



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 51 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

DOMINIC WAWERU WARUI.....1<sup>ST</sup> ACCUSED

MARY WAMBUI GATHENYA.....2<sup>ND</sup> ACCUSED

ANNE NJERI WAWERU.....3<sup>RD</sup> ACCUSED

JUDGMENT

The accused persons, Dominic Waweru Warui (*hereinafter referred to as the 1<sup>st</sup> accused*), Mary Wambui Gathenya (*hereinafter referred to as the 2<sup>nd</sup> accused*) and Anne Njeri Waweru (*hereinafter referred to as the 3<sup>rd</sup> 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 nights of the 2<sup>nd</sup> and 3<sup>rd</sup> June 2005, at Mutamaiyu village in Nyandarua District, the accused persons jointly murdered Paul Mungai Chege (*hereinafter referred to as the deceased*). The accused persons pleaded not guilty to the charge when they arraigned before this court. The prosecution called ten witnesses in its bid to establish the charge. Upon hearing the said witnesses, this court acquitted Mary Wambui Githenya and Anne Njeri Waweru after finding that there was no sufficient evidence to enable this court put them to their defence. This court however ruled that Dominic Waweru Warui had a case to answer. He gave an unsworn statement in his defence. He stated that he had indeed assaulted the deceased when the deceased went to his house in the middle of the night and attempted to rape the 2<sup>nd</sup> accused. He testified that he had hit the deceased with a piece of metal pipe in a successful bid to prevent the 2<sup>nd</sup> accused from being raped.

After the close of both the prosecution and the defence case, Mr. Oira, counsel for the 1<sup>st</sup> accused made closing submissions urging this court to find that the prosecution had failed to prove the case against the 1<sup>st</sup> accused to the required standard of proof beyond reasonable doubt. He submitted that the deceased was the author of his own misfortune in that he went to the house of the 1<sup>st</sup> accused in the middle of the night and attempted to rape the 2<sup>nd</sup> accused. He submitted that the 1<sup>st</sup> accused had used reasonable force to repulse the deceased. He urged the court to acquit the accused. On his part, Miss Opati for the State submitted that the prosecution had discharged the burden placed on it to prove the charge of murder against the 1<sup>st</sup> accused to the required standard. She urged the court to convict the 1<sup>st</sup> accused.

Before setting out the reasons for the determination of this case, it is imperative to set out the facts of this case as narrated by the prosecution witnesses. On the night of the 3<sup>rd</sup> June 2005, the 1<sup>st</sup> accused went to

sleep in his house. He slept in his house with his wife, the 3<sup>rd</sup> accused. The 2<sup>nd</sup> accused, who is a cousin to the 1<sup>st</sup> accused, had paid a visit to the 1<sup>st</sup> accused. On that material night, she slept in a room next to the house where the 1<sup>st</sup> accused slept. At about 12.30 a.m., PW1 Simon Maina Wambugu and PW5 Samuel Waimee Waweru, the neighbours of the 1<sup>st</sup> accused, heard screams emanating from the house of the 1<sup>st</sup> accused. PW1 and PW5, who were asleep in their respective houses at the time, woke up and went to investigate. According to PW1 when he reached the compound of the 1<sup>st</sup> accused, he found the 1<sup>st</sup> accused beating the deceased. He recalled that the 1<sup>st</sup> accused was wearing a shirt and inner wear. PW1 managed to dissuade the 1<sup>st</sup> accused from further beating the deceased.

At that moment, PW5 arrived at the scene. The two of them asked the 1<sup>st</sup> accused why he had beaten the deceased. The 1<sup>st</sup> accused told them that the deceased had attempted to rape the 2<sup>nd</sup> accused. According to PW5, the 1<sup>st</sup> accused complained that it was not the first time that the deceased had gone to his homestead in the night and messed up with his wife and family members. PW5 specifically recalled the 1<sup>st</sup> accused's complaint that the deceased had been responsible for the desertion of his former wife from his matrimonial home. PW1 and PW5 testified that when they saw the deceased, it appeared as if he had fractured his hand. He also had an injury on his leg which was bleeding. When PW1 and PW5 inquired from the deceased what had transpired, the deceased pleaded with them not to report the incident either to the area chief or to the police, because, according to the deceased, he did not want to be ashamed. PW1 and PW5 recalled that the deceased told them that he had gone to the house of the 1<sup>st</sup> accused to pursue "**things of men.**" The deceased implored them not to tell the members of the village what had transpired. He pleaded with PW1 and PW5 to inform his (*the deceased's*) mother to fetch him from the house of the 1<sup>st</sup> accused. PW1 and PW5 testified that it was unusual for the deceased to have gone to the house of the 1<sup>st</sup> accused in the middle of the night. PW5 speculated that the deceased's visit could have been understandable if he had a relationship with the 2<sup>nd</sup> accused.

