused. She used to see the 1st accused at the bus stage. She knew the 2nd accused as Mwana. He used to operate at the bus stage too. Indeed the accused and the deceased were touts at the bus stage. As they were beating the deceased they were saying that he could not be allowed to be stealing and assaulting others and then he hides. She saw 1st accused whip the deceased on the head whereas the 2nd accused hit him with a walking stick. The other 3 were assaulting the deceased as well. The deceased was thereafter put in the boot before he was driven away. After the deceased was driven away, she went to the deceased’s home within Kerugoya town to establish whether the deceased had been abandoned there. When she missed him he went and reported the incident at Kerugoya police station. Apparently after being assaulted, the deceased was later taken to his father’s house. She maintained that the accused were among the 5 people who came and took away the deceased.

PW2 Michael Gitari Ngugi testified that on 25th May, 2008 at about 9 a.m whilst at home washing clothes the accused approached him and ordered him to accompany them to the road. On the road they came

across a motor vehicle parked. The accused forced him into the boot of the said motor vehicle where he found the deceased bleeding from the forehead. The two were then driven to the home of one, Leonard Kinyua. They picked him up and he too was also forced into the boot. They were all then driven to the home of one, Muthie where they were ordered out of the boot. The accused then beat them with rungu and metal rods after ordering them to remove shoes. The accused then hit the deceased's legs and he was unable to walk. The deceased father, Obadia Mwangi came and tried to intervene but he was chased away by the 1st accused. The accused then summoned another motor vehicle and took the trio to Pop In bus stage and abandoned them there. The deceased was unable to walk. They left him at Pop in with his uncles. Later he learned that the deceased had passed on the same day.

Cross-examined, he stated that one, Gichangi was with the accused when they came for him. He was an employee of Muthie. When he got out of the compound, he found about 8 people who assaulted them. Out of them he only knew the accused and Gichangi. He was not told why he was being beaten. 2 days later he learned that they had been assaulted because it was alleged that they had stolen from Muthie, a mattress and 2 trousers. The beating was such that they could not see. The 1st accused used to stay with the deceased but they had disagreed. He had known both accused prior to the incident. He was very certain that the accused were among those who assaulted them. He reported the assault to the police. Later they were dumped at Pop In bus stage. The deceased father came and took him to the police station. Infact the accused and their team had threatened to lynch them.

PW3 was Leonard Kinyua Magondu. On the material day at about 10 a.m, the accused called him out of his house. He accompanied them to the stage where he found the deceased and PW2 in a boot of a motor vehicle. When asked by the accused whether he knew them and responded positively he was also forced into the same car boot. They were assaulted thereat and later driven to the home of Muthie. For 2 hours they were assaulted in the home of Muthie after they had been ordered to remove their shoes. Thereafter they were taken by a vehicle and dumped at Pop in bus stage. They were later taken to hospital and treated. Though deceased was admitted, him and PW2 were treated and discharged. Later the deceased passed on.

Cross-examined, he stated that he was called from his home by Gichangi and 1st accused. Gichangi was an employee of Muthie. He found more people on the road. He never asked why he was being pushed into the boot. Muthie asked them to return the items that they had stolen. As a result of the assault he suffered fractures on the legs and hands. He denied the allegation that they were assaulted by Matatu mob. He had known the accused before. They were among those assaulting them.

Obadiah Mwangi Wanyei was PW4. He is the father of the deceased. He testified that on the material day at about 10.30 a.m whilst preparing to go to church, one, Joseph came and told him that the deceased was being beaten and they were coming towards his house. On coming out of the house, he saw the deceased being assaulted by 5 people among them, the accused. When he intervened the 2nd accused threatened him with death. He ran to Kerugoya police station. He left the deceased being beaten. At the police station he was told to bring the assailants. On his way back, he found the deceased lying by the roadside. He took the deceased to Kerugoya District Hospital where he later passed on the same day.

Under cross-examination, he stated that he knew the accused very well even by their names. They used to operate together at a matatu stage in Kerugoya. They were among those assaulting the deceased as well as PW3. If anybody attempted to intervene he would be threatened with dire consequences. He saw the accused assault the deceased.

Peninah Wairimu Wangunda testified as PW5. she stated that on the material day at about 11 am she saw the accused take away her son, PW3. When she asked them where they were taking him, they responded that they were going to beat him as he had stolen. She followed them and saw them assault PW2 and the deceased.

