



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS
CRIMINAL CASE 58 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

PETER KURIA KABURU.....ACCUSED

J U D G M E N T

The accused, **PETER KURIA KABURU**, was charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is the prosecution case that the accused murdered **MICHAEL MUTUA WAITA** on 8th May 2005, at the Sinai Slums, Industrial Area, Nairobi.

The prosecution called eleven witnesses. **PW 1, ALICE WAIRIMU**, was the wife to the deceased. On the material night, at about 11.00 p.m **PW 1** was asleep in her house, when she heard the voice of her husband.

At the time, her husband was standing at the door, with blood oozing from his neck.

According to **PW 1**, she did not see her husband talking to the accused. It is **PW 2** who told her that the accused had run away. On her part, PW1 did not see the accused running away.

By the time **PW 1** went to the police to report about the incident, her husband was still alive. The husband was taken to the Kenyatta National Hospital by his brother.

It was PW1's evidence that her husband used to be a tenant of the accused, in a video studio.

PW 2, DAVID KANIA WAITA, was a brother to the deceased. He testified that on 7th May 2005, at about 5.00 p.m., he was at his brother's place. He had gone there to watch a football match, on video. The said march was between Manchester United and another team.

After watching the game, **PW 2** went to his own house.

At about 10.00 p.m. **PW 2** heard his brother saying that the accused had no respect for him, as the accused would ask him for money whether the deceased was along the road or even in his own house.

PW 2 came outside his house and he asked the accused why he always quarreled with the deceased. **PW 2** said that when he talked to the accused, the latter was with the deceased, outside the house.

According to **PW 2**, the accused did not respond to his question. However, when the deceased said that **PW 2** should go back to his house, so that the issue could be resolved on the following day, the

accused is said to have insisted that the issue be resolved there and then.

At that point, **PW 2** allowed the deceased to get into the house of the accused, with a view to resolving the issue. But within five (5) minutes **PW 2** heard scuffles inside the accused's house.

PW 2 rushed into the house and held the accused, asking him why there was a fight. The three of them i.e. the accused, the deceased and **PW 2** started leaving the house. As they did so, the deceased was ahead, followed by **PW 2** and then the accused.

As the trio got out, the deceased turned around, to look towards **PW 2**. It is at that point that **PW 2** saw blood oozing from the deceased.

PW 2 asked the accused why he had stabbed the deceased, but the accused did not reply. Instead the accused is said to have held the deceased as the latter was going down, and stabbed him with a knife.

At that stage, the accused is said to have run out leaving the deceased with **PW 2**.

Thereafter, **PW 2** got a vehicle which he used to take the deceased to Kenyatta National Hospital.

Whilst at the hospital, the deceased is said to have told **PW 2** that it was the accused and Mutua who understood what the problem was. That is all that the deceased said. Shortly thereafter, he was declared dead.

On observation, **PW 2** noted that the deceased had five (5) stab wounds; one was on the neck, 2 on the back, one under the armpit and one on the belly. Later, the deceased's body was taken to the City Mortuary.

When asked if he had known the accused, **PW 2** said that he had known him for about 20 years.

He also said that he did see the accused stab the deceased on the belly. He said that he was able to see that incident because the moonlight was very bright on the material night.

It was his evidence that the deceased had no weapon, and that the accused stabbed him in the belly when the deceased was already very helpless.

During cross-examination, **PW 2** said that the house in which the accused lived, at the material time, did not have electricity. He confirmed that inside the accused's house there was no light, save for that from the moonlight.

He also said that the accused allowed the deceased into the house.

And when **PW 2** heard scuffles inside the accused's house, he entered and found the accused and the deceased holding each other.

It was the evidence of **PW 2** that he only saw the accused stab the deceased in the belly.

He also emphasized that when the deceased first entered the house of the accused, the deceased had no injury or blood on him.

PW3, PETER KABURU MWANIKI, is a son to the accused.

On 7th May 2005, he was asleep when he heard noises, at about 11.00 p.m. The noises were those of a woman.

