



REPUBLIC OF KENYA

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

Criminal Case 66 of 2004

REPUBLIC..... PROSECUTOR

VERSUS

JOSEPH MATHERI NJAU & 5 OTHERSACCUSED

JUDGMENT

The Accused have been charged for the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code. The information that was presented to the Court related to four different counts of Murder. The facts of the prosecution case as stated in the information for the first Count are as follows:

“On the 28th March, 2001 at Kangoya Village in Kiambu District within Central Province, jointly with others not before Court, murdered Dancan Mbugua Njau”

The other Counts related to the following deceased persons:

- Ø Laban Mbugua Njeri
- Ø Laban Mbugua Njau
- Ø Kibe Njoroge Mbugua

In his evidence the PW1 Laban Mbugua Chege recalled that on 26th March, 2004 he went to attend the burial of his grandmother. After 2.00 p.m., Laban Mbugua went to his home and informed him that his radio had been stolen. The PW1 advised him to wait and see whether the same would be recovered. On the following day, the cousin to the PW1 viz, Daniel Kibe went there and was asked whether he had taken the radio. In response, Daniel Kibe denied having taken the radio. When the father to the PW1 threatened to take all of them to the police station, Kibe admitted having taken the radio. Subsequently, the father of the PW1 went to Ndumbero Police Station while accompanied by Daniel Kibe and Laban Mbugua Njeri. In addition to the above, the father of the PW1 directed that his son, Laban Mbugua Njau, Daniel Kibe would go to where the radio had been hidden. That was because Daniel Kibe had earlier indicated that the buyer viz, Matheri could only be traced at night. The PW1 subsequently testified that on 28th March, 2004 they went to the house of Matheri at around 9.00 p.m. while accompanied by Laban Mbugua Njau, Laban Mbugua Njeri, Daniel Kibe and Duncan Njau Mbugua. On arrival, Kibe requested Geoffrey Mwaniki who agreed to call Matheri. When the latter came, the PW1 observed that he had made his hair in “rasta style”.

After Kibe and Matheri had talked aside for a few minutes, the latter demanded that he should be

refunded KShs.200/= that he had earlier paid to the former. Though the father of the PW1 paid the cash, Matheri entered his house and came out with a slasher and a radio before stating the following words:

“Munajua kwamba munaweza ona taabu mahali mulipo”

When Matheri started hitting mabatis with a slasher, the mother asked the PW1 what the group had sold to her son. When the father of the PW1 explained that they had sold a radio to the son, she raised an alarm alleging that there were thieves. In response to her distress call, about 50 neighbors rushed to that home and never gave the PW1 and his group a chance to give any explanation. Instead, the neighbours took the group to the road and started assaulting them and throwing stones. Luckily, on reaching the road, the PW1 managed to escape into a coffee plantation from where he watched his group being assaulted by use of slashers and fork-jembes.

While hiding, the PW1 reckoned that he managed to see Matheri – the Accused 1 hitting his father while using an iron bar that was about 4 feet long. The PW1 also reckoned that he saw the Accused 4 who was armed with a panga. He further stated that after hiding for about three minutes and getting some strength, he went back to his home. On arrival, the PW1 informed all his close relatives on what had transpired. When PW1 went to report the matter to Kiambu Police Station he was arrested on allegations that he was a thief. While in police custody, the PW1 was informed that all his colleagues had been killed. In concluding his evidence, the PW1 stated that he had earlier seen the Accused 4 assaulting Laban Mbugua Njeri with a slasher.

In his evidence the PW2 James Ng’ang’a Kamau testified how on 26th March, 2004 Kibe went to this house at around 10.00 a.m. and requested him to keep a radio for him. On the following day, Kibe went back to his house while accompanied by Mbugua, Laban and Njau [Mbugua’s father). However, on the following day, four police officers went to the PW2 and demanded that he records a statement on how he had got into possession of the radio. In her evidence, the PW3 Sussanne Savioyo recalled how she went to the scene of the incident and found dead bodies along the main road. While at the scene, the PW3, CPL Mwaniki and PC Driver Muthanga were given

Ø two ID/Cards,

Ø 2 Voting Cards,

Ø 2 small wallets and

Ø Membership Card for Huruma Gatitu.

Besides the above, the officers also recovered three muddy tyres on top of the dead bodies. In her conclusion, the PW3 stated that it was a dark night though there was moonlight. That apart, the PW3 stated that members of the public were furious and they were shouting that they had arrested the thieves and killed them. In his evidence, the PW4 – PC Anthony Nyamu recalled that on the night of 28th March, 2004 at around 3.00 a.m. he was taken to the scene where he was shown the four deceased persons who had deep cuts and several injuries.

The PW4 also testified that he saw two tyres, an axe, and crude weapons beside the bodies. Eventually, the PW4 took the photographs of the deceased both at the scene and mortuary. The PW4 later produced the photographs Exhibit 8 and the Report Exhibit 9. In his evidence, the PW5 – Geoffrey Kaguru Kang’ara recalled that on 28th March, 2004, he saw Matheri – Accused 1 running from the road to his house. The PW5 subsequently saw the Accused 1 with a battery and radio that he claimed to have bought at KShs.200/00. Subsequently, the PW5 confirmed and corroborated the story of the PW1 in details.

Apart from the above, the PW5 also testified that after the incident, the Accused 2 advised him to hide the radio where he had cut the grass since the authorities would go to that home to look for the same. The PW5 conceded that he later dug a hole and hid the radio that had been wrapped in a black polythene bag.