PW1 and PW5 went to the home of the deceased and informed the parents of the deceased of the events that have transpired. PW2 Stanley Muga Chege and PW3 Samuel Kamau Chege were woken up by their parents and instructed to fetch the deceased. PW2 and PW3 testified that they found the deceased lying by the roadside some distance from the nearest homestead. PW2 testified that when they saw the deceased, the deceased had sustained a fracture of his left hand. He also had blunt injuries on his head. The deceased was complaining of pain. PW2 and PW3 then took the deceased to his house where they put him on his bed. PW2 and PW3 made a decision that they would take the deceased to the hospital for treatment the following day. When they woke up the following morning, they found the deceased had already succumbed to his injuries and died. PW2 recalled that at the time the deceased was living alone since he separated from his wife about three to five years prior to the incident. PW2 and PW3 did not know the reason why the deceased was beaten. They testified that when they discovered the deceased had died, they made a report to the police at Kinangop Police Station, who later arrived at the scene and took away the body of the deceased to Naivasha District Hospital mortuary. PW3 recalled that the accused persons were arrested on the same day that the body of the deceased was collected by the police.

PW4 Daniel Nyagah Kamau and PW6 John Ndung'u Chege were present at the Naivasha District Hospital Mortuary on the 14<sup>th</sup> June 2005 when the post-mortem was performed on the body of the deceased. The two identified the body of the deceased before the said post-mortem was performed. The post-mortem was performed by Dr. Njue who observed that the deceased had sustained complete fracture of right forearm. He had abrasions on the right shin. There were vast lacerations on the right leg. There was massive intramuscular bleeding involving the arm, forearm and the hands. There was contusion of the scalp both on the occipital and the frontal region. There was sub-arachoid haemorrhage on the left temporal area. There was evidence of raised intracranial pressure. Dr. Njue was of the opinion that the cause of death of the deceased was head injury and intramuscular haemorrhage due to blunt force. The post-mortem report was produced as *prosecution's exhibit No.7* by PW10 Dr. Philip Wainaina Kamau on behalf of Dr. Njue. The 1<sup>st</sup> accused was examined by a clinical officer who determined that he was mentally fit to stand trial. The P.3 form was produced as *prosecution's exhibit No.8(a)* by PW10.

After the report was made to the police, PW9 CIP Paul Mwai, the then OCS of Kinangop Police Station, accompanied by PW8 PC Joseph Ndirangu, visited the scene where it was alleged that the deceased had been assaulted. PW9 instructed PW7 Joseph Kamau Mbugua, a photographer, to take photographs of the scene of crime, including the photograph of the injuries that the deceased had sustained. PW7 testified that he took six photographs at the scene of crime on instructions of PW9. The said photographs were produced as *prosecution's exhibit No.1 (a)-(f)*. Both PW8 and PW9 testified that their investigations had established that the deceased was assaulted by the 1<sup>st</sup> accused when he (*the deceased*) had sneaked into the house where the 2<sup>nd</sup> accused was sleeping and attempted to rape her. Both PW8 and PW9 testified that the 1<sup>st</sup> accused was entitled to use reasonable force to repulse the attempt by the deceased to commit the said crime of rape. However, PW9 maintained that the reason he charged the 1<sup>st</sup> accused with the present offence was because the 1<sup>st</sup> accused had used excessive force. Both PW8 and PW9 testified that if the deceased had survived the assault, he could have been charged with the offence of attempted rape.

After the close of the prosecutions case, the 1<sup>st</sup> accused Dominic Waweru gave an unsworn statement in his defence. He recalled that on the material evening, the 2<sup>nd</sup> accused, his cousin had paid him a visit. He requested the 2<sup>nd</sup> accused to spend the night at his residence. He testified that the 2<sup>nd</sup> accused slept in a separate house within his compound from the one that he slept with his wife. He recalled that he was woken up in the middle of the night when he heard some movements outside his house. He testified that he armed himself with a piece of metal and attempted to open the front door. He discovered that the front door had been locked with a door latch from the outside. He managed to go outside his house by jumping through the window. It is at that moment that he heard the 2<sup>nd</sup> accused scream from the house that she had slept in. He went to her rescue. He recalled that when he reached the door of the house, a man emerged and held him by the neck. He hit the man with the piece of metal pipe until he was able to subdue him. It was then that he realised that the deceased was armed with a knife. He was able to identify the deceased as a neighbour. He asked him why he had gone to his compound at that time of the night. The deceased told him that he had gone to the house "*Kwa mambo ya wanaume*" (*things of men*). The 1<sup>st</sup> accused testified that he had assaulted the deceased because he was defending himself and did not intend to kill the deceased. He stated that he had no grudge against the deceased. He testified that he was arrested, taken to the police station and later charged with the present offence.

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 to enable it reach its own determination whether or not the prosecution established the guilt of the accused person.

