



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE 70 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA KIRIMI NYAGA.....1ST ACCUSED

CHARLES NYAGA MURUMA.....2ND ACCUSED

JOSEPH MURIMI NYAGA.....3RD ACCUSED

**Evidence – circumstantial evidence – test that circumstantial evidence must satisfy
before a conviction can be founded on it – Dying declarations be corroborated**

JUDGMENT

INTRODUCTION

The accused were charged with the murder of the deceased contrary to Section 203 as read with Section 204 of the Penal code. The accused all denied that they murdered one Josphat Mukembu on the 24th day of September 2006 at Rwaka Village Nkondi sub location in Tharaka District Eastern Province.

The prosecution called seven (7) witnesses including a Doctor (PW6) and the Investigating Officer (PW7). At the end of the prosecution case, Court found on the evidence that the prosecution had established a prima facie case and the accused were put on their defence. The gist of the evidence is entirely circumstantial. None of the prosecution witnesses PW1-PW5 inclusive saw any of the accused actually shoot the fatal arrow at the deceased. The following was the prosecution evidence.

The Prosecution case

PW1 Janet Kanini was wife to the deceased. She testified that on the fateful night (24-9-2006) she and her husband the deceased had retired to bed at about 10. p.m. and that while asleep her husband woke her up and told her that he heard his goats disturbed and making noise. Her husband went out and she followed him. Her husband shone a torch at the goat, it was released and she returned it to the goatshed, leaving her husband outside. A little later she heard her husband say that he had been shot (at with an arrow) at hi rib cage, and that he had removed it. She left the arrow at the scene and rushed the deceased to hospital where he succumbed to his wounds at 5.00 a.m. in the morning of 25.09.2006.

PW1 testified that the deceased told her that his attackers were – Charles Nyaga (also called Charles Nyaga Muruma – 1st accused), Joseph Murimi Nyaga – 2nd Accused), and Joshua Kirimi Nyaga 3rd Accused). PW1 knew the three (3) accused and confirmed her knowledge by touching in turn each of the accused.

In cross-examination, by Mrs Kaume learned Counsel for the accused, PW1 testified **inter alia** that the 1st accused is father to the 2nd and 3rd accused, that they were bad neighbours who used to poison their chicken, and that one had broken into their kitchen and stolen peas, that he saw a group of people, by the use of his torch, but would only identify three of them, and that the deceased told her these things before he collapsed at Materi Hospital; and that she was with **Ayub Njagi**, her son Daniel Kibaara and **Gitonga** whose vehicle was used to take the deceased to the Hospital, PW1 also testified that the deceased could not talk until he received first aid at Marimanti Police Station, and that he talked on the way to Materi Hospital.

PW1 also testified that a house under construction BY HER SON Mbiti created problems between her family and people she did not know and the house had been demolished at night. She testified that the only people she saw that evening before retiring to bed were Ayub Njagi, Mauki and another young man Ntende who had all gone to bed and were waken up to take the deceased to the Hospital.

In re-examination by learned State Counsel PW1 testified that neither the deceased nor any member of the deceased's family had a land dispute with the accused family except for chicken poisoning and theft of materials – but that they had forgiven the 3rd accused for theft of materials.

PW2 was Benson Muteria Kaunangu, a retired civil servant, and a neighbour and a brother-in-law of the deceased as PW1 was a cousin to him. He heard a noise on the material night, came out to inquire, called to the deceased's home as to what was going on and he was informed by Mukembu's (the deceased) son, **“come and help us”**. In turn he opened hi gate, called his son Brian Gitonga, and he found the deceased lying down in the middle of his homestead groaning in pain. They decided to take him to Hospital. He himself did not go, but his one Brian Gitonga drove his car in the company of PW1, (the deceased's wife) Daniel Kibaara and Njagi (the accused son). On the next morning he was informed that the deceased had died.

On cross-examination by Mrs Kaume learned Counsel for the accused, PW2 testified that he had been told of theft of materials by one of 1st accused's son, a week before the deceased died. He spoke to him and asked him what had happened and he had replied that he had been shot with an arrow and that he had removed it, and that the deceased could talk and that **“there were other people talking with him and he could respond”** ...

In re-examination By Mr. Muteti, learned State Counsel, PW2 testified that **“I spoke to the deceased for a few minutes not more than 10 minutes. I was with his son Njagi and his wife”**

PW3 John Njagi, was a son of the deceased. His testimony was that he had himself retired to bed at about 10.30 p.m. but that he was informed that he had been shot at by an arrow while he had gone out to chase out goat thieves and upon his inquiry he had been accompanied by his father that he had seen the accused persons all of whom I knew; that he had then ran out to inform Benson Muteria, PW2 PW3 also testified that before the deceased went into theatre he informed him that there were four assailants but he could not identify the fourth one.