Cross-examined, she stated that PW3's limbs were broken as a result of the assault. The accused were among those who assaulted the deceased claiming that together with her son they had stolen from Muthie. The trio were beaten from about 9 a.m until 1 p.m.

PW6 Nicholas Ngugi Douglas testified that on the material day at about 10.30 a.m whilst at home, he suddenly heard PW5 screaming and coming towards him. She is the mother of PW2. She told him that their children PW2, PW3 and deceased were being killed on the road. He followed her to scene where they found the deceased, PW2 and 3 badly beaten. They picked them up and took them to hospital. Later the deceased passed on.

Dr. Andrew Katangi testified as PW7. He conducted a post mortem on the body of the deceased on 4th June, 2008. He observed that the body had multiple bruises on the right shoulder inflicted by a heavy

object, bruises on both legs, stabbed wounds on both legs and sheens, serious injuries to the head, internal bleeding inside the head and brain damage. In his opinion the death occurred as a result of severe injuries inflicted to the head causing head injury as a result of assault. He filled the post mortem report which he tendered in evidence.

James Mithamo Gathuku (PW8), is a clinical officer. On 25th May, 2008 he examined both PW2 and PW3 and filled their P3 forms. He assessed their degree of injuries as harm. He tendered in evidence their respective P3 forms.

The last witness called by the prosecution was PW9 P.C. Mike Chesire. It was his evidence that on 27th June, 2007 whilst on patrol with PC Koome in Kerugoya town, they received information that the accused had been seen at the bus stage posing as conductors in Kenya Mpya buses. They proceeded there, were shown the accused whom they arrested and took to the police station. Later the accused were charged. The witness produced the P3 forms in respect of both accused pursuant to section 33 and 77 of the Evidence Act. Both had been found fit to plead upon examination by Dr. Owino. With that the prosecution closed its case.

Respective counsel elected to make no submissions on no case to answer. They left the determination of the issue to the court on the basis of the evidence on record. Upon considering the evidence tendered by the prosecution so far, I was satisfied that the prosecution had discharged its onus of establishing a prima facie case against both accused. I therefore put them on their defence. They all elected to make sworn statements in their defence but called no witnesses.

In his defence, the 1st accused stated that he was a bus conductor. He denied killing the deceased. On the material day he woke up at about 4 a.m and went to the stage with the driver. They collected their bus KAX 540C, picked passengers and left for Nairobi. They came back from Nairobi at about 5 pm and took the bus for cleaning. Thereafter he went home after parking the bus. On 27th June, 2008 whilst at the bus stage having come from Nairobi two police officers approached him and requested him to accompany them to the police station. He complied. At the police station he was locked up and later charged with the instant offence. He did not know the deceased. Contrary to what the witnesses said, he was not in the mob and did not know any of the witnesses who testified. However he could not explain why they said witnesses testified against him.

Cross-examined by Mr. Makura, learned Senior State Counsel, he stated that he was a conductor with Kenya mpya bus service. He did not know the deceased. Had the deceased been a conductor he would have known. On the material day, he picked the bus driver, Benard Ngugi in the morning and they went about their normal business. He denied having escaped Kerugoya town following the incident.

In his defence the 2nd accused stated on oath that he was a booking clerk with Kenya mpya buses. He denied killing the deceased. On the day in question, he woke up and reported for work at 5.30 am. He worked until 6 p.m when he left for home. On 27th June, 2008, 2 police officers came to his office and arrested him. They took him to the police station whereat they informed him that he had killed somebody. He denied knowing the deceased. He also denied being in the mob that killed the deceased. He also did not know any of the witnesses who testified. He claimed to have been framed in the case but could not tell the reasons thereof.

Cross-examined, he responded thus, he did not know the deceased. On the day in question he was on duty. They have a welfare association. If a member misbehaves he can be expelled. They do not punish them though. He knew the co-accused as a co-employee. He denied having picked the deceased on the material day and assaulted him before forcing him in the boot of a motor vehicle.

With that the defence closed their case. Ms Mwai, elected not to make final submissions. Rather she opted to rely on the evidence on record and the defence advanced by the accused. Mr. Makura too, took the same route.

Having carefully evaluated the evidence tendered by the prosecution as well as the defence, and the law I think that the issues for determination in this case are clear cut;

- (i) Whether the deceased was killed
- (ii) Whether the killing if at all amounted to murder or manslaughter

- (iii) Whether the accused was responsible.