In the present case, the facts are not in dispute. The deceased was beaten up by the 1<sup>st</sup> accused when he (*the deceased*) went to the house of the 1<sup>st</sup> accused with the intention of forcefully having sexual intercourse with the 2<sup>nd</sup> accused. The deceased intended to rape the 2<sup>nd</sup> accused. To accomplish his mission, the deceased was armed with a knife. He also ensured that the house where the 1<sup>st</sup> accused and his wife were sleeping was locked from the outside so that he could accomplish the mission of raping the 2<sup>nd</sup> accused. The deceased was thwarted in his mission when he was confronted by the 1<sup>st</sup> accused. In his bid to escape from the house where the 2<sup>nd</sup> accused slept, a struggle ensued between the 1<sup>st</sup> accused and the deceased. According to the 1<sup>st</sup> accused, the deceased held him by the neck in a bid to strangle him. In an attempt to extricate himself, the 1<sup>st</sup> accused hit the deceased severally with a piece of metal. The deceased let go of the 1<sup>st</sup> accused. At that moment the screams of the 2<sup>nd</sup> accused had attracted neighbours who arrived at the homestead of the 1<sup>st</sup> accused.

Among the neighbours who arrived at the homestead of the 1<sup>st</sup> accused were PW1 and PW5. The two neighbours testified that when they inquired from the deceased why he had gone to the house of the 1<sup>st</sup>

accused at night, the deceased told them that he had gone to the house of the 1<sup>st</sup> accused to look for sex. The deceased pleaded with PW1 and PW5 not to inform the police or the neighbours what he had done. The deceased told PW1 and PW5 that he did not wish to be ashamed or to be subjected to lynching by the residents of the area. He asked PW1 and PW5 to fetch his brothers so that they could take him to his house. PW8 and PW9, the police officers who investigated the case, testified that the 1<sup>st</sup> accused was justified to use reasonable force to thwart the deceased from achieving his unlawful mission of raping the 2<sup>nd</sup> accused. PW9 was however of the opinion that the 1<sup>st</sup> accused used excessive force when he assaulted the deceased. The deceased died as a result of the injuries that he sustained when he was beaten by the 1<sup>st</sup> accused.

The issue for determination therefore is whether the 1<sup>st</sup> accused used excessive force in his successful repulsion of the deceased from raping the 2<sup>nd</sup> accused. This court's evaluation of the evidence adduced established that the accused attacked the deceased with an iron rod at night. The deceased was armed with a knife. The deceased had locked the 1<sup>st</sup> accused and his wife inside their house. The 1<sup>st</sup> accused could not have been in a position to assess the threat that the deceased posed to him. He used the force that he considered reasonable in the circumstances. In any event, this court is of the opinion that when an intruder invades the sanctity of one's home, one is allowed by the law to use all the force at his disposal so as to repulse such invasion. Such force may in some instances be lethal depending on the time of the invasion and the intention of such intruder.

In the present case, the 1<sup>st</sup> accused was within his right to use all the reasonable force to repulse the deceased from achieving his unlawful mission of raping the 2<sup>nd</sup> accused. The deceased recognized that he had been found in a house of a neighbour at the time of night when he was supposed not to be there. The deceased pleaded with PW1 and PW5 not to report the incident either to the police or to the neighbours. He told PW1 and PW5 to inform his parents to take him home. The deceased was taken to his house where he succumbed to his injuries and died. The post-mortem report on the body of the deceased revealed that the deceased had died due to head injuries and intramuscular haemorrhage caused by blunt force. The injuries sustained by the deceased were consistent with the injuries that were inflicted on him by the 1<sup>st</sup> accused.

Having evaluated the totality of the evidence adduced, it is clear that, although the 1<sup>st</sup> accused used excessive force in repulsing the deceased, in the circumstances of this case, I do hold that the 1<sup>st</sup> accused was justified. The deceased went to the house of the 1<sup>st</sup> accused at midnight and attempted to rape his cousin. He was repulsed by the 1<sup>st</sup> accused. I do hold that the prosecution failed to establish, to the required standard of proof beyond reasonable doubt, that the 1<sup>st</sup> accused killed the deceased with malice aforethought or that the deceased used excessive force when he assaulted the deceased. The three assessors who assisted this court during the hearing of this murder trial were of the opinion that the 1<sup>st</sup> accused was guilty of manslaughter due to the fact that he had used excessive force. The prosecution did not adduce any evidence that connected the 2<sup>nd</sup> and the 3<sup>rd</sup> accused with the assault of the deceased. This court found that they had no case to answer.

I have however reached a different conclusion after finding that the accused could not have assessed the level of the force that he could have used because it was at night. I hold that the prosecution failed to establish the charge of either murder or manslaughter against the accused. The accused is acquitted of the charge of murder. He is ordered released from remand custody with immediate effect unless otherwise lawfully held.

**DATED at NAKURU this 14<sup>th</sup> day of November 2007**

**L. KIMARU**

**JUDGE**