



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

Criminal Case 114 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

BENSON MWANGI MUNYINYI.....1ST ACCUSED

JOHN GACHIHI MUNYIRI.....2ND ACCUSED

TERESIA MUGURE MUNYINYI.....3RD ACCUSED

JUDGMENT

The accused persons, Benson Mwangi Munyinyi (*hereinafter referred to as the 1st accused*), John Gachihi Munyinyi (*hereinafter referred to as the 2nd accused*) and Teresia Mugure Munyinyi (*hereinafter referred to as the 3rd accused*) were charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 21st December 2005 at Karunga –Bahati in Nakuru District, the accused persons jointly murdered Bernard Kamau Waititu (*hereinafter referred to as the deceased*). When the accused persons were arraigned before this court, they pleaded not guilty to the charge. The 3rd accused was however discharged on the 27th July 2006 when the State entered a *nolle prosequi*.

The prosecution called six witnesses in its bid to establish the charge of murder against the two remaining accused persons. The defence called six witnesses. The thrust of the defence case was that the deceased had extremely provoked the 2nd accused to an extent that what transpired on the day the deceased was killed was an act of self defence on the part of the accused persons. After the close of the prosecution's and the defence case, Mr. Kibe, counsel for the accused made submissions urging this court to find the prosecution had not proved its case on the charge to the required standard of prove beyond reasonable doubt. Miss Opati for the State submitted that the evidence adduced by the prosecution established that the accused persons killed the deceased with malice aforethought.

The facts of this case as can be reconstructed from the evidence adduced by both the prosecution and the defence are as follows; the deceased and the accused persons were brothers. The deceased was a step brother to the accused persons. The 3rd accused who was discharged is the mother to the accused persons and the deceased. The deceased and the 2nd accused resided on their mother's two acre farm at Bahati. The deceased lived in his house with his wife and six children. The 1st accused had constructed a house in the said farm but at the material time he was working and residing at Nakuru town. The 1st accused conducted petty business at Nakuru town.

According to PW4 Annaline Wanjiku Kamau, who was 16 years old at the time she testified in court, her

father, the deceased, had told her that his family i.e. his mother and brothers did not like him. The deceased told PW4 that the members of his family had disagreed with him over a long period of time. The deceased indicated to PW4 that he was doing his best so that he could purchase a parcel of land where he could relocate his family away from his mother and siblings. According to PW4 (*whose testimony was corroborated by DW6 Teresia Mugure Munyinyi*) the deceased was unhappy that his mother (DW6) had refused to subdivide the land and allocate him a portion thereof. The deceased was particularly unhappy because DW6 had given a portion of the land to the 2nd accused. It was apparent that there existed uneasy relationship between the deceased on the one hand and the 2nd accused and their mother on the other.

The prelude to the events that led to the death of the deceased occurred on the 30th November 2005. According to PW2 Simon Mbugua and PW3 James Waititu (*the sons of the deceased who were at the material time aged 9 years and 11 years respectively*), the 2nd accused hit one of the sheep belonging to the deceased with a maize cob. PW3 testified that the 2nd accused hit the sheep with a maize cob when the sheep strayed and ate maize which the 2nd accused was shelling. The deceased was not amused that the 2nd accused had hit his sheep. Although the sheep was not injured, the 2nd accused testified that the deceased was annoyed and threatened that he would break the ribs of the 2nd accused the way he had broken the ribs of his sheep.

The 2nd accused realizing that the deceased was annoyed and would indeed give effect to his threat to injure him, decided to run away from home. The mother of both the deceased and the 2nd accused was worried by the turn of events. She testified that the deceased had threatened to kill the 2nd accused. She decided to report the incident to the police at Bahati Police Station. The report was recorded in the occurrence book (O.B) as entry No.15 of 30th November 2005. According to the 2nd accused, due to the threat to his life, he moved in with friends for the entire period until the 20th December 2005 when he went home to collect maize for his consumption. DW6 testified that the police took no action when she made the report.