From the totality of the evidence tendered there is no doubt at all that the deceased was killed. He did not die from self-inflicted injuries. Neither did he commit suicide. There is the post-mortem report. The cause of death was stated therein by Dr. Gatangi (PW7) to be as a result of severe inflicted injuries. Head injury

as a result of assault. There is no way that these injuries could have been inflicted by the deceased on himself. They must have been inflicted by another party or parties.

Every killing however does not necessarily amount to murder. Murder is all about intentional and deliberate killing of another person. However there are cases where the killing is accidental in which event such killing cannot amount to murder but perhaps manslaughter. For the charge of murder to be proved the prosecution must show that the deceased was killed and was so killed with malice aforethought. What is malice aforethought? On my part I can do no more than refer to the definition of malice aforethought under section 206 of the penal code which provides:-

“206 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 had committed or attempted to commit a felony.....”

In summary by this section and in particular in the circumstances of this case, I take it that malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. The post mortem lists injuries sustained as “Multiple bruises @ shoulder – heavy object both legs. Stab wounds both legs (sheens) anteriorly. Subdural haematoma @ parietal region and brain damage. From the details of the injuries in the post mortem report aforesaid, it can be reasonably be inferred that whoever caused them intended to cause death or grievous harm to the deceased. In any event evidence is galore that the deceased together with PW2, and PW3 were assaulted over along period of time with sticks and iron rods and forced into a motor vehicle boot. The assailants when done with them in the home of one, Muthie after having broken some of their limbs drove them and dumped them at pop in at a bus stage. By then the deceased could not move. Further the act of forcing the accused into a car boot could only mean one thing, possible death of the victims, even from suffocation. Clearly then the assailants had intended the death of and or grievous harm to the deceased. Hence malice aforethought is established. This is therefore a case of murder as opposed to accidental or unintentional death and or manslaughter.

Did the accused have a hand in the death of the deceased? On the evidence on record I have no doubt at all that indeed that they did. There is circumstantial as well as direct evidence linking the accused to the death of the deceased. The offence was committed in broad day light. It was perpetrated by the accused in the company of others. According to the evidence of PW1, the wife of the deceased, the accused in the company of 3 others came for her husband from their house. They infact asked her to call him for them. She did so and when the deceased came out, they held him. The 2nd accused thereafter called for a motor vehicle. As they waited for the vehicle, the accused started assaulting the deceased with sticks claiming that he could not be allowed to be assaulting and stealing from others and then he hides. This witness knew the accused very well. She even knew the 2nd accused as Mwana. As for the 1st accused though she did not know him by name, she nonetheless used to see him at the bus stage. Accordingly the accused were persons well known to the witness. After the motor vehicle came, he saw the accused and their cohorts force the deceased into the boot of the same and drive away. Later she found the deceased comatose at Kerugoya District hospital. The accused and his group were the last person seen with the deceased beating him. When found in hospital, the deceased was comatose and later on the same day he passed on. His death was as a result of assault according to Dr. Gatangi. Can all these pass for a mere coincidence? I do not think so. There was no grudge between this witness and the accused as would have propelled her to falsely testify against them. The accused in their defence claim that they did not know

this witnesses and indeed all the other witnesses who testified in this case. This may perhaps be true of the medical evidence as well as evidence by the police. However with regard to other witnesses, their denial is farfetched. They all admitted that they were involved in transport business. All the other witnesses knew them as such. The witness last saw the accused assault the deceased and force him into the boot of the motor vehicle.

PW2 and PW3 too were the victims of the accuseds' orgy of violence on the material day but they survived the ordeal luckily. They knew the accused very well. They were all collected from their homesteads by the accused and their lieutenants and forced into the same motor vehicle boot where they came across the deceased seriously injured and bleeding. All these events happened in broad daylight. The issue of mistaken identity therefore cannot arise. These two witnesses plus the deceased were then driven to the home of one, Muthie where they were ordered to remove their shoes and were thoroughly beaten with sticks and metal rods for hours on end. It was there that the deceased was hit on the legs and was rendered immobile. The accused then summoned another vehicle, took the deceased and the two and dumped them at Pop In bus stage. These witnesses knew the accused very well. Indeed according to PW2, the 1st accused even used to stay with the deceased before they somehow fell out. He had known both accused prior to the incident. In cross-examination, both witnesses denied having framed the accused with the case. They all stated that they had no reason to do so. Much as the accused stated that the case may have been framed against them, they advanced no reason why that would have been necessary. After all in their defence, they all denied knowing the witnesses. Why would a person unknown to you frame you up in a case? It bears no logic.

