



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 11 of 2004

REPUBLIC.....RESPONDENT

VERSUS

JOHN MWANGI KAMAU.....APPELLANT

JUDGMENT

The accused John Mwangi Kamau, is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the offence are that on the 2nd day of August 2000 at Huruma Estate in Nairobi within Nairobi Area, jointly with others not before the court murdered one Geoffrey Mburu Mukami.

The prosecution called eight (8) witnesses in support of the state case.

PW1, Hellen Bosire, Bosire was at Huruma Estate on 2nd August, 2000 in the company of a lady by the name Mwende.

Wairimu informed him that his brother, Godfrey Mburu, hereafter referred to as the deceased) was engaged in a fight with some people. Bosire went to the scene and found John Mwangi Kamau alias Mwaura Mbuka (thereinafter referred to as the accused), Waiti, John and Kamau fighting with the deceased. He (Bosire) gathered that the deceased allegedly stole some items from the assailants. The assailants took the deceased to John Saga Shopping Centre within Huruma Estate. Bosire told his elder brother to follow them. About 11.00 am a kid by the name Mwaura informed Bosire that the assailants had tied the deceased with ropes and posts and set him (deceased) on fire. That the deceased had been taken to hospital. About 6 days later, the deceased succumbed to his injuries.

PW2, Daniel Njogu, Njogu is the brother of the deceased. He recalled the events of 2nd August, 2000. He was informed of the incident and went to John Saga Shopping Centre in Huruma. He found his brother tied with a rope on both hands and legs. Amongst the assailants he found at the John Saga was the accused. He witnessed the actual burning. He pointed at the accused as the person who lit the fire. He assisted in taking the deceased to Kenyatta National Hospital where he succumbed to his injuries.

PW3, Stanley Bosire Ondieki, Ondieki identified the body of the deceased for purposes of post-mortem on 18th August 2000. He was in the company of Joseph Njogu. Post-mortem was done by Dr. Kirasi Olumbe. He arranged for the burial.

PW4, Jane Wanjiku Thingo, Jane is the grandmother of the deceased. She recalled having given some

money to a kamau to go and buy sand for the purposes of building the deceased's house. However, she could not identify that Kamau in court.

PW5, Chief Inspector William Mukisa was at Muthaiga Police Station. He received a report of assault from the father of the deceased. He went to the scene. He saw the place, the grass had burnt but did not find the victim. He followed the victim to Kenyatta National Hospital at "burns ICU." The deceased was unable to talk. The deceased passed on 8th August, 2000. He facilitated the arrest of the accused. After interrogation, he charged the accused with murder.

PW6, Delila Mweme Muse was at home of PW1, Hellen Bosire when Grace Wairimu came to say the deceased was being harassed. He accompanied Grace Wairimu to the scene. On the way they found the deceased being beaten by the accused as they frog-marched him towards John Saga Shopping Centre. The accused threw stones at them. By reason of fear they did not follow the procession. Three (3) hours later one Mwanza brought the bad news that the deceased had been burnt to death at John Saga Shopping Centre by a group of people including the accused.

PW7, No.34460 PC. Francis Wanyoike, Wanyoike recalled that on 14th December, 2000, he escorted the accused to Nairobi Area Police Surgeon for age assessment and mental capability. The accused was examined by Dr. Kamau in his presence and certified mentally capable to plead to the charge of murder.

PW8, Dr. Jane Wasike Simiyu, Simiyu, a pathologist performed post-mortem on the body of Godfrey Mburu. As a result of the examination, she formed the opinion that the cause of death was septicaemia due to burns. The post-mortem report was received as exhibit 1 in these proceedings.

At the close of the prosecution's case, neither the defence nor the prosecution submitted at that stage.

I put the accused on his defence after evaluating the evidence on record. In his unsworn defence, the accused recalled that on 2nd August, 2000, he was in his house at Huruma Ngei 1. At about 7.00 am, Maureen a girlfriend of John Ndungu, a neighbour, reported to him, in the capacity as a caretaker of the premises, that John Ndungu's house had been burgled.

Another lady, neighbour, confirmed that she saw some people coming out of John Ndungu's house with some luggage. She thought Ndungu was moving houses.