Upon hearing the noises, **PW 3** rushed out, opened the gate quietly, and went towards the source of the noise. He found several ladies shouting, whilst a man was lying on the ground.

When **PW 3** inquired what had happened, he was told that the deceased had been knifed. **PW 3** tried to lift him up, but the deceased said that he was in pain. **PW 3** therefore put him down.

Later, **PW 3** helped **PW 2** carry the deceased to a vehicle, which then took the deceased to hospital. Later still, **PW 3** heard that the person who had been knifed had passed away.

By the morning of the next day, **PW 3** found that the house of the accused had been demolished, and everything therefrom stolen.

PW 3 did not witness the incident.

PW4, PETER MUTUA WAMBUA, used to sell paraffin, and he was also an employee of the deceased. **PW 4** said that it was his job to ensure that the rent was paid for the video hall, which the deceased rented from the accused.

According to **PW 4**, he had paid the rent for April 2005. He also said that on 3rd May 2005, he met with the accused, who was drunk; it was about 8.30 p.m.

PW 4 said that the accused was demanding the rent for May 2005. But the two failed to agree because **PW 4** had already paid the rent for April 2005. As a result, the accused quarreled with **PW 4**.

PW 4 ran away and hid. He did not tell the deceased about the demands for the May rent.

It was the recollection of **PW 4** that in April 2005, the accused had complained that the rent for April had been paid in a manner that was disrespectful. In **PW 4**'s understanding, the comment was made in reference to the delay in remitting the rent.

However, he also said that the rent used to be paid, sometimes, about a week after the end of month, as they depended on how good or how bad the business was. **PW 4** said that they had no disrespect for the accused, although rent was occasionally paid late to the accused.

He also added that the accused and the deceased had lived together for so long that the accused was like a father to the deceased.

But, as far as **PW 4** was concerned, the deceased was not to be blamed at all for the delay, if any, in payment of the rents, because it is **PW 4** who handled the said payments.

During cross-examination, **PW 4** said that the accused first asked for the rent for May 2005 even before the month of April was over.

However, if any rent was late, **PW4** conceded that the accused would be right to demand it.

And in answer to a question asked by the court, **PW 4** said that the rents were payable in arrears; not in advance. Therefore, the rent for May 2005 was not yet due as at the time the deceased was fatally injured.

PW 5, JULIUS MAINA, was asleep at about 11.00 p.m., on the night of 8th May 2005. He heard noises of people who sounded like they were quarrelling or fighting. But, as he was asleep, **PW 5** says that he did not hear very well.

Later, he went to the place where the noises were from, and he found that the deceased had been stabbed. He therefore did not know who had stabbed the deceased.

PW 5 assisted **PW 2** to carry the deceased to the vehicle which then took him to hospital.

During cross examination, **PW 5** said that he had seen the deceased walking past his (**PW5**'s) door.

He also said that his house was next to that of the accused.

Another piece of evidence which he tendered was that there was no moonlight on the material night.

Furthermore, although the accused's house had electric lights, the same were not lit.

But although there was no moonlight, **PW 5** said that it was not a very dark night. He told the court that he was still able to see at 11.00 p.m.

PW 6, DR ZEPHANIA KAMAU, was a police doctor. As soon as he took the witness stand, the doctor realized that his report on the accused, did not bear the age of the said accused. At his request, the doctor was then stood down.

Although the trial court later declined to adjourn the case so as to accommodate Dr. Kamau, the P3 form was admitted in evidence, as Exhibit 1. By that exhibit, it is clear that the accused was found to have been mentally fit to stand trial.

PW7, JOSEPH NJUGUNA KABURU, is an older brother to the accused. He used to live in Limuru, at the material time.

He received a phone-call from the wife to the accused, who told him that he should go to Buruburu to discuss a problem which had befallen the accused.

PW 7 went to Buruburu, and met both the accused and his sister-in-law, Teresia. It was the testimony of **PW 7** that the accused told him that there had been a fight at the accused's house on the previous night, and that somebody had died. The accused therefore sought the advise of **PW 7**.

