



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

Criminal Case 175 of 2003

REPUBLIC.PROSECUTOR

VERSUS

BERNARD KINOTI M'ARACHI.....ACCUSED

JUDGMENT OF THE COURT

1. The enactment and operationalisation of the STATUTE LAW (Miscellaneous Amendments) ACT 2007 abolished the role of assessors in murder trials with effect from 15.10.2007
2. As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that no prejudice shall be suffered by the accused as a result of this decision. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred todate.]
3. The accused herein, BERNARD KINOTI M'ARACHI is charged with murder contrary to section 203 as read with section 204 of the penal code. It is alleged that on the 20th day of September 2003 at kiruai village in chugu sub-location within Meru Central district, he murdered PACRASS MUTUA MBUGI.
4. The facts of the case are that on 20.9.2003 at about 8.00pm, the deceased left his house at Kiruai village, armed with a torch and a panga for his canteen and bar, which were nearby. About 10 minutes later, members of the family heard screams and the words, "**kinoti you are the one who killed my father.**" The deceased suffered injuries to the head from which he died while undergoing treatment at the hospital.
5. The prosecution called 8 witnesses PW1 was **Mary Thiringa Mutua** who stated that on 20.9.2003 at about 7.00pm, she saw the deceased leave their home at kiruai village for his canteen which was nearby; that the deceased took a panga and a torch with him as was his habit on such occasions. PW1 (Mary) stated further that a little while later after the deceased had left, she heard screams from the road and that when she rushed to the scene she found the deceased who was her husband, lying on the ground bleeding profusely from the head and unable to sit. Mary said her children together with other villagers took the deceased to hospital. On the following morning Mary said she learnt of the deceased's death the previous night.
6. Mary also told the court that before the deceased died, he had a summering land dispute with the father and that the case had been in court on 18.9.2003. Later, Mary said she identified the body of the deceased for the post-mortem examination. In her further testimony, Mary testified that she was the first of the deceased's two wives, the other one being **Anna Mutua** (PW2) and that she related well with both her husband and her co-wife. She also said that she heard the screams about 10 minutes after her husband left the homestead for the canteen. Mary also stated that the accused and the deceased had a long-standing dispute over water supply, which water supply she said was always being disconnected by the accused. As for how she was able to see anything and anyone on that night Mary said that the night was moonlit.
7. PW2 was **Anna Mutua**, the deceased's second wife. She testified that at about 8.00pm on

