



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

Criminal Case 6 of 2006

REPUBLICPROSECUTOR

VERSUS

JAMES GITHUI WATHIAKA..... 1ST ACCUSED
ANTHONY MIGWI GITONGA..... 2ND ACCUSED
JAMES MBATIA KIMONDO 3RD ACCUSED
JOHN KARIUKI WAITHAKA.....4THACCUSED
CHARLES GITHINJI MUTURI..... 5TH ACCUSED

JUDGMENT

James Githui Wathiaka (hereinafter referred to as the 1st Accused), Anthony Migwi Gitonga (hereinafter referred to as the 5th accused), James Mbatia Kimondo referred to as the 6th accused), John Kariuki Waithaka (hereinafter referred to as the 7th accused and Charles Githinji Muturi (hereinafter referred to as the 8th accused) were jointly arraigned before this court together with three others charged with two counts of the offences of murder.

In the first count is was alleged that on the 20th day of October, 2005 at Kimenyu village in Nyeri District within Central Province they jointly murdered Mercy Ngima Njiri (hereinafter referred to as the 1st deceased). In the second count the accused persons and others were alleged to have murdered Joseph Kagori Waigwa (hereinafter referred to as the 2nd deceased) on the same date and place as in the first count. This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

Thirteen witnesses have testified for the prosecution. The accused persons have also each given unworn statement in their defence. In addition the 6th accused called his wife Gladys Wangui Mbatia who testified. Briefly the evidence was as follows;-

On the night of 19th and 20th October, 2005 at Kimenyu Village in Nyeri District at around 2 a.m. a group of people invaded the home of the 1st deceased. The 2nd deceased who is the son to the 1st deceased was asleep with his wife Sarah Muthoni Kagori (P.W.4) within the same compound. They were woken up by noises from outside. On peeping outside, P.W.4 saw a gang of people who broke the door to the house and entered. They ordered second deceased and P.W.4 to get out of the house. They were

whipped over the head and the body as they were being shepherded out. Outside there were more people waiting and the two were pulled out and thoroughly beaten. P.W.4 pleaded for mercy. She managed to escape, ran away and hid inside a pit covering herself with some leaves.

In the meantime Catherine Wanjiku Nyagah (P.W.6) who is a daughter in law to the 1st deceased was in her house asleep with her children including her 15 year old son Elias Waigwa Maina (P.W.3). Her cousin Gladys Nyaguthii who had also visited her that day was also asleep in the same house. They were woken up by the commotion. P.W.6 put on the light and tried to open the door to her house but found it was locked from outside. The children of P.W.6 also woke up. They heard people screaming at the gate and someone threatening that those who were inside the house should be brought out so that they die together. P.W.3 identified her uncle's voice (2nd deceased) and her grandmother's voice (1st deceased) crying.

P.W.6 cried out and pleaded, she opened her door from inside and ask the people to open the door from outside so that she could unlock the gate for them. The door was opened and three men whom P.W.6 identified as the 1st accused, 5th accused and the 8th accused entered the house. The 1st accused asked P.W.6 for paraffin. P.W.6 informed him that she only had a little paraffin which was finished. P.W.5, P.W.6 and P.W.3 were all ordered out of the house. Outside the house they noted other houses burning. The three men entered the house and searched it but found nothing. P.W.3, P.W.5 and other children were ordered back into the house while P.W.6 was left outside. P.W.6 was taken to where the 1st deceased was lying while the 2nd deceased was made to sit down. The second deceased was also lying down a short distance away. P.W.6 tried to plead but the 6th accused pushed her with a stick. P.W.6 was not deterred, she got hold of 7th accused by the hand and pleaded with him, but P.W.7 told her that he was not the one responsible and that it was 1st accused whom she should talk to. P.W.6 pleaded with the 1st accused for about 25 minutes but the 1st accused told her that she should not live in that home otherwise she would die. P.W.6 pleaded that she should be given time until the next day. The 1st accused then told her to go back to the house but P.W.6 asked him to escort her as she was scared. The 1st accused escorted P.W.6 back to her house and he called out to the children to open the door for P.W.6 after which the door was then locked from outside. They heard the 2nd deceased saying in Kikuyu language "Githinji I will not leave you I will die with you." They also heard the 2nd deceased referring to "Baba Muturi" both P.W.3 and P.W.6 identified "Githinji" and "Baba Muturi" as referring to the 8th accused who was a neighbour well known to them. The 1st deceased was also crying calling out to "Baba Nduta" whom P.W.3 identified as the 1st accused. P.W.3, P.W.5 and P.W.6 continued to hear the 2nd and 1st deceased screaming and pleading. They pleaded for a long time after which P.W.6 heard the 2nd deceased groan and the sounds faded away.

Five minutes later the door to P.W.6's house was knocked and two small children who used to sleep in the 1st deceased's house were brought to P.W.6's house. P.W.6 put the children to sleep. They remained in the house until 5.00 a.m when P.W.6 jumped out of the window and opened the door. She went to her mother in law's house and found the bodies of 1st deceased and 2nd deceased having been burnt to death. Three houses had also been burnt to the ground.