PW 7 accompanied the accused to the Industrial Area Police Station, where he left the accused in the hands of the police.

PW 8, No 71054 PC JOHN KANYUGO, was a police officer who was attached to the Industrial Area Police Station, at the material time.

He recalled that at about 2.00 p.m. on 8th May 2005, he was at the police station when the accused reported that he had a fight with someone, who later died.

PW 8 arrested the accused and placed him in custody. However, thereafter, the matter was investigated by other police officers.

PW9, DR PETER MURIUKI NDEGWA, is a pathologist. He carried out the post mortem on the body of the deceased on 18th May 2005, at the City Mortuary. The body was identified by **PW 2** and Alice Wairimu.

It was the testimony of **PW 9** that the clothing of the deceased was soaked in blood.

When he examined the body, he found penetrating stab wounds on the lower back up to the cervical region; the large anterior cervical region; and the large renal angle, with bowels popping out. The internal organs in the abdomen were ruptured, with blood in the cavity.

In his professional opinion, the cause of death was loss of blood due to the multiple stab wounds.

PW10, P.C. KITONGA OLEKOOL, was a C.I.D officer who was attached to the Industrial Area Police Station at the material time.

On 9th May 2005 he was instructed by Mr. Rutere, the D.C.I.O, to investigate the accused in relation

to an alleged murder.

According to **PW 10**, when the accused presented himself to the police, he had said that he had fought with the deceased, who had been one of his tenants.

PW 10 sent various exhibits to the Government Chemist, for analysis. The said exhibits included;

- (i) A blood-stained shirt belonging to the accused;
- (ii) A blood-stained shirt belonging to the deceased;
- (iii) A blood-soaked polythene paper, collected from the accused's house; and
- (iv) A blood-stained brown trouser belonging to **PW 2**

When the witness was asked why it took more than 14 days from the time the accused was arrested, upto the time he was first taken to court, **PW 10** said that it was because the report from the Government Chemist had not yet been received. Secondly, he explained that the office of the Attorney General also delayed in giving its directions after the police file was placed before it.

PW 11, ROSE MABWANA SIKUKU, is a Government Analyst. She carried out analysis on the various items which were sent to the Government Chemist.

She explained that the blood stains on the greyish/brownish T-shirt [Exhibit A1], the Jeans trouser and a greyish shirt were from the same male person. But the blood sample did not match the DNA profile generated from the blood sample of the accused.

However, as **PW 11** did not receive the blood sample of the deceased, she was unable to ascertain if the blood stains on those exhibits were from the deceased.

That marked the sum total of the prosecution case.

Finally, after the accused was put on his defence, he gave a sworn testimony.

He said that on 7th May 2005, he left town at 8.30p.m. He got to Lungalunga area at about 9.00p.m., where he joined 2 friends at "**Wonderful Bar**".

He left the bar after 30 minutes, as he needed to rest early enough because he was traveling the next morning. When he reached the door of the bar, he heard the deceased calling him by name.

According to the accused, the deceased told him that he wanted a premises at which he could carry on a video business. As that was a small matter, the accused wondered why the deceased had waited to raise it at the bar.

It was the testimony of the accused that he told the deceased that the premises were then being used by Mutua (**PW 4**). The accused therefore asked the deceased for more time to consider the request. But the deceased is said to have abused the accused before walking off.

The accused emphasized that his tenant was Mutua (**PW 4**), not the deceased. He also said that the deceased only provided the Television which **PW 4** was using.

According to the accused, he never received any rent from the deceased. Instead, he explained that **PW 4** used to have difficulties in remitting the KShs.2,500/- monthly rent, culminating in the deceased wishing to take over the tenancy.

It was the evidence of the accused that after the deceased had abused him, the accused went to his house,

and slept. He was awoken by someone who was hitting both sides of his house. Thereafter, the said person got onto the iron-sheet roof, and cut-off the electric wires, plunging the house into darkness.

