



REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Murder Case 1 of 2009

REPUBLIC.....PROSECUTOR

VERSUS

SANNY NJAGI MBOGO.....1ST ACCUSED

PATRIC NJERU MBOGO.....2ND ACCUSED

J U D G M E N T

The accused persons herein are brothers. They are charged before this court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in that on the 27th day of December 2008 at Kithimu market in Embu District, they jointly murdered GEOFFREY NJUGUNA NYAGA. They denied the charge and the matter proceeded to full trial. The state called a total of 6 witnesses in support of its case. On their part, after they were placed onto their defence, the accused persons made unsworn statements of defence and called 2 witnesses.

The brief circumstances of the case as relayed by the prosecution witnesses is that on the material date, the deceased went to Kithimu Market. His brother John Kariuki Nyaga (PW2) and mother Anna Wambui were also at the market later that afternoon. According to PW2, he saw a group of people gathered somewhere at the market. His curiosity led him to the scene where the people were gathered. He told the court that he found the 2 accused persons there. Accused 1 is said to have been armed with a rungu (club) while his brother Accused 2 was armed with a panga. They were beating the deceased using those weapons. PW2 approached Accused 1 and asked him why they were beating his brother. They are said to have threatened PW2 with the said weapons. PW2 ran to the chief's camp to look for help. He did not get the chief or administration police. He therefore rushed back to the scene but he found that both accused persons had left but his brother had been set on fire and the members of public present were trying to put out the fire.

The deceased's mother (PW3) who happened to be at the market place then heard a lot of noise coming from one part of the market. She too decided to go and check what was happening. She told the court that she found her son being beaten by the 2 accused persons as other members of public stood and watched. She also went to look for help but finding none went back to the scene. This time she found her son being burnt. She also found PW2 and the area chief at the scene. The police were called and the deceased was taken to Embu Provincial General Hospital where he was admitted before being transferred to Kenyatta National Hospital 2 days later. According to PW2, his late brother informed him while in hospital that he had been lynched by the 2 accused persons. The area chief testified as PW4. He told the court that he left his house for Kithimu market on the material date about 6.00 p.m. On approaching the market, he saw a crowd of people surrounding a place where there was smoke. He went there and forced his way through the crowd. He said that he saw a naked man rolling on the ground. He enquired as to who the man was and PW2 and PW3 identified themselves as his brother and mother respectively. According to the chief, he was informed that the deceased had been lynched as a theft suspect but he was not told who had set him on fire.

Among the police officers who went to the scene was PW6- P.C Tobias Odhiambo. He told the court that when he went to the market, he found a crowd of people. He found the deceased at the scene with multiple burns on his body. According to the witness, he questioned the people at the scene and he was given the names of the 2 accused persons as the ones who had beaten him. He took the deceased to hospital where he was admitted. He also attended the post mortem later on 13/1/2009 where he and the deceased's relatives identified the body.

According to Dr. Njeri Maina who conducted the post mortem, the body was covered with 2nd degree burns on the interior and exterior parts. The arms and legs were also burnt. In her opinion, the cause of death was cardio-vascular shock due to the 60% burns. She produced the post mortem form before court as exhibit. She told the court on X-Examination that there was no other cause of death. The accused persons were arrested later and charged with this offence after PW1 (Dr. Thuo) examined them and confirmed that they were fit to stand trial.

In his defence accused -1 told the court that he sells cereals at Kithimu market. He said that on 27/12/2008 i.e the date in question he and his brother Accused 2 attended the funeral of a relative. He said that the burial took place and lasted until 6.30 p.m. when they started walking back home. On the way, they met a crowd of people who were talking about a thief, who had been burnt at Kithimu market. They were arrested a few days later and taken to Itabua Police Station where they were accused of having killed the deceased. He denied having killed the deceased.

On his part, the 2nd accused reiterated that he was with his brother 1st accused, on the date in question. He adopted Accused 1's defence and repeated that they had both attended a burial programme as exhibit to show that the

burial took place.

DW1- Ireri Rawland Njagi told the court that he had attended the burial in question together with the accused persons on the date they are said to have killed the deceased herein. He said that they left the burial at about 6.00 p.m at a place called Gatondo. He produced the burial programme as exhibit to show that the burial took place.

DW2 came to produce the burial permit and receipt as exhibits. As far as I am concerned, his evidence was as irrelevant as that of the funeral programme produced by Accused 1. I say so because these documents only show that a certain person had died and that she was being buried on the date in question. These documents have no nexus or relationship with the accused persons whatsoever. Further, the fact that there was a burial does not automatically prove that the 2 accused persons attended the same. These documents were of no relevance or probative value whatsoever to this case.

The accused persons' defence is that of alibi. Their counsel submitted that they had not been placed at the scene of crime on the date and time in question. He also submitted the state had failed to establish mens rea against the accused persons- He therefore urged the court to acquit them.