According to PW1 Lucy Njeri, the sister to the deceased and the accused persons, when the deceased saw the 2nd accused at his mother's homestead on the 20th December 2005, he chased him away. It was apparent that the action by the deceased in chasing away the 2nd accused from home spilled over and transformed into a disagreement between the deceased and his mother (DW6). She testified that the deceased on that day threatened to kill her. DW6 was worried and feared for her life. She again went to Bahati Police Station and made another report. The report was recorded in the occurrence book at the said police station as O.B No.28 of 20th December 2005. Like the previous time, it was evident that the police took no action.

According to PW4, on the 21st December 2005, the deceased woke up as usual and went to a farm which he had leased to cut grass for the cows. The deceased carried with him a new panga which he intended to use to cut the grass. The deceased sent PW4 to go and buy washing detergent (Omo) from a nearby shop. PW4 rode a bicycle to the shops. The deceased also assigned PW2 and PW3 work. He told them to carry manure to their farm. According to PW3, the deceased walked from their house towards the direction of the leased farm. The path to the said farm passed through the homestead of the deceased's mother.

According to PW2 and PW3, the accused persons were at the time shelling maize outside their mother's house. PW1, who was at home at the time, testified that the deceased quarrelled with the 2nd accused. She recalled that the deceased inquired from the accused persons what they wanted with him. According to PW1, the deceased then went to his house and came back with a stick and hit the 2nd accused with. The stick broke. The deceased went back to his house and came back with an iron rod. The accused persons at the time had moved near the gate leading to a public road. The deceased followed them to the road. It was then that the 1st accused hit the deceased with a pestle which he was previously using to shell maize. PW1 testified that the 1st accused hit the deceased when the deceased attempted to hit him with

the iron rod.

This version of events by PW1 was however contradicted by the testimony of PW2 and PW3 the sons of the deceased. According to the two, it was the accused persons who attacked the deceased and assaulted him using a stick and an iron rod when the deceased was walking towards the direction of his farm. PW2 and PW3 testified that the accused persons hit the deceased severally on his head and on his torso. They hit the deceased even when he was lying prostrate on the ground. According to PW3, the accused persons hit the deceased severally for over a period of about thirty minutes. When PW4 returned from the shop, she was met on the road by her younger sister called Faith Waithera Kamau.

PW4 was informed that her father, the deceased, was being beaten by the accused persons. PW4 found the deceased lying on the ground bleeding from an injury on his head. PW4 attempted to go to where her father was lying on the ground but was chased away by the 1st accused. She recalled that at the time the 1st accused was beating the deceased using a piece of stick. The mother of the deceased was standing nearby holding a panga. She testified that the deceased was inquiring from the accused persons and his mother why they wanted to kill him. She decided to report the incident to her maternal uncles as her mother was not at home at the time.

PW5 PC Dickson Njagi testified that he was at the Bahati Police Station on the 21st December 2005 when the 2nd accused arrived at the police station and made a report that the deceased was creating disturbance at their home. At that moment, PW5 received information from the control room Nakuru Police Division that a person had been killed in Karunga area. PW5 requested the 2nd accused to escort him to his home. PW5 was accompanied by two police officers, PC Monari and PC Kiptoo. When he arrived at the scene, he found the deceased lying on the ground. The deceased was unconscious. The 1st accused was at the scene. He was holding a pestle (*a big stick*). The mother of the deceased was standing nearby while holding a panga. PW5 decided to take the deceased to hospital in view of the injuries that he had sustained. The deceased was however declared dead on arrival at the Provincial General Hospital, Nakuru. PW5 arrested the accused persons. He commenced investigations. After concluding his investigations, he charged the accused persons with the present offence. He produced the stick which he recovered from the 1st accused and the panga which he recovered from the mother of the deceased as *prosecution's exhibit No.1 & 2* respectively.