- 20.9.2003, the deceased returned home from Meru town and after he had changed clothes, he took a panga which she identified in court as MFI-1 and a torch and headed for his canteen as was his (deceased's) habit to do. That the canteen (bar) was just outside his homestead. PW2 (Anna) said that at the time, her two children Dennis and Fredrick were also home. Anna testified further that a little while after the deceased had left, she heard screams and in particular she heard the screams of her son Murithi who was also saying that kinoti had killed the deceased. She said she then rushed to the scene in company of her sons Dennis and Fredrick and on arrival at the scene, she was her husband lying on the ground and bleeding from the head, mouth and nose. Anna testified further that because she was sick, she went back to her house, and only went to the hospital the following morning.
8. Anna said that on the way to hospital the following morning, she learnt that the deceased had died the previous night. In further testimony, Anna said that when the deceased arrived home at about 7.30pm or thereabouts on 20.9.2003, he only changed clothes and left, as he appeared to be in a hurry. She however agreed that she did not tell the police at the time of recording her statement that she had heard her son screaming and saying that kinoti had killed the deceased. She explained the omission by saying that the police did not ask her to give the name of the person who was screaming.
 9. PW3 was **Francis Muthomi** who testified that on 20.9.2003 at about 8.00pm he was at the deceased's shop where he had gone to listen to "**Citizen Radio**" that at about that time, he heard the deceased and kinoti both of whom he knew well, talking at a distance of about 300 meters away from the deceased's canteen. He said he was able to identify the voices of the two people who were both his neighbour. PW3 (Muthomi) identified kinoti as the accused herein.
 10. Muthomi testified that he went towards the pair and that when he got to a distance of about 70 metres from where the deceased and the accused were, talking he realized that the two were quarrelling and were challenging each other to fight. Soon thereafter, Muthomi said he then ran back to the deceased's shop and informed the deceased's sons, **Patrick (PW5)** and **Boniface (PW4)** about what was going on between the deceased and the accused. He then walked towards his home but that before he got home he heard Patrick and Boniface screaming, thus forcing him to run towards the screams. Muthomi said that when he got to the scene, he found the deceased lying on the ground hardly able to breath and that soon thereafter, good Samaritans took the deceased to hospital.
 11. Muthomi also told the court that the night was very dark. He also admitted that he did not tell the police that he had heard the deceased and the accused quarreling and the deceased challenging the accused to beat him (deceased). Muthomi also said that he spent about 10 minutes listening to the quarrel between the deceased and the accused and also said that there was a third voice which he could not recognize. Muthomi also said that it was him who gave the accused's name to the police, and that he knew the accused well because he used to meet him on a near-daily basis before the fateful day.
 12. PW4 was **Boniface June Mwiti (Boniface)**. He stated that on 20.9.2003 at about 7.45pm, he was in his father's bar together with his brother Patrick (PW5) attending to patrons, one of whom was an old man called kaimenyi, and that muthoni was also around eating a cake. Boniface stated that a little while after Muthomi had left the bar, he came back to the bar and informed them that the deceased and the accused were fighting and asked them to go to the road and confirm for themselves.
 13. Boniface said he and Patrick then went to the road but did not find the deceased and accused. He said he then decided to go back to the bar and that on the way, he saw the accused's mother standing at the gate and that he was able to see her because there was moonlight. As he walked back to the bar. Boniface said he heard his brother Patrick screaming and he ran towards the screams. That as he ran, he saw the deceased lying on the ground face down and bleeding from the head and the ear. Boniface said he organized for transport and took the deceased to hospital.
 14. In his further testimony, Boniface said that though there was moonlight it was not very bright but that he had met with the accused before he reached the spot where the screams were coming from. Boniface also stated that he met one other person-koome- who told him that he (koome) was running away because of the screams. Boniface also admitted during cross-examination that when they reported the incident to the police that evening, they did not give names of suspects to the police.