Counsel for the state on the other hand submitted that mens rea had been established as there was an intention to cause the deceased grievous bodily harm if not kill him as envisaged under Section 206 (a) of the penal code. He also submitted that the accused persons had been placed at the scene by PW2 and PW3, and that their evidence had been corroborated by the dying declaration made by the deceased to Pw2.

I have carefully considered all this evidence along with these submissions. I have also considered the law applicable in this matter. To start with, the fact and cause of death is not disputed. The deceased died from cardiorespiratory arrest following massive (60%) 2nd degree burns. From the evidence on record, the deceased had been beaten up before he was set on fire. As a result of the burns, no other injuries could be seen on the body. The pertinent points for decision herein can therefore be compacted to the following:-

- 1. Were the accused persons placed at the scene by the prosecution witnesses?**
- 2. Did they participate in the orgy that led to the death of the deceased?**
- 3. Did the deceased make a dying declaration to PW2 and if so what was its probative value?**
- 4. Has the prosecution discharged its onus of disproving the accused persons' alibi as the law commands?**
- 5. If actus reus is established has the prosecution proved the mens rea or malice aforethought?**
- 6. Finally has the charge murder been proved to the required standard?**

On point 1 my answer is in the affirmative. PW2 and PW3 may have been the deceased's brother and mother but there was nothing in their evidence to even remotely suggest that they had reason to fabricate the story against the accused persons. They knew the accused persons well before. They were both at different corners of the market and

when they rushed to the scene after hearing screams, they had no idea that it was their relative who was involved. They saw the 2 brothers at the scene. They described how the accused persons were armed and how they were beating the deceased. According to PW2, he even talked to Accused 1 and sought to know the reason why they were beating his brother. It was after they threatened to beat him too that he decided to go and seek for help from the chief. He was candid enough to state that when he came back to find his brother on fire, the accused persons were not present.

PW3's evidence tallied with that of PW2. She found her son being beaten by the 2 accused persons and ran to look for PW2. By the time she came back, she found her late son on fire. She did not know who set the deceased on fire.

The evidence of these 2 witnesses however establishes beyond any reasonable doubt that the 2 accused persons are the ones who started the assault. They were the two people seen at the scene by PW2 and PW3 armed and assaulting the deceased. If others joined them later, that does not exonerate the accused person from culpability. Even assuming for the sake of argument that they are not the ones who set the deceased on fire, they too were part of the '**mob**' who beat up, burnt and thus killed the deceased. They displayed a common purpose or intent with others who joined in the fray that resulted in the death of the deceased. We cannot reason that because the accused persons only beat (assaulted) the deceased and there is no proof that they are the ones who burnt him- yet the cause of death was the burns, that they cannot be held responsible for the death.

The beating and the burning were not 2 distinct transactions. It was one transaction and it is the transaction that resulted into the death of the deceased. The evidence of PW2 and PW3 as to what happened at the scene does not in my considered view even need the corroboration of a dying declaration. It was consistent and credible. I was left in no doubt that they were telling the truth. When PW4 - the area chief went to the scene, he found PW2 and PW3 already there. They had therefore witnessed what had happened. The above answers points 1 -3 as enumerated herein above. This analysis also takes care of question No.4 as the prosecution through the evidence of PW2 and PW3 has placed the 2 accused persons squarely at the scene. While on this, I would like to state that I have considered the accused persons' defence. The fact that there was a burial in the vicinity does not necessarily mean that they attended it. I appreciate that the burden of proof to disprove that alibi still lies with the prosecution. The prosecution has proved that the accused persons were at the scene on the material date and time. They were not therefore at the funeral as they claimed.

If on the other hand they had attended the funeral, the programme clearly shows that the burial was scheduled to end at 3.00 p.m. and they could have arrived at the scene between 5.00- 6.00 p.m when the incident happened. Actus Reus has in my view been proved.

On the issue of mens rea, the question is whether they actually intended to kill him or cause him grievous bodily harm. I have found that the 2 accused persons did actually trigger the incident and they are the ones who started beating up the deceased. It is not denied however that there were other participants involved. It is not known when the accused

persons stopped the assault and when the deceased was set on fire. They could have stopped at a point where the deceased's life was not endangered and others took over. Indeed there is even a possibility that it was neither of them who struck the match to set the deceased ablaze. There were other players in the entire '**game**' who could have taken over from the accused persons after they set the incident into motion. This possibility mitigates the existence of the requisite mens rea for murder.

The intent to kill or cause grievous bodily harm has not been proved to the satisfaction of this court. My finding is that the two accused persons triggered and participated actively in the "**lynching**" of the deceased, but the intent to kill him or cause him grievous bodily harm has not been proved. The charge of murder cannot therefore hold.

In the circumstances, I invoke the provisions of Section 179 (2) of the Criminal Procedure Code and find both accused persons not guilty of the murder charge as charged and acquit them accordingly of the same. I nonetheless find them guilty on the charge of manslaughter contrary to Section 202 as read with Section 205 of the penal code and convict them accordingly.

W. KARANJA

JUDGE

Delivered, dated and signed at Embu this 4th day of May 2010.

In presence of:- Mr. Njage for accused and Ms Matiru for state.