Post-mortem was performed by PW6 Dr. Paul Gachunga on the body of the deceased on the 29th December 2005 at the Municipal Mortuary Nakuru. On external examination of the body of the deceased, he noted that there was a fracture of the right wrist. The head of the deceased was deformed due to multiple skull fractures. Both knees of the deceased were bruised as were the forearms, a sign of defensive injuries. On internal examination of the head, he noted that the multiple skull fractures had caused severe brain damage to all the lobes of the brain. There were bone pieces in the brain matter. In his opinion, the cause of death of the deceased was cardiopulmonary arrest secondary to severe brain damage secondary to severe head injury. The post-mortem report was produced as *prosecution's exhibit No.3*.

When the accused were put on their defence, they called six witnesses. They testified as DW1 and DW2. DW3 was Julius Mwangi Ngatia, DW4 Joseph Maina, DW5 Salome Wanjiru Maina and DW6 Teresia Mugure Munyinyi. The thrust of the defence case was that the deceased was a quarrelsome and troublesome person. According to DW4, the deceased at one time even smoked bhang. DW2 testified that on the 20th December 2005, the deceased was in a foul mood and had threatened to break the ribs of the 2nd accused. He testified that the deceased was not prepared to cool down and was spoiling for a fight with the 2nd accused. According to the accused persons, it was the deceased who was the aggressor. He had intended to cause injury to the 2nd accused over what he perceived to be insolence on the part of the 2nd accused. The accused persons testified that it was the deceased who had extremely provoked them and his death resulted when they were acting in self defence. The accused persons did not deny that they had caused the death of the deceased. They however testified that it was the deceased who provoked the fight and in fact was the first to assault the 2nd accused before he was fatally injured.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to reach its own determination whether or not the prosecution established the guilt of the accused person.

In the present case, the prosecution adduced evidence which established that it was the accused persons who assaulted the deceased and thereby caused him to sustain fatal injuries. The accused persons do not deny that they indeed assaulted the deceased and caused his death. It was the prosecution's case that it was the accused persons who were the aggressors. According to PW2 and PW3, the minor children of the deceased, it was the accused persons who hit the deceased with a piece of stick and an iron rod thus causing his death. PW1, the sister of the deceased, testified that the deceased had quarrelled and then assaulted the 2nd accused thus provoking the fight which led to the death of the deceased. PW4 testified that when she arrived at the scene, she found the 1st accused hitting the deceased as he was lying prostrate on the ground. The deceased was asking the 1st accused why he wanted to kill him. When PW4 sought to go to the rescue of her father, she was chased by the 1st accused. By the time the police arrived, the deceased was unconscious. He later succumbed to his injuries before he was attended to at the hospital.

This version of events was however disputed by the accused persons and their witnesses. It was their case that it was the deceased who was the aggressor. They told the court that it was the deceased who provoked the fight when he hit the 2nd accused with a piece of stick. The 2nd accused gave testimony of the background of the events that took place before the fateful date. The 2nd accused testified that the deceased had chased him from home because he was annoyed that he had hit his sheep and thereby injured its rib. The 2nd accused testified that the deceased was jealous of him because he perceived that their mother loved him more than the deceased. The accused persons testified that the deceased died when they were legitimately defending themselves from his aggression.

The issue for determination by this court is whether the prosecution proved to the required standard of proof beyond reasonable doubt that it was the accused persons that killed the deceased with malice aforethought. This court's evaluation of the evidence adduced by both the prosecution witnesses and the witnesses called by the defence is that there existed a bad relationship between the deceased on one hand, and the 2nd accused and their mother Teresia Mugure Munyinyi on the other. It was clear from the evidence adduced that the mother of the accused persons and the deceased favoured the children who were born of her husband. It was apparent from the evidence adduced that the mother of the deceased discriminated against him by the fact that he was born out of wedlock. The mother of the accused and the deceased exhibited this discrimination when she apparently allowed the 2nd accused to cultivate a portion of her two acre farm that she had inherited from her husband.