15. PW5 was **Patrick Murithi Mutua (Patrick)**. He testified that on 20.9.2003 at about 8.00pm, he was together with Boniface selling beer at the deceased's bar and that at some point before the incident the deceased went to the bar, first at 6.00pm and then later after he (deceased) had changed clothes and bought four cigarettes and then left. According to PW4 (Boniface) the deceased did not go to the bar that evening before the incident.
16. Patrick also narrated how, while he and Boniface were in the bar, they were informed by Muthomi that the deceased was fighting with kinoti, the accused. That they rushed to the scene and that they found his father lying on his stomach. That the deceased was taken to hospital where he died the same night. In his further testimony, Patrick stated that when he got to where the deceased was lying, there was nobody else around and that other people came around only after he had raised the alarm. He could not say who had killed the deceased.
17. PW6 was **George koome** who said that between 7-8pm on 20.9.2003, he was walking from kirema's home when he heard someone screaming and calling Rosalia and that on hearing the screams which she said were being made by Elizabeth M'arachi he ran towards the same and also saw many other people running in the same direction. He also said he heard Patrick screaming. That on arrival at the scene, PW6 (koome) saw the accused lying on the ground and complaining that he had pain on his leg. That the accused's father, M'arachi was also at the scene as well as Elizabeth M'arachi, the accused's mother. That he saw the accused and M'arachi from a distance at about one meter and that he was able to recognize them well. Koome also testified that Elizabeth asked him to assist the accused to get up from the ground and that he did so and helped the accused to go to the compound. Koome also stated that when he sought to know what was happening, M'arachi informed him that the accused had beaten the deceased and that Elizabeth ought to know from the accused why he (accused) had beaten the deceased. Koome finally stated that police arrested him on the following day.
18. During cross-examination, koome testified that he was a chang'aa brewer and that when he saw the accused on that night the accused was crying because of what he (accused) said was pain in his leg. Koome also said that he was unable to identify the deceased initially because he (deceased) was lying face down
19. PW7 was **Dr. Henry Njue Njiru**, who was the assistant director of medical services by the time of his testimony. He testified that he carried out a post mortem examination on the body of the deceased on 25.9.2003. That the deceased's body had swellings on the face and the back of the head with bruises on the right chest wall. That the body also had two compound fractures with bone fragments on the left side of the head, a compound fracture of the left side of the upper jaw and four loose teeth. The doctor opined that the cause of death was due to gross brain damage. The post mortem report was tendered in evidence as P exhibit 1 but the doctor could not tell how old the injuries were nor could he say with any degree of certainty what kind of object caused the injury apart from saying that it was a blunt object.
20. PW8 was **Kenneth Mwenda (Mwenda)** a first maternal cousin to the accused herein. He stated that on 19.2.2003 at about 8.00pm, he paid a visit to the accused's mother Elizabeth M'arachi. That at that hour, Mr. M'arachi asked him to go out and check about the screams that were emanating from just outside the gate and that when he went out he saw both the accused and the deceased. That the deceased fell down as he (Mwenda) watched, after which he said he ran to the house to tell Mr. M'Arachi what he had seen. Mwenda also stated that the accused informed them that he (accused) had been hit in the back by an unknown person. It was also Mwenda's testimony that the accused had no injuries. He also said that he and M'Arachi did not bother to find out where the deceased was and that they went to sleep until about 8.00am the following day when he got up. He said that on that morning, the accused sent him to the gate to look for a hammer which he found under a tree just outside the gate where the accused had been found lying the previous night and about ten metres from where the deceased had been found lying the previous night. Mwenda said that on recovery, he gave the hammer to the accused's mother as instructed by accused.
21. Mwenda also testified that at about 10.30am, on 21.9.2003, he and the accused person were arrested at the accused's home and taken to the police station but that he was released later the same month. Mwenda also stated that when he went out on the night of 20.9.2003, he was able to recognize the voices of both the accused and the deceased whom he had known for a long time, though he could not say whether the two were uterine brothers.