Then there is the evidence of the deceased father (PW4) and the mother of PW2. PW4 saw the accused with others assault the deceased as they came towards his home. When he intervened, the 2nd accused threatened to kill. He was forced to run to the police station for assistance as the accused and their group continued assaulting the deceased. When he came back he found the deceased lying on the ground by the roadside. This witness in cross-examination categorically stated that he knew the accused very well as they used to operate together at a matatu stage. This witness could not have been mistaken as indeed the accused themselves have admitted that they used to work at the bus stage with Kenya mpya bus service. He even knew their names as Karani and Mwana.

As for PW5, she too saw the accused as they took away her son (PW2). She witnessed as her son was being assaulted as well as the deceased by the accused. Her intervention brought no respite, if anything, it fueled the beatings. The trio were beaten according to this witness from about 9 am until about 1 p.m. The beatings were as a result of the alleged theft from one, Muthie by PW2, PW3 and the deceased. She too knew the accused very well. Infact it was the 1st accused who called her son.

All these witnesses testify to the fact that the accused with their cohorts infact collected the deceased, PW2, PW3 from their homes from where they fetched them. It appears to me that the accused were persons well known to the deceased, PW1, PW2 and their parents. If indeed they claim that they did not know these witnesses, on what basis would they have known their respective homes. The accused did not at all suggest that these witnesses were lying. On my part I must hasten to add that I observed the demeanour of all these witnesses and they all struck me as honest, truthful and candid witnesses. They had nothing to gain by falsely testifying against the accused nor a bone to grind with them.

On the whole I am satisfied that it is the accused in the company of others who inflicted fatal injuries on the deceased that led to his subsequent death. They were properly and positively identified in the act by the witnesses aforesaid. They knew that their actions would probably cause and indeed did cause the death of the deceased.

So what was the Motive for the killing? It is trite law that failure to prove motive does not, perse, vitiate an accused conviction as by dint of the provisions of section 9 of the penal code, motive is not one of the elements necessary to prove in a criminal offence. However even if motive was necessary, it can be found in the evidence of PW1, PW2, PW3 and PW5. Apparently PW2, PW3 and the deceased were allegedly being disciplined for having stolen from one, Muthie, a mattress and two trousers.

It is also trite law that where the case against two accused persons proceeds on the basis of their acting in concert then both can be found guilty, if the evidence establishes that they were acting jointly and or on common design. It matters not that they were in an amorphous group. See KING V R (1962) 1 ALL E.R. 816, MUNGAI V R (1965) EA 782 and GEORGE MUCHIRI RITHO V REPUBLIC NYR C.A. CR. APP. No.56 of 2007 (UR). The accused herein set out in the company of other persons to round up and deal with those suspected or perceived to have robbed, Muthie of some items. The deceased, was a victim of their mob justice or is it injustice. The action of each of them during the execution of the mandate was

the action of all others as it was in pursuance of a common purpose. The action herein of the accused was in furtherance of that common purpose and the action of each affected the other.

The only misgiving I have on the part of the prosecution is that they did not call the investigating officer as a witness to shade light with regard to his/her investigations in this case and the results thereof. However I am aware that there is no law to the effect that in every case the investigating officer must come and testify. Such cases are confined to their peculiar facts and circumstances. The evidence of the investigating officer would have been necessary if there were loose ends in the prosecution case that required tying up. Much as it would have been desirable for the investigation officer to have testified herein, I nonetheless do not discern any unbridgeable gap in the prosecution case that his/her evidence would have been of assistance.

The accused have in their defence essentially raised defences of alibi. However if those defences are juxtaposed against the overwhelming prosecution evidence, they collapse as a house of cards. They were seen participating in the act by no less than 6 witnesses in broad daylight. They were persons well known to them. Those witnesses had no grudges or bones to grind with the accused. Indeed even the accused themselves claimed not to know them. That being the case, those witnesses will have no reason to simply pick on them and falsely accuse them. I would in the premises dismiss the defences aforesaid as mere afterthought calculated to mislead the court.

The upshot of the foregoing is that I find each of the accused guilty as charged. Accordingly I convict each of the accused for the offence of murder contrary to *section 203* as read with *section 204* of the penal code.

I will now invite respective counsel to address me on matters of sentence.

Dated and delivered at Nyeri this 5th day of February, 2010.

M.S.A. MAKHANDIA
JUDGE