It appears that the deceased was unhappy that he had not been given a portion of his mother's parcel of land to cultivate. The deceased resented the fact that his mother favoured his younger siblings, and particularly the 2nd accused. Matters came to head when the 2nd accused was seen by the children of the deceased *i.e.* PW2 and PW3 hit a sheep belonging to the deceased. Although the sheep was not injured, the deceased reacted violently towards the 2nd accused. The deceased was heard by several witnesses make a vow that the 2nd accused would pay for having hit his sheep with a maize cob. The deceased specifically stated that he would break the ribs of the 2nd accused the way the 2nd accused had broken his sheep's ribs. This incident occurred on the 30th November 2005. The deceased threatened the 2nd accused to the extent that he made a report to the police at Bahati Police Station. The 2nd accused made this report accompanied by his mother. The report was recorded as O.B entry No.15 of the 30th November 2005. The 2nd accused fled from home and moved in with a friend.

On the 20th December 2005, the 2nd accused went home to collect maize. He was seen by the deceased in

the compound of his mother. The deceased chased him away. The 2nd accused and his mother again made a report to the police at Bahati Police Station. The report was registered under O.B entry No.28 of 20th December 2005. In both instances, although the 2nd accused and his mother complained that the deceased had threatened them, the police took no action. The assault on the deceased by the accused persons on the 21st December 2005 should therefore be seen in this context. On that day, the deceased saw the 2nd accused in the compound of his mother. According to PW1, the sister to both the accused and the deceased, the deceased and the accused quarrelled. It was apparent that the quarrel degenerated into a fight. Although PW2 and PW3, the young children of the deceased testified that it was the 2nd accused who first assaulted the deceased, I believed the testimony of PW1 when she testified that the prelude to the fight was an argument that took place between the deceased and the 2nd accused.

The deceased was assaulted by the accused persons. The accused persons used pestles which they were using to shell maize to repeatedly assault the deceased. It was clear from the testimony of PW1, that the deceased was hit on the head with a pestle which caused his death. The post-mortem report which was produced by PW6 Dr. Paul Gachunga revealed that the deceased had sustained multiple skull fractures which could not have been caused by one blow. The multiple fractures of the skull were caused by several blows which were administered on the head of the deceased. The deceased also had bruises on his fore arms which were consistent with defensive injuries.

My evaluation of the totality of the evidence adduced in this case clearly established that although the deceased had provoked the 2nd accused, and had in fact contributed to the initial quarrel on the fateful day, that he was fatally injured, the reaction by the accused persons was beyond the expectations of persons who were acting in self defence. It was clear that the accused persons intended to cause serious injury to the deceased. That was the reason why the accused persons kept assaulting the deceased even when he was defenceless and was slumped on the ground. The deceased was beaten by the accused persons until he lost consciousness. That was when the 2nd accused went to Bahati Police station and made a report that the deceased had been injured. The police took the deceased to the hospital but he succumbed to his injuries before he was admitted at the said hospital.

It was evident from the foregoing, that although the accused persons were provoked by the deceased, and further that although the deceased person was the aggressor on the day he was fatally injured, the accused persons used excessive force in reacting to the aggression by the deceased. The accused persons did not use reasonable force to subdue the deceased. Instead, the accused persons assaulted the deceased with the aim of causing him grievous harm. There was an element of revenge when the accused persons hit the deceased even while he was lying prostrate on the ground. I considered the defence of the accused persons. Their defence corroborated material aspects of the prosecution's case that the deceased was the aggressor and had provoked the accused persons, particularly the 2nd accused.

In the circumstances of this case, I do hold that the prosecution proved to the required standard of proof beyond reasonable doubt that the accused persons caused the death of the deceased. I however hold that the prosecution established the lesser charge of manslaughter and not that of murder. The prosecution failed to establish malice aforethought. The two assessors who assisted this court during the hearing of this murder trial found the accused guilty of the lesser charge of manslaughter. I agree with their verdict. I therefore convict the accused persons of manslaughter in accordance with **Section 202 as read with Section 205** of the **Penal Code**.

It is so ordered.

DATED at NAKURU this 14th day of November 2007.

L. KIMARU

JUDGE