About the same time he saw deceased. He enquired from him (deceased) about the breakage. A short while after John Ndungu arrived with a group of about six (6) other people. They collected the deceased for purposes of taking him to the police station. He followed them. The group split into two. One remained with the deceased. The other went for his (accused's) brother, John Mwaura, who was also implicated in the breakage and theft at John Ndungu's house. He got to accused's brother before the group after him reached. He sought to know the truth from him. Time was now about 12 noon. He asked his brother to accompany him to John Saga Shopping Centre. It was too late. The deceased had been set on fire by matatu operators. He went to Kenyatta National Hospital where the deceased was admitted. He assisted in paying hospital fees of Kshs.1350/=. Later on, he learnt that Mburu passed on.

DW2, Stephen Mwaura Mwangi, Mwangi, recalled going to work at Lousters on 2nd August, 2000. He received information that certain household items had been stolen from John Ndungu's. He further learnt that the group was en-route to John Saga Shopping Centre. He came to learn that the deceased had been set on fire by matatu touts. He did not see the deceased.

At the close of the defence case, Ms. Gulenywa for the accused submitted that the prosecution had failed to prove its case beyond reasonable doubt. That there were material contradictions in the prosecution's case. While eye-witness evidence is to the effect that the deceased was assaulted, the post-mortem report shows that the deceased died of burns.

That the evidence against the accused is merely circumstantial. There is no eye-witness account of what

actually happened. That DW1's and DW2's testimony is to the effect that they could not tell who killed the deceased. (PW4 Jane Wanjiru Thingo) could not even identify the accused in court. Investigating officer could not even trace the witnesses as they went underground. Accused was merely a Good Samaritan and a relative who paid Kshs.1350/= at the hospital as the required fees. The circumstantial evidence is not capable of proving the guilt of the accused to the exclusion of all who were at the scene.

Mr. Njogu, for the state, contended that the prosecution had proved its case beyond reasonable doubt. That PW1 (Hellen Bosire) was the accused and others beat up the deceased. That they were using metal bars. PW2 (Daniel Njagi) saw the accused pour paraffin on the deceased and that he actually lit the fire. The cause of death was a result of septchemia due to burns. That is consistent with the actions of the accused setting the deceased on fire. Malice aforethought as defined in section 206 of the Criminal Procedure Code can be inferred from the fact that the evidence that the deceased was beaten, then paraffin poured on him and eventually he was set a blaze.

I have analyzed the evidence of the prosecution as well as that of the defence as best as I can. Arising from the evidence, it is clear to me that the deceased was arrested by a gang of six (6) and frog-marched to John Saga Shopping Centre apparently with a view to being handed over to the authorities. On the way, something happened. It is not clear what it was and the mob then poured on him paraffin and set him ablaze. This issue is whether on the evidence the accused was among the mob.

While the prosecution maintains that accused was amongst this group, the defence contends otherwise.

From the testimony of PW2, David Njoroge, it was the accused who set the deceased ablaze. There is no other evidence to that effect. I take cognizance that PW2 a brother to the deceased. I also take into account that there was a mob baying for the blood of the deceased. In my view, it was a case of mob-justice. It is not clear who played what role. It would appear that PW2, a brother to the deceased mentioned the name of the accused by reason of vengeance. Going by the evidence of DW2 the accused could have participated in the chain of events which culminated into the death of the deceased but could not possibly have been at the place when the deceased was set ablaze.

In the result, I find the accused guilty of manslaughter and convict him accordingly.

Dated and delivered at Nairobi this 12th day of April 2006.

N.R.O. OMBIJA

JUDGE

12-4-2006

Coram; Ombija – J

Court Clerk – Anne Wambui

Mr. Njogu for Republic

Mr. Gulenywa for accused

Mr. Njogu: May the accused be treated as a first offender. The state has no records.

Mr. Gulenywa: The accused is aged 30 years. He has been in remand for the last six years and eight months (from 200 – 2006). He pleads for leniency. The accused has suffered a lot. He is a married man with two children who are now out of school.

SENTENCE:

In sentence the accused to serve two years imprisonment.

Right of appeal in 14 days.

N.R.O. OMBIJA

JUDGE