



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
Criminal Case 43 of 2002

REPUBLIC PROSECUTOR

AND

JULIUS MURIIRA 1ST ACCUSED

PAUL MWITI MURIUNGI 2ND ACCUSED

SILAS GITONGA MURIUNGI 3RD ACCUSED

GERVASIO GIKUNDI KAUNI 4TH ACCUSED

JUDGMENT OF THE COURT

The four accused persons JULIUS MURIIRA, PAUL MWITI MURIUNGI, SILAS GITONGA and GERVASIO GIKUNDI KAUNI are jointly charged with one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars thereof being that on the 22nd day of September 2001 at Thuti village Thangatha Location in Meru North District within the Eastern province, they jointly murdered Joshua Kangaria Bundi.

The brief facts of this case are that on 22.9.2001 at about 6.00pm, the deceased Joshua Kangaria Bundi and his wife Sabena Mukoiti Kangaria (PWI) were returning from Gachibini market where they had been for the better part of the day. The deceased had gone to sell goats while PWI had gone to sell bananas.

When the couple got to their gate they found the four accused persons, all of whom were well known to PWI from the year 1994 when PWI got married to the deceased. The four accused persons were armed with walking sticks except for the third accused who was armed with a panga. The 1st accused then seized the deceased and demanded money from him. When the deceased failed to produce the money, the

1st accused, and then the rest of the accused persons descended upon the deceased, beating him with the sticks.

On seeing what the accused persons were doing to the deceased, PW1 started running away while screaming for help. The deceased's father, one GENESIO BUNDI MUTEA (PW3) accompanied PW1 back to the scene of the attack. On seeing PW3, all the four accused persons ran away, leaving the deceased on the ground. The deceased was bleeding from the mouth and nose. The deceased's brother, DAVID KABERIA BUNDI (PW2) went and reported the matter to the chief's camp at Kunati. That same evening, PW2 came back to the scene with police officers. The third accused was arrested that night.

On the 23.9.2001, PW1 went and reported the matter to Mikinduri police station. She was accompanied by her brother in-law, DAVID KABERIA BUNDI, PW2. On that same day, PW1 saw the 2nd and 4th accused persons who were under arrest at the chief's camp. The body of the deceased was removed to Meru District General Hospital mortuary for preservation. The post mortem on the deceased's body was performed by Dr. Gichere on the 29.9.2001. The post mortem report was produced by Dr. Isaac Macharia Mwangi who testified as PW5. According to the doctor's findings, the deceased's face was swollen and had blood clots from the mouth and nose. There was also swelling around the eyes. The left frontal region of the head had a depression.

According to the post mortem report, which was produced as P exhibit 1, the frontal bone of the skull had depressed multiple fractures with bleeding under the skull. Inside the skull, the brain was highly contused around the left frontal region with bleeding inside the brain. Dr. Gichere opined that the cause of death was blunt head trauma.

Dr. Macharia also produced P3 forms in respect of all the four accused persons. The P3 form in respect of the 2nd accused was produced as P exhibit 2 while the form in respect of the 3rd accused was produced as P exhibit 3. The P3 forms in respect of the 4th and 1st accused were produced as P exhibits 4 and 5 respectively. When PW5 was cross-examined by Mr. Muriuki who appeared for all the four accused persons, he testified that the main injuries on the deceased's body were on the head, though the neck and spine were also injured.

After investigations, all the four accused persons were arrested and charged.

At this stage, it is useful to set out the evidence by prosecution witnesses other than that adduced by PW1 and PW5. PW2 was DAVID KABERIA BUNDI, a brother to the deceased. His evidence was that on 22.9.2001 at about 6.00pm, he was at his home. He then heard screams coming from the direction of the deceased's home which is about 200 metres away from his own house. He rushed to the scene and found the deceased lying on the ground and vomiting. When PW2 enquired from PW1 what had happened to the deceased, PW1 informed him that the deceased had been assaulted by Muriira, Gikundi, Silas and Mwitii. These are the 1st, 4th, 3rd and 2nd accused persons respectively. PW2 then went and reported the matter, first to the chief and later to the police. A police officer accompanied him to the scene and together they arrested the 3rd accused who was found in the deceased's neighbour's house. On the 23.9.2001, the other three accused persons were arrested. It is PW2 who identified the body of the deceased to the doctor for post mortem. PW2 stated that he knows all the four accused persons who are his neighbours.

When cross-examined by counsel for the accused, PW2 denied knowledge of a fight between the deceased and the accused persons over the use of a disputed footpath through deceased's shamba. He also denied seeing any bows and arrows at the scene and went on to state that his brother, the deceased, was not armed with bows and arrows as alleged. PW2 denied another suggestion put to him that the neighbours did not record statements because the deceased had fought the four accused persons using bows and arrows.

PW3 was the deceased's father, one GENESIO BUNDI MUTEA. He testified that at about 6.00pm on

22.9.2001, he was at home together with his wife and children. He then heard screams coming from the direction of the deceased's home. As he made for the direction of the screams, he met with MUKOITI, PW1, who informed him that the deceased was being assaulted by the four accused persons. At the scene, where he met the four accused persons all of whom he knew well. On seeing PW3 all the four accused persons ran away. According to this witness, the 3rd accused, Silas Gitonga Muriungi was armed with a panga. Apart from PW2, other neighbours came to the scene. PW2 then went and reported the matter to the police. The police managed to arrest the third accused that same night.