Cross-examined by Mrs Kaume learned Counsel for the accused, PW3 testified that the deceased was talking upto the Hospital, and that he clearly heard the **“accused as being present when he was shot”**, that he had initially seen Nyaga and Murimi and that he had added Kiremi on the way to Materi Hospital – although this latter information was not in his statement to the Police. He was in the company of his cousin Kibaara when the deceased spoke to him at the Materi Hospital.

More poiqnantly PW3 testified that his family and that of the accused had had wrangles since his

childhood over constant chicken poisoning and small theft from their house by the accused family members. The house under construction by his cousin Mbiti had been demolished twice by persons he did not know. He also never saw the arrows where they were found and handed over to the Police.

Re-examination by Mr. Muteti learned, State Counsel PW3 reiterated his testimony that the deceased had recognized only two but later added that he had also seen Kirimi Joshua as the other person he had seen. He did not associate the demolition of Mberia's house to the accused.

PW4 John Kamwaru, is a brother of the deceased. He had received information from one Kathuri his sister-in-law that Ayub Mukembu a son of the deceased had been shot by **unknown persons**. He it was, who upon being informed later the next day (25.09.06) that his brother had died, sent some young men, Zachary Mbiti and another to report to the police who came and took the arrows from where they were scattered. He testified that the accused had a grudge against the deceased because the deceased had caused one of the 1st accused's son to be arrested and charged for stealing. He testified **"I do not know who shot my brother"**

When cross-examined by Mrs Kaume learned Counsel for the accused PW4 testified –

"I have never been told who killed my brother – that morning when I went to his home no one told me who had shot him. The arrow heads were collected by the police on 10.11.000 and on 25.09.2006. No one touched them as I had asked everyone no to disturb them."

PW5, Stephen Njeru Gichiobi is a relative of the deceased. He lived 3 acres away from the deceased. He was woken up by his child who had heard noises from the deceased's home. He went there and found a vehicle outside the home and the deceased already in it. He spoke to the deceased and sought to know what the problem was – the deceased asked for water but the vehicle left before the water was brought. He told him that he had been shot by an arrow but did not know who had done it. He knew the accused as a neighbour of the deceased but he had never heard of any issue between them.

When cross-examined by Mrs Kaume, Counsel for the accused PW5 testified that the deceased never told him who had shot him and that even those he found there did not have that information. **"I do not know to-date who shot him"**. Even in re-examination by Mr. Muteria State Counsel, PW5 stated that he found the deceased's son Ayub Benson Mutiria and James Mutiria and that none of them told him who shot Mukembu (deceased)

PW6 Dr. Henry Njiru testified that he carried out a post mortem upon the deceased, he found a sutured wound between the 9th and 10th ribs about 4 cm deep. It had caused a laceration of the liver with blood in the abdominal cavity and concluded that the cause of death was internal bleeding due to laceration to the liver.

PW7 was IP Peter Kirui then based at and OCS Katunga Police Station. He was the investigations officer in this matter. He testified that when the report of the incident was first made on 25.09.2006, at 8.30 a.m, no suspect was named – **"No attacker was named"**. He rushed to the scene, where he collected one arrow head with blood stains. He also observed that a construction nearby had been destroyed and that the victim had been taken to Hospital. He interviewed people nearby, but that they were neighbours as members of the family had accompanied the deceased to the hospital.

PW7 testified that when he received information that the deceased had died he summoned members of the family to record statements. The information he then got was that the deceased had named his attackers Charles Nyaga and his sons (four of them) and he arrested Charles Nyaga and his two sons. He arranged for the post mortem to be carried out and he charged the accused.

Upon cross-examination by Mrs Kaume Counsel for the accused, PW7 testified that the initial reports of the incident made by Jeremiah Mbiti and Julius Njagi did not mention any suspect or the accused. The names of the suspects were given later after he had visited the scene.

The foregoing was the prosecution evidence. The Court found that the prosecution had made a prima facie case, and put the accused upon their defence.

The Defence Case

After being reminded of their rights under Section 306 of the Criminal Procedure Code (Cap 75 Laws of Kenya), to give evidence on oath and recall witnesses in their defence, or to give unsworn statements or simply keep quiet, the accused each elected to give sworn testimony. The evidence of the 1st accused, (Charles Nyaga Muruma), DW1 was similar to that of know of his co-accused , both of whom are his sons and DW2 his wife. The 1st accused testified as DW1. He testified that he was shocked by the accusation and charges against him or his sons, the 2nd and 3rd accused. He his wife (DW2), daughters Jane and Muthoni had returned from Church on the material day. He had eaten and retired to bed early at about 8.00 p.m. He was woken up by his wife, and informed that there were screams, he went out and realized that the screams came from the direction of the deceased's home. He called out and his sons the 2nd and 3rd accused and they accompanied him to the home of the deceased. He found some villagers already at the home, such as Kirema, Kithure, and Muriria and others kept arriving. They found the deceased lying down and that PW2 (Muruma Benson) was also present.