The accused opened his door and looked out onto the corridor. But when he tried to lock the door, thereafter, he saw somebody who was rising up. The said person held him by his shirt and the two of them struggled until they got inside the accused's house.

The stranger was silent all that time.

The accused said that when he and the stranger fell down in the corridor where the accused kept his tools, **PW 2** called out to the stranger. At that stage, the stranger answered to the name "Waita," by going towards **PW 2**. And that gave to the accused an opportunity to close his door. But, as garbage was strewn all over the place, the accused was unable to close the door. And as he was still collecting the garbage, the deceased is said to have returned to where he was, and to have kicked him in the back. That action prompted the accused to start fighting with the deceased, again.

In the course of the fight, the deceased is said to have been joined with his brother and another person. The accused says that the deceased was armed with a knife.

It is that very knife which the deceased is said to have fallen on.

At that stage, the accused ran away, as he feared that the three persons he was fighting with could have "taken him out."

According to the accused, he went straight to the police station at Industrial Area, reaching there at 11.10p.m. He says that the police officer declined to give him some officers to accompany him back to his house. Instead, the police officer told him to go back to the station the next day.

The accused spent the rest of that night at the house of a friend of his. The following morning, the said friend told him that somebody had died. The accused then went to his sister's house in Buruburu.

Later, **PW 6**, who is his brother, accompanied him to the Industrial Area Police station, where he was arrested.

When the police took him to the scene, the accused found that his house had been demolished, and everything had been taken away.

He concluded his defence by saying that he had had no intention of killing the deceased, who looked drunk. He also said that he too was drunk at the material time. Therefore, it was his evidence that he could not recall what was happening.

During cross-examination, the accused said that the brothers of the deceased had wanted to beat him up, but that they ended up beating their own brother, the deceased. However, this court notes that when cross-examining the prosecution witnesses, and in particular **PW 2**, the accused did not suggest to him that he or any other brother of the deceased, had been involved in fighting him. It does therefore appear that the accused simply introduced the issue of a fight involving the deceased with his two brothers, on the one hand; as against the accused. The issue was introduced as an afterthought.

He also said that the deceased had a knife. He then changed his story to say that he did not see the deceased with a knife.

And although he said that the deceased had been a friend of his for over 20 years, the accused did not go to see him when he heard that the deceased had died.

At the time of the alleged attack by the deceased, the accused says that his son, Mwangi, was inside the house.

But the accused did not call the son as a witness. However, I do appreciate that he had no obligation to call his son or any other person, as a witness, because in a criminal case, an accused person is not required to prove his innocence. The burden of proof always rests on the prosecution to prove the guilty of the accused. Finally, during re-examination, the accused said that;

“I could not see but I felt he had a knife. I held the knife on the handle where he was holding, then pushed it into him. I had no intention of stabbing him. I stabbed him after long struggle.”

In a nutshell, the accused person concluded his defence by admitting having stabbed the deceased with a knife.

I have given careful consideration to the evidence on record. I have come to the conclusion that the prosecution has proved that Michael Mutua Waita died from a massive loss of blood due to multiple stab wounds.

The accused has admitted having caused one of those stab wounds. He said that he did so after struggling with the deceased, for a long period of time.

But, at the same time, the accused said that he was too drunk to recall exactly what had happened. In my considered opinion, the contention of drunkenness is nothing more than an attempt by the accused to try and escape the consequences of his action.

In any event, by the time when **PW 2** saw the accused stabbing the deceased in the belly, the deceased was already so weak that he was not fighting with the accused. In other words, even if the accused is to be believed, that he had a fight with the deceased, there was no fight that was ongoing at the time when the accused stabbed the deceased in his stomach.

I also find that the deceased was, previously, the tenant of the accused. In other words, it is not **PW 4** was the tenant, as suggested by the accused. Indeed, when the accused reported the incident at the Industrial Area Police Station, he expressly told **PW 10** the deceased was his tenant.

But even assuming that it was **PW 4** who was a tenant to the accused, I think that would be incredible for the deceased to have sought to become a tenant of the accused by hurling abuses at the accused. That line of defence, simply does not make any sense to me. It is not worthy of belief.

