



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 56 of 2004

REPUBLIC.....APPLICANT

V E R S U S

GEOFFREY BAARIU MWENDA.....1ST ACCUSED

JOHANA MUTUMA BAIMULA.....2ND ACCUSED

JUDGEMENT

1. The accused herein, Geoffrey Baariu Mwenda and Geoffrey Mutuma Baimula are charged with the offence of murder contrary to s.203 as read with s.204 of the Penal Code. It is alleged that on 11.6.2004 at Mwanika village in Kabachi Location in Meru North District, together with others not before the court, they murdered Ayub Gikundi.
2. The evidence tendered before court and which led the assessors to return a verdict of not guilty against both accused persons was as follows: P.W.1 Lucy Nkoroi recalled that on 10.6.2004 she was at home at 2.00 p.m. when she heard screams from an area called Itata. She went there and found her son, Ayub Gikundi, tied up and being beaten by the accused persons and others using sticks and pangas and when she sought the help of Mutuma, 2nd accused, he knocked her down and dragged Gikundi away. The next day her other children told her that Gikundi had died.
3. When cross-examined, P.W.1 said that the persons who were beating her son were six in number and the accused persons were two of them. That the 1st accused hit him with a walking stick while the 2nd accused person also beat him but was unclear as to what the 2nd accused used. She denied that she had a grudge with the 2nd accused because of a land case that she had with him.
4. P.W.1 also denied that her son, the deceased, was a criminal who had committed many crimes in the Mwanika area and that is why he had been arrested on the material date. She also denied that it was she that initially raised the alarm that her son had stolen miraa
5. P.W.2 Isaya Ithalie, father of the deceased received information on his son's death and had no other useful evidence to give.
6. P.W.3 C.I.P. Evans Monda was on duty as OCS Mutuati Police Station on 11.6.2004 when the 2nd accused made a report that he had found the body of an unknown male, half naked, lying by a road side

and when P.W.3 went to the scene, he found the body which had injuries all over it and in a pocket he found a court release order showing that the deceased was Ayub Gikundi who was out on bond after being charged with the offence of stealing stock. The body was removed and taken to Meru Hospital Mortuary but before he left the scene, P.W.3 was surprised when the 2nd accused disappeared. During investigations his name featured as a suspect in the murder and he was only arrested in May 2006. The 1st accused was arrested only 1 month after the offence as his name was also mentioned during investigations.

7. During cross-examination, P.W. 3 said that it was on the evidence of P.W.1, the deceased's mother that he arrested the accused persons. They were only two of the suspects named in the case as having been party to the assault on the deceased. He did not explain why others were not arrested.

8. P.W.4 P.C. Norman Ng'ang'a was with P.W.3 at the place where the deceased's body was found and he attended the post-mortem on the body. Later in any event he arrested the 1st accused who had been named as a suspect.

9. In cross-examination, P.W.4 said that the 2nd accused did not disappear at the scene because he had in fact been left at the Police Station and that he was not the reportee. Later at re-examination P.W.4 said that he was the one who received the initial report and did not know who made that report.

10. P.W.4 had earlier said that after the incident, he visited the home of the 2nd accused severally but he was informed that he was living 30 km away at a place called Rwanda.

11. P.W.5 Julius Maore Kangere said that on 10.6.2004 he was at Mwanika Centre and he saw the deceased whom he knew as Ayub Gikundi being beaten by members of the Public for allegedly stealing miraa. They were using walking sticks and other weapons. One Stephen Kaulu then tied the deceased up and when he searched him he got an identity card belonging to the 1st accused. It was then alleged that the 1st accused's house had been broken into and the deceased was the culprit. The deceased admitted to the Kangaroo court that he was the burglar and then the 1st accused arrived and called for the 2nd accused who was the sub-area. The two and others then led the deceased away towards the police station and the next day he was found dead.

12. In cross-examination, P.W.5 said that the crowd that was at the scene was in the range of 50 people. At no point did P.W.5 say that the accused persons in any way assaulted the deceased.