Upon their inquiry as to what had happened he was informed that the deceased had been stabbed by an arrow, but no one knew who had done it. DW1 testified that after about 10 minutes of their arrival the deceased's son Job Njagi (DW3) returned with a vehicle and the deceased was taken to Hospital. He testified that the deceased was talking but did not say who had injured him. He and his sons returned home until the next day when he returned to the deceased's home and learnt that the deceased had died early morning of that day.

DW1 further testified that the Police came that morning, and made inquiries if anyone knew what had happened but as no one was able to answer them, as PW1 and PW3 (wife and son of the deceased) had not returned from hospital. The Police carried a search and collected arrows. When asked what had happened DW1 answered he did not know. DW1 denied categorically that he had anything to do with the death of the deceased. He took part in the burial preparations, even his son, 2nd accused was one of these who dug the grave for the deceased. He had heard of no suspect until he and his sons were arrested, no one told him or his sons why they were charged after close to two months. He observed that of the five arrows collected, only one had blood stains; that he was forced to write statements at the Police Station, that he is innocent and should be released. He had no grudge with the deceased who was his friend, and a good neighbour.

DW1 testified further that the deceased had a case with one of his sons, John Nyaga who had stolen green peas from the deceased, but that he himself had arrested his son, taken him to Marimanti Police Station and that before he was charged, the deceased withdrew the complaint, and that the matter ended there. He knew his son was a thief as he also stole from him. He testified that the families lived like brothers, There was no bad blood between him.

In cross-examination by Mr. Muteti learned State Counsel, DW1 testified that the deceased was his great friend; and so was the deceased's wife. He could not speak of his children, but he had no differences with the children of the deceased. He was shocked by the evidence of the deceased's wife and son (PW1) and PW3). He went to the deceased's home, on the night in question, he was sober, he does not drink. He heard the deceased talking but he did not talk to him as there were many other people before he was taken to Hospital. DW1 testified that he has four sons, including a boy of 16 years who was staying in his uncle's home. DW1 was equally categorical that he was framed up by the family of the deceased, had never poisoned their livestock, and to his knowledge no one in his family ever did so. DW2 Kaburi Charles was wife to the 1st accused and mother to the 2nd and 3rd accused persons.

Her evidence is conformity with that of DW1 her husband. She had gone to Church on the material day and returned in the evening, that at night as they slept she woke her husband DW1 after she heard screams. They realized that the screams came from their neighbour's compound. DW2 confirms the

evidence of DW1 that they found the deceased lying within his own compound, there was a large crowd, the deceased had already been shot, and she being in a state of shock did not approach him. The deceased was talking, but did not say who had shot him as it **was dark that night**. She confirms her husband's evidence that after the deceased was taken to hospital she and her family members went back to sleep, but returned the next day, and saw the Police come, search and take away five arrows with one arrow blood stained.

DW2 testified that they buried the deceased after 6 days; there was no grudge between her family and that of the deceased and she denied the existence of any grudge between her family and that of the deceased, DW2 also denied that her family ever poisoned the deceased's livestock. The deceased was either friend and he "would help her"

Her evidence in-chief was not shaken in cross-examination by Mr. Muteti, learned State Counsel. She expressed that the deceased said that either her husband or sons shot him. They were all friends. They had no dispute with the deceased. A house being constructed by one of the deceased's sons Jeremiah Mbiti Nyaga was demolished on the night the deceased was shot.

DW3 was Joseph Murimi Nyaga the 2nd accused. He reiterated the evidence of DW1 and DW2. He accompanied his father (1st accused) and brother (2nd accused) and his mother (DW2) after being woken up by his father (DW1). He testified that he talked to the deceased who informed him that he had been shot but did not know who had shot him. After the deceased was taken to the hospital he returned to his house. He too returned to the deceased's home the next day, the Police came, asked him what had happened and he had informed that he did not know. The Police had a discussion with the deceased's wife (PW1) and went away. They were arrested on 13.10.2006. He does not know who shot the deceased, or to whom the arrows belong, as he himself does not have arrows in his house and had never handled any.

In cross-examination by Mr. Muteti learned State Counsel DW3 reiterated his evidence in chief. He maintained that his evidence was the truth, he had spoken to the deceased, that night, he had no reason to hate him, his brother John had wronged the deceased.