The accused said that the deceased fell down onto his own knife. Later, the accused said that he did stab the deceased. He said that he pushed the knife into the deceased.

Yet, in the same breadth, the accused went on to state that he had no intention of stabbing the deceased.

On my part, I am unable to reconcile the said aspect of the defence. I say so because if the accused pushed the knife into the deceased, he cannot have had any other intention but to stab the said deceased.

The findings by the doctor who carried out the post mortem were to the effect that the deceased sustained deep penetrating stab wounds. Those finds were consistent with the description given by the accused, when he said that pushed the knife into the deceased.

When the accused pushed the knife into the deceased and caused deep penetrating stab wounds, he must have intended to cause the deceased to suffer serious injury.

In those circumstances, I am unable to accept the contention by the accused, that he caused the death of the deceased unintentionally.

The accused asserted that there was provocation, as the deceased disconnected electricity to the accused's house. It is also said that after the deceased had disconnected the electricity, he went ahead to

attack the accused twice.

The attack on the accused is said to have taken place inside his own house.

As the accused feared for his life, he says that he was justified in applying reasonable force to dispel the attack.

I have already made a finding that if the accused was as drunk as he alleges he was, he could not have been able to recall the exact events of that night. Secondly, and in my event, it defies all logic that the deceased would go to the house where the accused lived and attack him, simply because the accused had told the deceased to wait for a little while, to be given a premises for lease.

If, as the accused suggests, **PW 4** was already having difficulties in paying rent for the premises, it would imply that the deceased would have had a good reason to expect that he would soon be given the premises. He would therefore have been happy, and would have had no reason to either want to disconnect electricity from the accused's house, or to have wanted to attack the accused, at his own house.

To my mind, the assertions of provocation or self-defence are so outlandish, that they cannot be believed.

I also find that the act of pushing a knife into the deceased when the deceased was "already helpless", cannot be deemed as constituting self-defence. Such action actually connotes aggression on the part of the accused.

When the assessors in this case gave consideration to the evidence on record, they came to the conclusion that the accused was guilty of murder.

The offence of murder is defined at section 203 of the Penal Code, as follows;

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

There is no doubt whatsoever that the accused caused the death of Michael Mutua Waita, through the unlawful act of stabbing him with a knife.

The next question that I have got to address is whether or not, the accused had malice aforethought.

In section 206 of the Penal Code it is stipulated 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 death of or to do grievous harm to any person, whether that person is 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 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."

In this instance the accused stabbed the deceased. As the said action caused deep penetrating stab wounds, there can be no doubt that the accused either intended to kill the deceased or to cause him grievous harm, at the very least.

The action of the accused was motivated by his belief that the deceased and **PW 4** were treating him with disrespect.

In the event, I find and hold that the prosecution has proved that the accused had malice aforethought. Accordingly, I do agree with the assessors that the accused is guilty of murder. I therefore hereby convict him for the offence of murder.

However, that is not the end of the matter, because the accused submitted that the entire trial herein was an illegality. His submission was founded upon the provisions of section 72 (3) (b) of the Constitution, which requires the police to take a suspect to court as soon as reasonably practicable. In particular, that sections states that a person charged with a capital offence should be brought to court within 14 days of his arrest.

The accused herein was held in custody for 23 days before being taken to court.

In **REPUBLIC Vs JAMES NJUGUNA NYAGA, CRIMINAL CASE NO. 40 OF 2007**, the accused had been held in custody for 5 months before being taken to court.

When he invoked the provisions of sections 72 (3) (b) and 77 of the Constitution, the court declared the criminal case “**null and void,**” as it is **premised, and has its genesis on an illegality.**

And the position remains so irrespective of the weight of the evidence that the prosecution may adduce in support of their case. For such evidence will be in support of a vacuum – a nullity.”

And in **MAKOKHA IMBIAKHA V REPUBLIC, MISC CRIMINAL APPLICION NO. 52/2008**, [At Kakamega], the Court terminated the murder case against the applicant after the state failed to offer any explanation for the 7 months delay in bringing him to court.