22. In his further testimony, Mwenda said that he used to visit his aunt Elizabeth M'Arachi many times before the 20.9.2003, and that he also used to sleep there often so that it was not strange that he had spent a night in that home on 20.9.2003. He also testified that though the night was dark, he was still able to recognize the voices of both the accused and the deceased and that he heard the deceased say to the accused: - **"Kinoti, I will cut you with this panga."** During cross-examination, Mwenda reiterated his evidence in chief that he saw the deceased fall, but that he did not care to check what was wrong with the deceased. Mwenda said he did not know whether the accused and the deceased had any grudges between them though he told the police that the deceased and his father always quarreled over land. Mwenda also reiterated his evidence in chief that the deceased fell some ten metres from where the accused was. He also said that apart from recognizing the accused and the deceased by their voices, he was also able to see them clearly though he could not say how able to do so.
23. At the close of the prosecution's case, the accused gave unsworn evidence, and called no witnesses. He stated that the deceased in this case was his stepbrother and that on 20.9.2003 at about 8.00pm while he was in the home with his father M'Arachi M'Mutungu and his mother Elizabeth M'Arachi, he heard someone calling M'Arachi to go out and see the deceased who had been killed outside. He said that he remained in the house as his parents answered the calls by members of the public because he was sick and that thereafter he went to sleep until the next morning at about 10.00am when he was arrested along Koome and Mwenda. The accused denied that he committed the offence.
24. It was contended on behalf of accused person that the prosecution had not proved its case against the accused person beyond any reasonable doubt. Mr. Isaboke, for the accused, submitted that nowhere throughout the entire evidence is the accused implicated in murder. It was contended that vital witnesses such as Catherine Karambu who PW1 said was heard screaming and saying Kinoti had killed her father and also Elizabeth M'Arachi did not testify. Mr. Isaboke submitted further that the testimonies of PW2 and PW5 did not tally as to whether the accused was seen at the scene of crime that night or not. Mr. Isaboke also submitted that the evidence of PW3, Muthomi, should not be believed because the said Muthomi did not say he heard the accused's voice.
25. It was contended further that the circumstances prevailing on that night were such that none of the witnesses, including PW4, Boniface, could say with any degree of certainty that they recognized the accused as the deceased's assailant. Mr. Isaboke also said that Mwenda's (PW8) evidence must be treated with caution since neither Mr. M'Arachi nor Elizabeth M'Arachi came forward to corroborate his evidence.
26. It was Mr. Isaboke further contention that none of witnesses pointed to the accused as the man who struck the lethal blow to the deceased. He questioned the absence of investigating officer whose testimony he submitted would have shed some light on how the deceased might have met his death.
27. Mr. Muteti, principal state counsel on his part submitted that the prosecution had established its case beyond and reasonable doubt against the accused person. He submitted that the motive for the deceased's death was clear; namely that the accused and the deceased had a long standing dispute over water supply. Mr. Muteti referred to the evidence of PW8 who said he was there when the deceased fell some ten metres away from the deceased immediately after the deceased had allegedly told the accused: - **"Kinoti I will cut you with this panga."** Mr. Muteti also submitted that the deceased's father must have been aware of the scheme to kill the deceased even after Mwenda reported what he (Mwenda) had observed.
28. Concerning recognition of the accused person, Mr. Muteti submitted that it was clear from the evidence of PW3, Muthomi that he (Muthomi) heard both the accused and the deceased who were his close neighbours engaged in a quarrelsome discussion and further that PW4, Boniface also saw the accused person walking from the direction of the screams as corroboration of the evidence given by Muthomi.
29. Mr. Muteti also submitted that the theory about the accused person having been injured found no support in the evidence before the court especially in view of the fact that the accused person did not say how he had sustained the injuries and further when the accused was taken to hospital after complaining of pain in the leg, the hospital confirmed that the accused had suffered no injuries whatsoever when he was taken to the hospital on the night the deceased was attacked and killed.
30. Regarding the failure by the prosecution to call the investigating officer to testify, Mr. Muteti

submitted that the reason why the officer could not testify were that the officer had retired and could not be traced. Mr. Muteti urged the court not to draw any negative inference since it was not a deliberate move by the prosecution not to avail the witness. He also submitted that since there is other overwhelming evidence on record, the court should find that other evidence and particularly the circumstantial evidence, is sufficient to sustain a conviction against the accused person.

