



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Case 23 of 2003**

REPUBLIC.....PROSECUTOR

VERSUS

FABRIANO UTUKU MUKIRA.....ACCUSED

J U D G M E N T

The Accused person-Fabriano Utuku Mukira was arraigned before this court to answer 4 counts of murder contrary to section 203 as read with section 204 of the penal code on 21/8/2003. He pleaded not guilty on all the 4 counts and the long journey started. This matter has been in court for the last seven years. It has not been an easy matter and it has met its fair share of obstacles along the way. At one point, counsel who had been appointed to conduct the pauper brief withdrew from the case citing emotional distress. He said he was unable to defend a person who had killed so many people including an innocent toddler. The case was assigned to another counsel and the same proceeded. Assessors were appointed and one witness testified before Justice Lenaola. He was transferred soon thereafter and the matter was to proceed before Lady Justice Khaminwa. The law was subsequently changed before she took the evidence of any witnesses. The assessors were therefore discharged and the matter started de novo without the aid of assessors. After taking the evidence of 10 witnesses, Justice Khaminwa was transferred from the station. She declined to come back to hear any part heards and so with the consent of the defence, I took over the matter and took the evidence of the last 2 witnesses. At the close of the case, counsel for the Accused person declined to make any submissions. The accused person was placed onto his defence and he elected to make a sworn statement but they asked for time to prepare.

On the date for defence hearing, counsel sent somebody to say that he was not ready to proceed saying that the Accused was unwell. The Accused person told the court that he had problems with his stomach. It was then clear that for some undisclosed reasons, the Accused person did not wish the matter to proceed. I gave the defence a last adjournment but when the matter came up again a month later, the Accused person declined to proceed saying that he was not ready. One would wonder what more time he needed given the matter had been proceeding for over 6 years.

I declined the application for adjournment but the accused person declined to testify. I therefore made the inference that he had decided to offer no evidence. His counsel who was in court said he had no submissions to make and so he closed their case. The file then had to go to typing and it has taken quite some time for me to manage to go through the 172 page proceedings, and also to reconcile my mind to the fact that I only have before me the evidence that was adduced by the prosecution and that the accused person has offered no defence whatsoever notwithstanding the magnitude and seriousness of the case facing him.

Be that as it may, I appreciate the fact that the task of Judgment writing and decision making has never been an easy one and is one of the most difficult and unenviable task a Judge or Magistrate has to perform. After the conclusion of a case however, a Judgment must be rendered. That is a task I cannot shirk and one that I cannot delegate and so here we are.

In brief, the prosecution case is that PW1 Jane Njoki went to the shamba on the morning of 6/2/2003. She was with her mother and they were harvesting millet. While there, the accused person who PW1 said they knew well before as an in-law found them. He greeted them and asked PW1 for some water to drink. She went to wash the cup in order to serve him the water. As she turned, the accused person who was said to have been carrying a panga cut up her mother severely on her head and neck. He then took the witness by her hand and pushed her down and dragged her behind the house where he cut her severely leaving her for dead. She does not know where he went thereafter but she managed to scream and call out for her grandmother PW2 who was in a nearby farm. According to PW2, '**SEVERINA UTUKU**', she had seen a person from afar running while holding a panga. Shortly thereafter, she heard the voice of PW1 calling her. She went to where the voice was coming from and found PW1 lying on her back groaning. She carried her to the path where she started screaming. PW3 John Njagi heard the screams and rushed there. He found the injured woman. Some other people also heard the screams and gathered at the scene. According to PW3, they enquired from PW1 what had happened to her and she told them that she had been attacked by Fabriano Utuku. They also went to the other parts of the shamba where they found the other bodies. PW1's mother who had been cut badly is said to have been able to talk to the witnesses. She told them that she had been attacked by Fabriano Utuku but she died about 10 minutes thereafter. They went round and saw other 3 bodies including that of a child.

PW4 Nyaga Kiringa was the husband of one of the deceased – i.e Surivana Kaguna (deceased in ct 3) and father to the deceased in ct4). He told the court that on the morning in question he was going to a meeting at the nearby school. He met the Accused who was his brother- in-law. They talked and the Accused is said to have enquired if PW4's wife had prepared porridge so that he could pass by and have some. PW4 replied in the affirmative. The Accused is said to have told him that he was going to the farm to cut some maize and leave it cooking for his family before proceeding to the meeting. He is said to have been wearing a green trouser and white shirt. He was also carrying a panga and a Kiondo (Kikuyu basket). According to PW4, the accused proceeded towards PW4's home. He identified the shirt exhibited in court as the one he saw the Accused person wearing that morning. According to PW4, he decided to go back home and that is when he found that his wife and child had been cut up and had died. The child had been placed on top of his wife's body. He said that at the scene he saw the Kiondo which he had seen the accused person carrying a few moments earlier. He screamed and other people went to his help.

The matter was reported to the assistant chief and the chief PW7 and PW8 who were at a nearby meeting.

PW6 Savetorious Nyaga a husband to one of the deceased persons told the court that he was also going to take a bath. He said that he met the Accused person who he knew well before. They talked and the Accused who was carrying a Kiondo and a panga told him that he was first going to collect maize from his shamba and then he would proceed to the meeting later. On his way back home, the witness learnt that there were some killings around that area. He rushed to his shamba where his wife was. He found her badly injured but still alive. He asked her what had happened and she said she had been attacked by Fabriano i.e (accused). He said that the deceased repeated this 3 times and then she died. PW7 and PW8 reported the matter to the police. PW9 P.C Kanji from scenes of crime went to the scene and photographed the bodies before they were removed and taken to the mortuary. PW10 P.C Jonathan Kyalo visited the scene and observed the bodies. He organized members of public to assist in carrying the bodies down the hill as the police vehicle could not access the scene. The witness also recovered the shirt the Accused was said to have been wearing several days later. The Kiondo the Accused was said to have been carrying was also recovered at the scene where the bodies were found and taken to the police station.