In those two authorities, the cases were terminated after the accused persons had raised preliminary objections. To that extent, the said authorities are distinguishable from the case before me, as in this case, the case has already been heard on merit.

Secondly, in this case, the Investigating Officer (**PW 10**) explained that there was a delay in taking the accused to court because the report from the Government Chemist had not yet been received. Thereafter, when the police placed its file before the Attorney General, for purposes of being advised on whether or not they could charge the accused with murder, the advice was not given immediately.

A look at the record of the proceedings shows that the Government Analyst who analysed the exhibits in this case was Rose Mabwana Sikuku (**PW 11**). She said that the exhibits were received by her on 11th and 16th May 2005. However, she did not state when exactly she did her analysis on the exhibits.

Meanwhile, **PW 10** said that the investigations were concluded on 23rd may 2005.

Therefore, although the state did not produce evidence to stat when the exhibits were analysed. I believe that it can be deduced that it must have been done prior to 23rd May 2005.

Notwithstanding the conclusion of the investigations, the Investigating Officer was required to seek the advice of the Attorney General on whether or not the accused ought to be charged with murder. The said requirement is an administrative exercise.

Although the process serves a useful purpose, it must not be permitted to erode the fundamental rights

of any person.

In this case, there has been no explanation as to why it took about eight days before the Attorney General advised the police to charge the accused with murder. I therefore hold that the state has not satisfied me that the accused was taken to court as soon as was reasonably practicable. That implies that the constitutional rights of the accused were violated.

Now comes the difficult part of this judgment! Should I acquit the accused because his constitutional rights have been violated? That is what the accused said I should do.

Mr. Enonda, the learned advocate for the accused, submitted that the proceedings were an illegality.

But Mr. Ong'ondo, the learned state counsel, urged me to disregard the submissions of the accused because, in his view, the prosecution was not accorded an opportunity to explain the delay in bringing the accused to court.

With all due respect to the learned state counsel, the accused did offer to the prosecution, an opportunity to explain the delay. The accused did so, not by way of a preliminary objection or an application; but through the cross-examination of the Investigating Officer.

However, as I have already held, the explanation tendered was wanting.

When the trial court was summing-up the case to the assessors, I did ask them to tell me whether the accused ought to be acquitted, because notwithstanding the evidence which proved that he was guilty, his constitutional rights were infringed.

In the first instance, that question may appear to be one of law, which should be determined solely by the court. But it was my considered opinion that the assessors were the best suited persons to determine that question, within the context of public interest. My said view is informed by the provisions of section 70 of the Constitution, which stipulates as follows;

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest.....”

To my knowledge, this is the first time that a court of law has asked members of the public, in their capacity as assessors, to determine what they consider to be in public interest.

The answer that the assessors gave to me was that even if the accused had been brought to court late, and even though such a delay constituted a violation of the constitutional rights of the accused, the accused should not be released. Instead, the assessors said that the accused should be punished for the offence he had committed, whilst the police should be ordered to compensate him for the violation of his rights.

In my considered view, the position taken by the assessors is eminently sensible and fair. I say so because the Constitution itself states, at section 72 (6), that a person who is unlawfully arrested or detained by another person shall be entitled to compensation from that other person. In effect, the remedy for the accused has already been explicitly spelt out.

Meanwhile, the enjoyment of the constitutional rights and freedoms have also been made subject to the respect of the rights and freedoms of other persons, and for public interest.

Here, the accused took the life of another person. He had no right to do so.

Furthermore, it would be in public interest to punish the accused for the offence he had committed,

whilst also ordering that he be compensated for the violation of his rights.

In the event, I decline to order that the accused be acquitted simply because his constitutional rights were infringed.

In conclusion, I reiterate that the accused is hereby duly convicted for the murder of Michael Mutua Waita.

Dated, Signed and Delivered at Nairobi, this 30th day of September, 2009.

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FRED A. OCHIENG

JUDGE