The matter was reported to the police and Supt. Paul Simiyu Walukana (P.W.13) who was then the O.C.S. Kiganjo police station visited the scene accompanied by P.C. Shadrack Kabeba (PW.10) and other officers. P.W.13 contacted scenes of crime personnel and Cpl. John Mugo (P.W.2) of Crime scene support services went to the scene and took various photographs showing difference views of the scene.

The bodies were thereafter escorted to Nyeri Provincial Hospital Mortuary.

Upon carrying out investigations P.W.13 received names of suspects. On 20th October 2005 with the assistance of an informer, the 1st to 6th accused persons were arrested. On the 27th October 2005 Dr. Anthony Njuguna (P.W.7) performed a post mortem examination on the body of the deceased persons. The two bodies were identified to the Doctor by Francis Maina Waigwa (P.W.8) and one Charity Mumbi

in the presence of P.C. Charles Muthombi (P.W.9). In the case of the 1st deceased the Doctor found that the cause of death was cardio respiratory arrest secondary to burning whilst in the case of 2nd deceased the cause of death was asphyxiation following strangulation.

On the 23rd February, 2006 the 7th accused was arrested by P.C. Lawrence Wamugunda (P.W.12) at Kariandas village following a tip off. A month later on 23rd March, 2006 P.C. Josphat Mule (P.W.11) arrested the 8th accused who was identified to him by an informer.

All the accused persons having been examined by Dr. Samuel Owino Onganga (P.W.1) and found both mentally and physically fit were charged with the two counts. At the close of the prosecution case, Karimi Kuria Mbogo (2nd Accused), Daniel Muriuki Warui (3rd Accused) and Francis Mwangi Muriithi (4th Accused) were all acquitted under section 306(1) of the Criminal Procedure Code as no prima facie case was established against them. 1st Accused, 5th Accused, 6th Accused, 7th Accused and 8th Accused each gave an unsworn statement denying any participation in the commission of the offences. The 1st Accused explained that P.W.3, P.W.6 and P.W.8 who were all members of one family had a grudge against him because he had caused P.W.8 and his brother, to be arrested and charged with robbery after 1st Accused's house was broken into in a robbery and police sniffer dogs led the police to the houses of P.W.8 and his brother and the 1st Accused searched the house in the presence of the wives of P.W.8. After this incident an uncle to P.W.8 was found murdered and it was suspected that the knife used in the murder belonged to 1st Accused but 1st Accused claimed the knife had been stole from his house during the robbery at his house. The 1st accused established that he was at his place of work in Gilgil at the time of the commission of the offence. The 1st accused dismissed the evidence against him as nothing other than "fitina."

The 5th accused also alleged that the evidence against him was false. He attributed this to a grudge arising from a rental agreement whereby he rented a house to P.W.5 at the request of P.W.6, but P.W.6 failed to pay the rent.

The 6th Accused explained that he spent the night of 19th October 2005 asleep in this home. He woke up on the morning of 20th October and started going around collecting milk from people as usual. Later Njiri a son to the 1st Deceased went to him at his place of work and informed him about her death. He wanted money, but 6th Accused had only 200/= in his pocket, so he gave 6th Accused 100/=. Njiri came back about 20 minutes later demanding more money, but 6th accused told him to wait for about 2 or 3 days. At 4.00 p.m. the same day Njiri came with the O.C.S. Kiganjo and 6th Accused was arrested. The 6th Accused denied having been present at the scene of the murder.

Likewise the 7th Accused stated that on the night of 19th October, 2005 he was at his home where he slept. He was on his way to the shamba the following morning when he met someone who informed him about the death of the 1st deceased. He went to the home of 1st deceased and saw what had happened. He remained at his home until 23rd February 2006 when he was arrested. He attributed his arrest to a grudge arising from the robbery at his brother's (1st Accused's) house and the subsequent arrest of P.W.8 together with his brother.

The 8th Accused testified that on the 19th October 2005, he went to Nairobi for business after which he went to his home in Mathira where he had some relatives. He spent the night there. The next morning he went to his office in Kiganjo and only went to his home in Kimenyu in the evening. No one asked him anything until 23rd March 2006 when he was arrested. He attributed his arrest to a grudge arising from his having identified Maina Waigwa as one of those who had attacked his brother, causing Maina to be jailed. Gladys Wangui Mbatia (D.W.6) the wife to 6th Accused supported the evidence of her husband that they had spent the night of 19th and 20th October 2005 at their home and that her husband never left the home.

From the evidence adduced by the eye-witnesses P.W.3, P.W.4 P.W.5 and P.W.6 it is apparent that the two deceased persons were attacked, tortured and burnt by a gang of people who invaded their home on the night of 19th and 20th October 2005. The evidence of the eye-witnesses is consistent with the evidence of P.W.7 who performed a post mortem examination on the bodies of the deceased persons and found that both bodies were burnt and the 2nd deceased had also fractures on several parts of his body and both legs were bound with a sisal rope and there were also remnant of a sisal rope around the neck. I have no doubt that the gang which invaded the home of the deceased persons had a common mission, to kill or cause grievous injury to the deceased person. The question is whether 1st Accused, 5th Accused, 6th Accused, 7th Accused and 8th Accused were positively identified and proved beyond doubt to have been part of the gang that invaded the home of he deceased persons.