DW4 Joshua Kirimi Nyaga was 3rd accused. In brief his testimony was consistent with that of both DW1 DW2 and DW3. He had been woken up by his parents. They all went to the deceased's home after answering the screams for help. He found the deceased lying down. He was in shock. There was a large crowd, in his estimation, 20 people. He stood 5 metres away. No one said who had shot the deceased. He was a primary school boy. He was then 16 years of age. He went to school the next day, and upon his returning at 4 p.m. met Police at the scene near the deceased's home. He was arrested after 3 weeks – thought no one had asked him about anything prior to that date. He saw the arrows produced in Court, but he said he had never seen them before. He did not know to whom they belong. He himself did not participate in the burial of the deceased.

THE ISSUE AND ANALYSIS OF THE EVIDENCE

The issue in this case is not unlike in other murder cases, whether the accused murdered the deceased Josphat Makembu as charged.

At the end of the Defence evidence, Mr. Muteti (now learned Senior State Counsel), offered to make no final submissions to show that the prosecution had proved its case against the accused beyond any shred of reasonable doubt. Instead Counsel submitted that he relied on the evidence on record that the prosecution had established such a case.

I have set out in extenso the evidence for the prosecution and the defence and about the only thing that is clear from it, and not in dispute both from the prosecution and defence evidence, is that the deceased was shot with an arrow on the night of 24.09.2006. There is however no direct evidence that it is the accused or any one of them who shot the deceased with an arrow on that night at about 10.00-10.30 pm. The evidence on record does not in my view even fit the appellation of "**circumstantial evidence.**" There is

no circumstance that might in the evidence of the prosecution's star witness, PW1 and PW3 they heard the deceased say, he saw four people by the light of his torch and that he only recognized the accused. A circumstance would be something like, the accused were with the deceased, they had been quarrelling that night, or that they had been drinking together etc.

In this case, the circumstance described were allegations of poisoning chicken on unknown previous occasions, and theft of pigeon peas by the 2nd accused and for which he was arrested by his own father 1st accused, and escaped prosecution because the deceased himself forgave him. The deceased and accused were neighbours, and from the prosecution and defence evidence, there was no land boundary dispute between (usually a source of differences and enmity between neighbours). There was no other circumstance which could be said to be either a grudge or notice by the accused for wanting the deceased out of the way.

DW 1 testified that his son, the 2nd accused even participated in burial preparations and helped in digging the grave for the deceased. Few, if any, persons, with bad blood with a deceased person would want to assist in his burial, or even dare to be present at his funeral. He would generally stay away.

The prosecution witness PW1 – PW4 also testified that a house being built on the deceased's land by his brother's son Mbiti, had been destroyed twice, (including the night of 24.09.2006) by persons unknown. Only persons with either interest in the deceased's land or not wanting another relative to encroach on their father's land or their inheritance would cause such damage, and might be motivated to cause injury to the good samaritan – waiting to share his land with his brother or brother's children. The accused were merely neighbours not relatives of the deceased. They would have no motive to cause injury to the deceased.

So far as circumstantial evidence goes, there is no evidence of any circumstance that would connect the accused to shooting of the deceased with the arrow. The only evidence is that of the deceased dying declaration that he saw four persons with the aid of his torch. He only recognized the three accused, indeed in the evidence of PW2, he only recognized the 1st and 2nd accused, and added the 3rd accused later thus throwing into doubt whether he recognized two or three of the accused, and if so which one in particular. The torch was never produced in evidence. Its type and intensity of light was never discussed. DW2 testified that **“it was too dark that night.”**

A line of cases has established that a court should approach a dying declaration with necessary circumspection (**Archira vs Republic [2003]**

K.L.R.7007), in **ALUTA VS REPUBLIC [1985] K. L.R. 543 AT p.547** paras.5-10 that court said:-

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or on Counsel's speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration.”

In view of what I have stated above, that there is no circumstance connecting the accused with the deceased's death, and there is no independent corroboration of either dying declaration or other circumstance, neither is there any circumstance connecting the accused or any of them with the five arrows or the one arrow with blood stains. No finger printing for instance was carried out to show that the accused jointly or singly had in their possession the five arrows or shot the fatal one at the deceased.

For those reasons, I find and hold that the prosecution has failed to discharge its burden to prove beyond reasonable doubt that the accused or any one of them murdered the deceased, Josphat Mukembu – I therefore

order that the accused be set free forthwith unless otherwise lawfully held.

Those are the orders of this court.

Dated, delivered and signed at Meru this 12th day of June 2009

M. J. ANYARA EMUKULE

JUDGE