In his evidence, the PW6 Peter Ngari Mugo testified that on 5th April, 2004 he went to the City Mortuary where he identified the bodies of all the four deceased persons before the post-mortems were carried out. On the other hand, the PW7 PC George Kamanda confirmed and corroborated the story of the PW3 in details.

After the close of the prosecution case, the Court “Acquitted” the Accused 3, 5 and 6 for reasons that have been explained explicitly in the Ruling. In their defence, the Accused 1, 2 and 4 have denied committing the offences for which they have been charged for. The Accused 1 explained how he heard dogs barking at around mid-night and on going to the window he saw eight people in their compound despite the fact that they had earlier closed the gate. According to the Accused 1, when neighbours sensed danger they raised an alarm and the group of eight people jumped over the fence and started running away to the road. After about 15 minutes, the Accused 1 reckoned that he heard noise being made by many people. Later, the Accused 1 explained how he was arrested together with his brother and father. The Accused 1 also explained how he was assaulted by CID officers on 29th March, 2004 and forced to sign papers.

On the other hand, the Accused 2, Rahab Wairimu Njau who is the mother of the Accused 1 and Accused 4 recalled that on the material night at around midnight, she heard dogs barking very loudly and on peeping through the window, she saw a group of people who had torches and were armed with sticks. Apart from the above, the Accused 2 also stated that she observed one of them was having a small axe. The Accused 2 recalled two previous incidents where they were raided and goods were stolen from them. Despite reporting the two incidents to the Police Station nothing was recovered.

The Accused 2 explained how she screamed and neighbours rushed to her home to assist them. She also recalled that at around 1.30 to 2.00 a.m., the police came to the scene and collected the bodies of the deceased. The Accused 2 was categorical that she never committed the offences for which they have been charged for.

On the other hand, the Accused 4 – David Mwaura Njau explained that on the material night at around 1.00 a.m. he heard screams from villagers of

“..... **thieves** **thieves** **thieves**

On rushing to the scene, the Accused 4 saw a group of about 100 people beating the victims. In fact on arrival, the Accused 4 found that police officers were already at the scene and the victims were dead. The Accused 4 was categorical that he never took part in the vicious attack on the deceased.

After the summing up, all the three assessors returned a verdict of “Guilty” against the three Accused persons.

A review of the evidence on record clearly show that the offences were committed at night. Precisely, the offences were committed slightly after midnight. Unfortunately, the prosecution only managed to get two eye-witnesses to give evidence. That is despite the fact that there were about 100 people at the scene. In his own evidence the PW1 stated that he only managed to see the incident for only about three minutes before he got the strength to escape to his home. The PW1 also conceded that prior to the incident, he never knew Matheri – the Accused 1 nor the other assailants. During cross-examination by Mr. Kimani Advocate, the PW1 stated that he could not recall how bright the moon was. The PW1 could also not recall whether it was cloudy. It is obvious that the above circumstances could not have been favourable for a positive identification by the PW1.

In addition to the above the PW3 stated during cross-examination that it was a fairly dark night and that she was not able to identify anybody.

That apart, though the PW5 Geoffrey Kang’ara stated that he saw the Accused 1 coming out with a slasher he never stated that any of the Accused had attacked the deceased. Instead, the PW5 stated that a crowd of about 100 people rushed to the scene and started beating the five people. Specifically, the PW5

stated in his evidence in-chief that he never saw the Accused 1 fighting.

The above evidence and analysis show explicitly that the Accused were not identified by any witnesses as the assailants. The evidence that was adduced is that the Accused 2 had raised an alarm and neighbours who came to the scene viciously and mercilessly attacked the deceased without finding out the reasons why they had gone there. It is common knowledge that a mob does not act fairly, rationally and impartially in most situations. On their part, the four deceased and the PW1 were also wrong to go to the home of the Accused at around mid-night without the help of local police and the Area Chief. Definitely, the deceased and PW1 were not prudent nor wise to have risked their lives just because of a radio that was valued at Kshs.200/=. This Court is not surprised that the Defence Counsel was of the view that they were on a suicide mission. Objectively speaking that visit should have been made in broad day light in the presence of either the police or local chief given the fluid security situation in Kiambu District.

Secondly, it is apparent that the assailants had not been expecting the deceased and that they acted concertly to achieve any specific goal. The Court is of the view that the crowd acted spontaneously and furiously given the fact that there had been two previous raids on that home. There was no evidence that the killings had been planned before execution.

Whereas the Court sympathizes with the family of the deceased, the evidence on record does not prove beyond any reasonable doubt that the Accused actually committed the offences of Murder. Definitely, the police did their best given the constraints that they operated upon. The major constraint seem to have been the unfavourable conditions for identification of the assailants.

In view of the above, I hereby find that the Accused 1, 2 and 4 are “Not Guilty” of Murder as charged in Count I, II, III and IV. The three Accused are hereby “Acquitted” accordingly. They should be released forthwith unless held lawfully. Those are the Orders of the Court.

Right of appeal explained.

MUGA APONDI,

JUDGE.

Judgment read signed and delivered in open Court in the presence of the Accused, Ms Kiniti for Kinuthia and M/s Mwanza for Mrs Ongoma.

MUGA APONDI,

JUDGE.

22ND JUNE, 2006.