31. From the summary of the evidence as given above the following issues arise for determination?
 - (a) Has the prosecution proved that there was a motive for the deceased's death and is proof of such motive necessary?
 - (b) Has the prosecution established through both direct and circumstantial evidence that the accused is the one who killed the deceased;
 - (c) is failure by the prosecution to call the investigating officer fatal to the prosecution's case?
32. in my considered view, the prosecution's case is hinged on both direct and circumstantial evidence. The direct evidence comes from the testimonies of PW3, and PW8 who at different times said they heard or saw the accused person on the fateful night. Both of these witnesses said that they knew both accused and deceased persons well, either because they were neighbours or because they were family. PW3 (Muthomi) said he recognized the voices of both accused and deceased as they exchanged words some 70 – 80 metres away from where he stood listening to them for about 10 minutes. PW4, Boniface also testified to the fact that after Muthomi left the bar he returned after about ten minutes and asked him and Patrick to go and find out what the accused and the deceased were quarreling about.
33. Mwenda testified that he saw both the accused and the deceased standing near the gate to the house of Elizabeth M'arachi and M'Arachi M'Mutungi challenging each other to a fight, that soon hereafter he saw the deceased fall and that he did not bother to check and find out what had happened to the deceased.
34. The circumstantial evidence in this case is found in the testimony of PW1 (Mary) and also that of PW2 who both said the accused and the deceased always quarreled over the deceased's water supply, which was always being disconnected by the accused. There is also the circumstance of land dispute between the deceased and his father, which dispute was in court and the parties had been to court over the same on 18.9.2003. There is also the evidence of PW8, Mwenda who testified that on the morning of 21.9.2003, the accused specifically sent him to fetch a hammer which was said to be just outside the gate where Mwenda had the previous night seen the accused and he deceased exchange words, and where the deceased had fallen immediately he had told the accused that he (deceased) was going to cut him, (accused) with panga. Mwenda confirmed that he had indeed fetched the hammer and handed it over to the accused's mother Elizabeth M'Arachi as instructed by the accused person.
35. The accused on his part said that he was nowhere near where the attack upon the deceased took place. He said he was sick that night and could not even go out when word came to the house calling upon his father and his mother to go out and see who had killed the deceased.
36. I have carefully considered the evidence that has been placed before me, and I am satisfied that the prosecution has proved its case beyond any reasonable doubt against the accused person. I am satisfied that both the accused and the deceased were engaged in an exchange that fateful night, whether the exchange arose as a result of the land or water dispute is immaterial. I am also satisfied from the evidence of PW8, Mwenda, that the deceased fell at the feet of accused soon after the deceased had told the accused that he would cut him (accused) with panga. It would seem to me, and I find it to be so, that the accused was used by his father M'Arachi to silence the deceased because of simmering land dispute between father and son. it is also clear to me that the accused and his own score to settle with the deceased because of the water dispute. I have considered the testimony given by the accused and particularly his allegation that he was sick on the fateful night and that he could not go out to assist the deceased. That allegation cannot stand, and particularly in view of the evidence by PW8 who said that the accused was found to be fit when he was taken to hospital that same night after he complained of a pain in the left leg.
37. There is therefore no doubt in my mind that from both direct and circumstantial evidence, the prosecution placed the accused person squarely at the scene of the crime. The circumstantial evidence of the recovery of the hammer by Mwenda on the direction and instruction of the accused person also lends credit to the conclusion I have reached that the accused person was at the scene of crime and that it is him who dealt the fatal blow to the deceased. Although the hammer was never recovered and tendered in evidence as an exhibit. I am satisfied that that was

the blunt object that was used by the accused to hit the deceased on the head. Dr. Njiru (PW7) testified that the deceased had numerous compound fractures on the head. I am persuaded that the accused feigned illness immediately, after the deceased had in order to camouflage his participation in the murder.

38. I am therefore satisfied that in the circumstances of this case, the accused was only vocally recognized by Muthomi but he was also physically recognized by Mwenda who said that even recognized the clothes which the accused wore that night. I find that the conduct of Mwenda, M'Arachi and the accused was inconsistent with the innocence of the accused who feigned some injuries so that no one could infer that he had been involved in the murder. In totality therefore, the circumstances surrounding the death of the deceased, coupled with the direct evidence given by Muthomi and Mwenda point to no other conclusion than the guilt of the accused.
39. The final issue for determination is whether the prosecution's failure to call the investigating officer is fatal to their case. Whereas it is desirable for the investigating officer of any case to be called as witness, I am satisfied that in this case, the prosecution was not trying to hide or conceal evidence that was prejudicial to their case. The evidence is all there on record, pinning the accused person to the scene and to the striking of the lethal blow upon the deceased. In circumstances, I do not think that the failure by the prosecution to call the investigating officer was fatal to their case.
40. In the result, I find the accused guilty of the offence of murder and convict him accordingly.
41. It is so ordered
42. Dated and delivered at Meru this 18th January 2008

RUTH N. SITATI

JUDGE