13. P.W.6 Dr. Henry Njiru conducted the post-mortem on the deceased's body and concluded that the deceased died of blunt trauma to the head which had caused a blood clot on the surface of the brain. That the body of the deceased had multiple bruises on the trunk and left arm as well as bleeding through the ears and nose. There was also a bruise on the right side of the head. Internally it had a linear fracture on the right side of the skull and the clot on the surface of the brain.

14. The accused persons in their defences stated as follows:-

The 1st accused admitted that on the material date he saw the deceased being beaten by a mob of 50 or 60 people but because he was too tired he did not involve himself in the matter. He stated that he saw Stephen Kaulu who was at the scene and who told him that the deceased's mother P.W.1 is the one who raised the alarm about her son having stolen miraa.

15. The 1st accused denied that he beat the deceased as claimed by P.W.1 and said that he saw P.W.5 as well as the 2nd accused later on the material day but that he was not with them at the place where the deceased was being assaulted.

16. During cross-examination the 1st accused stated that he knew the deceased who was a known criminal but that is not why he killed him.

17. The 2nd accused for his part said that he knew the deceased who was his cousin and that on the material date he was informed by Stephen Kaulu that Gikundi, a known thief and rapist had been arrested and when he went to the market he did not see him. The next day he was told that the said Gikundi had died. He reported the incident to the OCS at the local police station and they went to see the body and the same was taken away.

18. The 2nd accused denied having run away from home after the incident and said that he was arrested at his home. He blamed C.I.P Monda, P.W.3, for instigating his arrest because the two had disagreements over the handling of persons who were dealing in illicit liquor.

19. From the evidence above, the only witness whose evidence ties the accused persons to the offence is P.W.1, mother of the accused. Her evidence is however not conclusive because all she said is that the accused persons together with others walked away with the deceased and the next day he was found dead. Other evidence points to the fact that the deceased was a known thief in the Mwanika area and on the material day was caught stealing miraa and punished by an irate mob which included the accused persons. I am like the assessors certain that they were there because to that extent the evidence of P.W.5 is corroborated by that of P.W.1 in this respect. P.W.5 was however more credible and unlike P.W.1 who may have exaggerated her evidence as a mother was an independent witness. He said that the mob of 50 or so people then led the deceased towards the local police station and from there the trail went cold because it is unclear what happened to the deceased between then and his death. It is probable that he was beaten to his death by the mob but where is the evidence that the accused persons although in the mob did actually inflict such harm as to lead to the death? The evidence of P.W.1 that the 1st accused hit the deceased with a walking stick as suspicious and in the circumstances needed corroboration which is however, lacking. She said nothing in any event about what the 2nd accused did to the deceased except that she assaulted her, a matter not in issue here. P.W.6 on the other hand said that the deceased's body had multiple bruises on the trunk and arm but the cause of death was blunt trauma to the head. It may be that one of the accused persons inflicted that injury but where is the evidence that they did?

20. Another piece of evidence that is important to relate is that of P.W.3 who said that the 2nd accused disappeared from the scene after initially making the report to the police. P.W. 4 contradicted him and to my mind in any event that suspicion alone was no reason to have had the 2nd accused arrested.

21. The charge sheet states that they jointly murdered the deceased but where is the evidence that they actually did? I am not prepared on the basis of the disjointed and inconsistent evidence before me to find that they did and the doubts I have will ultimately favour them. The incident occurred in broad daylight and it is incredible that there is little cogent evidence to give a clear insight as to what happened that day.

22. I can only conclude by saying that I see no proof beyond reasonable doubt of the charge of murder as framed in the charge sheet and like I said I am one in my finding with the assessors.

23. The above being my finding then I must hereby find that the accused persons are “**not guilty**” of the offence of murder.

24. They shall be released unless forthwith otherwise lawfully held.

25. Orders accordingly.

Dated signed and delivered this 17th day of May 2007

Isaac Lenaola

Judge

In the presence of

Mr Mokuia Advocate for the accused

Mr. Muteti State counsel for the state

Isaac Lenaola

Judge