Post mortems were later carried out on the bodies of the deceased persons. They had all died from massive haemorrhage due to deep cut wounds which had severed some of the main blood vessels. The post mortem reports were produced as Exhibit by PW11.

PW12 A.P. Khamis who was then attached to Kirie Chief's camp in Siakago told the court that on the material date at about 100.p.m. while at the camp, the Accused person had gone to the looking tired and "*suspicious*". He asked to be given some drinking water. He was only wearing a pair of trousers and had no shirt. He said he had been chased away by the villagers from Kiangombe village and wanted to be taken back there. PW11 refused but he gave him a T-shirt to wear and advised him to go and report the matter to Siakago police station.

It is not clear when the accused person was arrested but he was brought to this court for plea on 21/8/2003. The arresting officer did not testify. That basically is the evidence on record.

From this evidence, there is no dispute that the deceased persons on all the 4 counts were killed on the date in question. They all died from the serious cut wounds as evidenced by the post mortem forms. The fact and cause of death is therefore not disputed. The only issue for determination is whether it was the accused person herein who attacked the deceased persons. He tendered no defence whatsoever. Indeed even from the cross-examination of the witnesses, it is difficult to discern his intended defence. The court therefore has to solely rely on the evidence adduced by the state. This does not nonetheless lessen the need by the prosecution to discharge its onus of proof beyond any reasonable doubt. Has the prosecution discharged this onus? It is noted that the only witness who can be called an "*eye witness*" was PW1 Jane Njoki. She was also cut up by the Accused person and left for dead. She told the court that it was the Accused person who he knew well before as an in-law who found them in the shamba. He greeted them and asked her for water. It was about 10.30 a.m. and thus in broad daylight. She went to get water for the Accused but before she could turn round and give him the water, he held her by the arm pushed her down and cut her leaving her for dead. When the Accused left, she called out for her mother but she had been cut severely and blood was just flowing. She told the court that other than herself and her mother, there was no other person at the scene. These circumstances leave me in no doubt whatsoever that it was the Accused person who cut and killed the deceased. To buttress PW1's evidence is the evidence of PW4 and PW5 who clearly stated that they had met the Accused person a few minutes earlier. They had even talked to him. He specifically told PW4 that he was headed for his house-i.e where PW1's mother was killed. Although PW4 and PW5 did not see the Accused kill the deceased person, they saw him clearly headed for the direction where the deceased persons were killed a few minutes later. They did not meet anybody else in the vicinity. Further - PW3, PW4 and PW5 all said that when they asked Suvirina (deceased in ct 3) who had cut her, she said and repeated 3 times that it was Fabriano -i.e the Accused person who attacked her. The Kiondo they had seen him carrying earlier on was found at the scene. The same day, 3 hours later, the Accused appeared at the chief's camp where PW11 said he was looking tired and "*suspicious*". He had no shirt. His shirt was recovered some days later near the scene. The death declaration to these 3 witnesses was corroborated by PW1's evidence and the evidence of PW4 and PW5 to the effect that they had seen the Accused headed for the scene a few minutes earlier. In the absence of any explanation or rebuttal from the Accused person, this evidence remains strong and unshaken.

I have no reason to discredit the same. The circumstances are such that there was no opportunity for anybody else to have killed the 4 deceased persons.

What baffles me however is the motive. None of the witnesses who testified said that the Accused person had a problem with any of them. Indeed, he was an in-law to PW1 and her mother. Why then did he kill them? What was his motive? By dint of section 9 (3) of the penal code, the prosecution has no duty to prove motive. This provision provides:-

9 (3) "*unless otherwise, expressly declared, the motive*

by which a person is induced to do or omit to do

an act, or to form an intention is immaterial so

far as regards criminal responsibility.....”

The accused's motive remains unknown but it was not incumbent upon the prosecution to prove the same.

What defence did the accused person have? He proffered none. There is no evidence whatsoever even from cross-examination that he suffered from any mental disease that could have clouded his mental faculties. He has not actually advanced any defence of insanity which the law would require him to prove.

I have always agonized over the accused person's state of mind when he committed these killings, but I have been apt to observe that he was ably represented by counsel throughout this trial. They never raised the issue of his mental status. The matter was handled by 3 Judges before me. None of them saw the need to enquire into the accused's state of mind. They must all have been satisfied that he was of sound mental status. On the few occasions I handled the matter, the Accused person appeared quite normal other than for being obstinate and refusing to testify. There is therefore no room whatsoever for me to surmise or to question his mental status. Going by the evidence before me and the proceedings over the last 6 years, there is no basis for me to make a finding that the accused person was not in control of his mental faculties when he killed the deceased persons? Did he then have the requisite mens-rea? From the nature of the injuries on his victims, it is clear that the deceased had the intention to kill them. They all had several deep cut wounds which had severed the main blood vessels on the neck. He cut them with the clear intention of killing them. Even PW1 who survived did so by the Grace of God. The Accused must have believed that he had killed her. Malice aforethought as defined under Section 206 (a) of the penal code has therefore been established.

After considering all this evidence, my finding is that all the charges against the accused person have been proved beyond any reasonable doubt as by law required. I consequently find him guilty as charged on all the counts and convict him accordingly. He will be sentenced on count 1 only while the sentences on the other 3 counts will remain in abeyance.

Delivered, dated and signed at Embu this 5th day of May 2010

W. KARANJA
JUDGE

In presence of:-Accused and Ms Matiru for state.