



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 2 of 2003

REPUBLIC PROSECUTOR

VERSUS

1. HARRISON MWANGI MUGO)

2. CHARLES IRUNGU MUGO) ACCUSED

J U D G M E N T

Harrison Mwangi Mugo (hereinafter referred to as the 1st Accused) and Charles Irungu Mugo (hereinafter referred to as 2nd Accused) were jointly arraigned before this court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 29th day of September 2001 at Kwa 'V' village in Kirinyaga District within the Central Province jointly with others not before the court they murdered Francis Mwangi Kariuki (hereinafter referred to as deceased).

Nine witnesses have testified in proof of the prosecution case. Briefly their evidence was as follows:

On the 29th September 2001 at about 4.00 p.m. Emily Wanjiru Njaramba (P.W.9) was selling traditional Beer when she saw a group of people who included 1st and 2nd Accused, chasing the deceased. Both the 1st and 2nd Accused as well as the deceased were known to P.W.9. Someone in the crowd threw a stone at the deceased and the deceased fell down. All the people then descended upon the deceased beating him . P.W.9 heard the 1st Accused demanding his teeth from the deceased whilst the 2nd Accused was asking the deceased whether he knew that he wanted to kill his brother when he removed his teeth. At that stage P.W.9 left leaving the people still beating the deceased.

Rebecca Wairimu Njagi (P.W.2) was coming from her house when she saw people running towards the Bush where the traditional liquor was being sold. She went and found the deceased lying down on the ground his clothing covered in dust. P.W.2 also decided to run away.

P.C. Omar Ibrahim (P.W.6) and his colleague P.C. Kinoti (both Officers attached to Sagana police station) were waiting for a vehicle at Kwa V Trading center when they were approached by the 1st Accused who reported to them that there was someone who had been subjected to mob justice. The 1st Accused complained that the man had earlier assaulted him. P.W.6 asked 1st Accused to accompany him to the police station so as to make a statement.

In the meantime the deceased's parents Mary Nyawira Kariuki (P.W.3) and Joseph Kariuki Harun

(P.W.4) received information acting on which on the morning of 30th September 2001 they proceeded to the scene where the lifeless body of the deceased was still lying. P.W.4 went to Sagana Police Station and made a report to Cpl. Godfrey Hinga (P.W.7) who proceeded to the scene and noted that the deceased's body had marks on the neck showing signs of strangulation. The deceased also appeared to have been beaten and blood was oozing from his mouth. P.W.7 recovered a rope from a thicket nearby. He contacted the scenes of crime personnel and P.C. Peter Ndei Kanyi from the scenes of crime went to the scene and took photographs showing various views of the body. The body was thereafter taken to Murang'a Hospital mortuary where a post mortem examination was done on the 9th October 2001 by Dr. Waiganjo. A report signed by Dr. Waiganjo which was produced by Dr. Abraham Gatangi (P.W.8) showed the cause of death as head injury due to blunt trauma.

On the 11th October 2001, P.W.7 and other officers arrested the 1st Accused from his house. On the 12th October 2001, the 2nd Accused was arrested from Sagana Police Station where he had gone to check on the 1st Accused. Both Accused were examined by Dr. Gatangi (P.W.8) who confirmed that they were both physically and mentally fit to stand trial.

John Mwangi (P.W.1) a clinical officer attached to Kerugoya District Hospital also produced a P3 form confirming that he examined the 1st Accused on 4th August 2001 following a complaint of assault. He noted that the Accused had a deep cut wound on the upper lip and laceration at the lower gum as well as 2 loose upper incisor teeth and a bruise on the right eye.

In his defence the 1st Accused who gave unsworn evidence testified that he was assaulted by the deceased on the 4th August 2001. He reported the matter to the police and was issued with a P3 form which was duly filled. He was advised to report to the police if he sees his assailant.

On 29th September 2001, he was at a shop when he heard noise coming from a quarry.

On going to check he found that the person who had previously assaulted him had been apprehended. He decided to report to the police. He met two officers to whom he explained the problem but they asked him to accompany them to the station. At the station he waited for about an hour but was finally told to go home as no vehicle was available.

On 11th October 2001, three police officers went to his home and asked him to go and record a statement. He was however locked in.

The 2nd Accused also gave an unsworn statement. He testified that he was at Kwa 'V' shopping center when he heard screams of "thief thief." On going to check he found a man who had been apprehended being questioned by people. He left and went towards the shop where he met two police officers to whom he made a report.

On 12th October 2001 he learnt that his wife had been locked up at the police station. He went to see her and was also locked in. About a month later he was charged.

From the evidence that has been adduced it is not disputed that sometime in August 2001 the 1st Accused and the deceased had a confrontation as a result of which the deceased assaulted the 1st Accused and knocked off his teeth. The 1st Accused reported the assault as a result of which he was issued with a P3 form and examined by P.W.1 who confirmed that the 1st Accused was assaulted. The prosecution case against the Accused person is based on this assault as providing the motive for the subsequent attack and murder of the deceased.

However the only evidence adduced by the prosecution which appear to implicate the Accused persons is the evidence of P.w.9 who claimed she actually saw the two Accused persons chase and attack the deceased. A court has however always to be very carefully whilst dealing with the evidence of identification by one single witness and must carefully scrutinize it before deciding whether to base a conviction on such evidence. It is apparent from the evidence of P.W.9 that the deceased was being chased by a group of people. However P.W.9 only identified 1st and 2nd Accused as having been among

the group. She did not identify any other person although the assault took place in broad daylight within her working area. Moreover no one else appears to have witnessed the attack or identified the Accused persons although the attack took place at an area where P.W.9 was selling traditional liquor and must therefore have had other customers known to her.

The evidence of the witness relating to how the attack took place was also not consistent as her statement differed from her evidence in court regarding whether the deceased was hit with a stone and if so who hit him, or whether the deceased tripped on a stone and fell down.

Further the witness did not say anything about a rope and yet according to the evidence of P.W.7, the photographs produced and the evidence of P.W.3, a rope appears to have been used to strangle the deceased. However P.W.9 did not make any mention of the rope nor did she explain the role played by any other person other than the two accused persons. While the witness may well have identified the two Accused persons as having been among the group that was chasing the deceased, the evidence of this witness is not sufficient to prove beyond reasonable doubt that the Accused persons actually assaulted the deceased or that they inflicted the fatal blow or that the two Accused persons had a common intention to kill or harm the deceased.

Moreover although the witness tried to explain her failure to attend court, it is evident that she was reluctant to attend court hence the need to issue a warrant of Arrest against her. Her reluctance to come to court raises suspicions. I find that the credibility of this witness is suspect. It would be unsafe to rely solely on her evidence to base a conviction.

I do concur with the unanimous opinion of the assessors that the two Accused persons be given the benefit of doubt as the prosecution has failed to prove the case against the two accused beyond any reasonable doubt. I therefore find each Accused not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

I acquit each Accused and order that each shall be released forthwith unless otherwise lawfully held.

Dated signed and delivered this 31st day of January 2006

H. M. OKWENGU

JUDGE