The evidence implicating these Accused persons is essentially that of the eye-witnesses i.e. P.W.3, P.W.4, P.W.5 and P.W.6.

As regards 1st Accused person, according to P.W.3, he not only heard the 1st deceased screaming calling out to 1st Accused addressing him as “Baba Nduta”, but P.W.3 also saw the 1st Accused when he actually entered the house accompanied by P.W.8 and P.W.7, ordered P.W.6 to produce the stolen goods and asked for lantern so that he could remove paraffin threatening to burn the witnesses. P.W.4 also identified the 1st Accused as having been amongst the gang that pulled her and her husband (2nd deceased) out of their house, set their house on fire and burnt 2nd deceased to death. P.W.5 did not know the 1st Accused physically but heard someone mention “Baba Nduta” which is an alias for 1st Accused.

P.W.6 also corroborated the evidence of P.W.3 and P.W.4 and confirmed that 1st Accused was present and actively participated in the events and appeared to be spearheading the mission as it was to the 1st Accused that P.W.6 was referred when she was pleading that she was innocent and should be spared.

The 1st accused on his part maintained that all the evidence of these witnesses was nothing but lies actuated by the bad blood existing between the family of 2nd deceased and 1st Accused. He maintained that he had only searched the house of the witnesses on the 6th July 2005 in the presence of police officers after a robbery at his home. I have considered this evidence against that of the prosecution witnesses. I am satisfied that the prosecution witnesses spoke the truth that 1st Accused was present during the attack on the deceased persons and took an active role. The witnesses were not only consistent in their accounts regarding the participation of the 1st Accused but also gave clear and graphic details. I believe the evidence of the prosecution witnesses and found it sufficient to dislodge the alibi set forth by the 1st Accused. Accordingly I reject the defence of the 1st accused and concur with the unanimous opinion of the Assessors that 1st Accused is guilty of both offences of murder.

With regard to the 5th accused, he was only mentioned by P.W.6 as one of the 3 persons who first entered her house. This however was not consistent with the evidence of P.W.3 who identified the 3 people who first entered the house as 1st Accused, 7th Accused and 8th Accused. I am inclined to agree with the 5th Accused that P.W.3 who knew the 5th Accused would have identified him if he did indeed enter the house. I find that there is a doubt as to whether 5th Accused was present during this incident and the benefit of that doubt should go to the 5th accused. I therefore with respect disagree with the opinion of the Assessors with regard to the 5th Accused and find him not guilty of both offences.

Similarly the 6th Accused person was only mentioned by P.W.6 as having been present outside the house and having pushed P.W.6 with a stick. The 6th accused however maintained that he was not present at the scene and blamed one Njiri for causing his arrest. I have considered the evidence and the circumstances in which 6th Accused was identified. P.W.5 claims that she was pushed with a stick. There is no evidence that she spoke with this person or that there was any other contact as would remove any doubt as to the identity of the person. I find that the possibility of a mistaken identification has not

been ruled out and I am inclined to give 6th accused the benefit of doubt and in this regard disagree with the majority opinion of the Assessors and find him not guilty of both counts.

As regards the 7th Accused, whereas both P.W.3 and P.W.6 mentioned this witness as having been present during the incident, there was some discrepancy in their evidence, in that whilst P.W.3 claimed 7th Accused was one of the 3 people who first entered the house P.W.6 did not name 7th accused as one of the three people who entered the house but claimed that she first saw 7th Accused outside when she asked 7th Accused what she had done to deserve to die and 7th Accused referred her to 1st accused. I find that the evidence before me is not sufficient to prove the active participation of the 7th Accused in this matter and I therefore give him the benefit of doubt and find him not guilty of both offences.

Finally as concerns the 8th Accused, he was identified by both P.W.3 and P.W.6 as having been present during the incident and having actively participated. Both these witnesses together with P.W.5 also maintained that they heard the 2nd deceased tell the 8th Accused that he would die with him. I have considered the defence of the 8th Accused and his alibi that he spent the night at Kimenju in Mathira, I find however that the evidence of P.W.3, P.W.5 and P.W.6 clearly disproves his alibi. I accordingly reject the same and find that the 8th Accused was present and actually participated in the attack against the two deceased persons. I accordingly agree with the unanimous opinion of the Assessors and find the 8th Accused guilty of both offences.

The upshot of the above is that I find the 5th Accused, 6th Accused, 7th Accused not guilty of both counts and acquit each of the offence charged. 5th Accused, 6th Accused and 7th Accused shall each be set free unless otherwise lawfully held.

I find the 1st Accused and 8th Accused each guilty of both offences as charged and convict both Accused under Section 322(3) of the Criminal Procedure Code.

Dated signed and delivered at Nyeri this 20th day of July 2007.

H. M. OKWENGU

JUDGE