



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case No. 50 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL MACHARIA MWANGI.....ACCUSED

JUDGMENT

The Accused person is charged with murder contrary to section 203 as read with Section 204 of the Penal Code particulars alleging that on the 20th day of June, 2003 at Itaaga Village in Maragua District, Central province, the Accused murdered Peter Nduati Mburu.

The evidence before the court is that Samuel Macharia Kamande, PW4 in the company of his father were going home from Itaaga shopping centre on 20th June, 2003 when, at about 9.00 pm. They found a person they both knew as Peter Nduati Mburu lying dead on the way about 70 metres away from his home. There was no other person at the spot and since the deceased was a fellow villager, PW4 and his father went to the deceased's home and told his wife and his parents what they had seen.

As those relatives of the deceased went to the scene, they started screaming thereby attracting other members of the neighbourhood who included Joseph Mwangi Gitau, PW2, and Simon Maina Irungu, PW7.

PW2 told the court that on his way to and from where the body of the deceased was, he was meeting the Accused, a close neighbour of the deceased, standing on his side of the land and that on each occasion, the two talked about what had happened to the deceased. But when PW2 who was armed with a stick for the night saw the Accused having what PW2 thought was a panga and suspected that the Accused had not bothered to go and see where the deceased was lying dead, PW2 suspected the Accused with the death of the deceased. He told the court that after he had returned to his home, he subsequently saw the Accused pass by towards a destination PW2 did not know.

According to the evidence of PW3, Paul Murigi who told the court that the Accused and him had known each other, the Accused went and slept in his house that night on the basis that Peter Nduati Mburu had been killed that night and that the Accused was afraid to sleep at his home. The following day, the two parted.

But according to the evidence of Police Constable Samuel Kiruyu, PW8 when he visited the scene of the murder that night with other police officers and collected the body of the deceased, they met Simon Maina Irungu, PW7, at the scene and PW7 mentioned the name of the Accused to the police who subsequently acted on that information to have the Accused person arrested and charged with this offence. PW8 told the court he did not know the motive for the murder and no evidence of that motive

has been led before this court by any other witness. PW8 accepted that by then PW7 was a minor.

In the evidence before me, the age of Simon Maina Irungu is not clear. When he entered the witness box, it was indicated he was 14 years in June, 2003 and it was therefore expected he was 16 years old to-day. As he proceeded to give evidence, however, he told the court he was 11 years old in June, 2003 giving the picture that he was a minor who could walk alone in a dark night from a video hall at Itaaga Trading centre to his home.

He told the court, on oath, that during the evening of 20th June, 2003 he was at Itaaga Trading Centre in a video hall when he saw the accused briefly in the video hall. He went on to say that on his way home after leaving the video hall he found somebody on the way and that when that person spoke mentioning PW7's name, PW7 recognised the voice to be that of the Accused person. PW7 could not see the person but somehow claimed to have seen that the person had a panga. The witness who claimed he did not talk to the person he met although that person had inquired to know whether PW7 knew him, added that he instead hurried home, claiming that that person told him to leave immediately and he got scared. A neighbour sharing one boundary.

PW7 continued to say that after he had reached his home and heard people screaming, women and men, he went to the place where the screaming was from. On the way he and one Njoroge, met a man called Kimunya who told them to go and see Nduati had been cut. They proceeded to the scene and found Nduati had been cut and PW7 claimed that the place was on the road where he had met the person whose voice he recognized as the accused's PW7 stayed there until the police arrived.

Dr. Patrick Mburu who carried out postmortem examination told the court that the deceased had a deep cut on the left side of the neck, cutting through major vessels and the cervical vertebrae so that only a flap of the skin on the right side of the neck still held the head to the body. He formed the opinion that the cause of death was cardiopulmonary arrest due to severed carotid artery, trachea and spinal cord.

In his defence, the Accused did not accept that he committed the offence. He explained how he was busy at his home throughout the day until the evening after 9.00 p.m. when he heard screaming which seemed to be far and nobody, according to him, seemed to know what was happening. But as he tried to go where there screaming was, he met a hostile group of people, who included Joseph Mwangi Gitau, at the gate and the accused retreated back to the house where he had been. As those people surged forward into the compound, the Accused disappeared and went where his mother had gone.

The two subsequently returned to their home to find some of their banana sackers cut down and their dogs cut dead. They received information from Samuel Macharia Kamande that the people who cut bananas and dogs wanted the Accused as they claimed that the Accused knew the person who had murdered Peter Nduati Mburu and they wanted the Accused to tell them.

Not knowing the intention of those people, the Accused went and slept in the house of his friend Paul Murigi until the following day when he returned to his home in the morning, discussed the matter with his mother and they agreed he should go to Nairobi where his brother was.

While at Nairobi his brother assisted him to go to Kamukunji police station where he explained to the police why he had not gone to Maragua Police Station. After the police at Kamukunji had talked to the police at Maragua who said they wanted a person called Samuel Macharia Mwangi, the Accused slept at Kamukunji police station and was collected the following day by the police from Maragua who went and charged him with this offence.

Briefly that is what has been said on both sides. The evidence is clear that the deceased was killed by somebody; another human being. But that evidence is not clear as to whether that killing amounted to murder as the investigations of this case, if any, never tried to get the motive behind the killing or more facts. That may have been so because the evidence connecting the Accused with the killing of the deceased was not strong. But once the prosecution decided to charge the accused with murder, the prosecution had to be prepared to prove the motive leading to a clear intention to commit murder prior to

the act of killing. This is because a person provoked or acting in self-defence can inflict to his opponent the type of injuries the postmortem doctor found on the body of the deceased.

The evidence trying to link the Accused person with the offence is based on suspicion by PW2 and PW7. For PW2 he suspected it was the Accused person who murdered the deceased because the Accused had not gone to see what had happened to the deceased. On the part of PW7, he suspected the Accused killed the deceased because PW7 claims the deceased was killed at the place where PW7 had found a person PW7 thought was the Accused person. PW7 by then a minor of eleven years of age, relying on voice identification could have mistaken the voice he heard talking to him. Moreover since because of darkness this witness could have mistaken the voice he heard talking to him. Moreover since because of darkness this witness could not see the person he claimed to be the Accused, how could he see whether or not that person was armed and got to the extent of knowing that the weapon was a panga? Otherwise, the fact is that PW7 was a minor whose word needed good corroboration which is not available in this case.

On the whole, I find there is no sufficient evidence to sustain a conviction of the Accused in this case. The three Assessors were unanimous that the Accused person is not guilty. I have no reason to disagree with them.

Accordingly, this case is hereby dismissed and the Accused person acquitted. He be released forthwith unless lawfully detained in some other cause.

Dated this 31st day of March, 2006.

J. M. KHAMONI

JUDGE