When cross-examined by defence counsel PW3 testified that he saw each of the four accused persons from a distance of about three metres away where they were all standing near where the deceased lay. He denied a suggestion put to him on behalf of the accused persons that there was a dispute between the deceased and the accused persons over the use of a footpath that passed by the deceased's home. On why the neighbours did not record statements regarding the alleged attack upon the deceased, PW3 stated that it was because the accused persons are the children/brothers of those very neighbours. PW3 also denied a suggestion that the deceased was armed with a bow and arrows. He also testified that among the neighbours who refused to record statements though he came to the scene was the father of the 1st accused.

PW4 was Corporal JONAH WANGILA. He testified that on 23.9.2001, while on duty at Mikinduri police station, he received a report concerning the murder of the deceased. The reportee was David Kaberia, PW2. After booking the report, PW4 went to the scene in the company of other officers. They found the deceased's body lying in a shamba next to a footpath. The deceased's body had injuries on the head and back. PW4 was updated regarding the deceased's killers. After the body was removed to Meru District General Hospital mortuary, and following the arrest of the four accused persons he took all the accused persons for age assessment at Miathene sub-district hospital. He also caused P3 forms to be issued in respect of each accused. These P3 forms in respect of all the accused persons were produced as exhibits 2, 3, 4 and 5. PW4 is the one who decided to charge the four accused persons with the present offence.

In further evidence during cross-examination, PW4 told the court that when he questioned some of the witnesses, he established that the deceased did not want members of the public to pass by his home using a footpath. He also testified that as a result of enquiries made, he was informed that the death of the deceased resulted from a scuffle between the deceased and the four accused persons. PW4 also testified that he did not recover any weapons from the murder scene, but denied a suggestion made on behalf of the four accused persons that the deceased was armed with a bow and arrows. PW4 also denied another suggestion that he and other police officers refused to record a statement from the father of one of the accused persons.

When put on their defence, each of the four accused persons gave unsworn evidence. None of them called any witnesses. The 1st accused Julius Muriira stated that on 22.9.2001 at about 6.00pm, he was on his way home from the canteen when he heard screams. When he got to the place from which the screams were coming, he found some six people fighting and at the same time shooting arrows. On seeing what was happening, he retreated and went on his way. He denied murdering the deceased and stated that the charge against him was a frame up.

The 2nd accused, Paul Mwiti Muriungi stated that on 22.9.2001 at some unidentified hour of the day he was walking home from a canteen when he stumbled upon a group of people fighting. The people were fighting using arrows. When he noticed what was happening, he went his way. On the following day, he was arrested in connection with this case. He denied any knowledge of the offence. He also stated that some other people who were arrested with him were later released for reasons he did not know.

The 3rd accused, SILAS GITONGA MURIUNGI gave a similar account, which was that as he came from the canteen, he saw some six people ahead of him fighting using bows and arrows and that because he feared for his life, he turned and fled. He was arrested the following day on charges that he knows nothing about. He stated that he was framed. He also stated that two other suspects who had been

arrested before him were released.

The 4th accused, Gervasio Gikundi Kauni testified that on the 22.9.2001, he was walking home from the canteen when he saw a group of six people fighting ahead of him. They were shooting arrows. On seeing what was happening, he turned and went his way. On the 23.9.2001, he was arrested. He also testified that some other suspects arrested in connection with the murder of the deceased were released. He wondered why those other suspects were released. He denied murdering the deceased, either on his own or jointly with others.

At the close of the case, Mr. Muriuki submitted that the prosecution had not proved its case beyond any reasonable doubt against any of the four accused persons to warrant a finding of guilty. His view was that the evidence was not only scanty, but that whatever evidence there was was contradictory and inconsistent. It was also contended on behalf of the accused persons that the prosecution's case was made even weaker by the fact that there was no eye witness as to the events that led to the deceased's death.

In his further submissions, Mr. Muriuki contended that if the deceased was killed by anybody, then he was the author of his own misfortunes for being armed with dangerous weapons, to with a bow and arrows.

It was also contended on behalf of the accused persons that since the offence allegedly took place at dusk, the witnesses and especially PW1, could not positively say that it was the accused persons who perpetrated the crime. He contended also that the accused persons were mere scapegoats as the actual perpetrators of the deceased's murder could not be traced.

Mr. Muteti for the state submitted that the prosecution had proved its case beyond any reasonable doubt against each of the four accused persons. He dismissed the similar defence accounts by each of the accused persons as mere shams. Mr. Muteti contended on behalf of the state that whether or not the deceased was armed with a bow and arrows is immaterial and that what matters is that the deceased met his death at the hands of the four accused persons. He submitted that there was no evidence that the deceased provoked the accused persons in any way at all or to such an extent as to make them attack the deceased. Regarding the defence contention that only relatives of the deceased were called as witnesses, Mr. Muteti submitted that there was no legal provision barring the prosecution from calling only relatives to give evidence in any particular case. He further submitted that PW1 gave names of all the four accused persons, whom she said she knew well, first to PW3 and PW2 and later to the police as the deceased's attackers and that in the circumstances, there was no chance of mistaken identity of the deceased's attackers. In any event, Mr. Muteti contended that since the time of the attack was 6.00pm, East African time, errors of identification were most unlikely since it was still daytime.

The issue for determination of the court is whether the evidence which is before it is sufficient to prove that the four accused persons acted together with a common intention and killed the deceased? Among the many issues to be tackled before answering the above question are the following:- Was the time of the alleged offence such that it was easy for the prosecution witnesses to clearly recognize the deceased's assailants who were also admittedly neighbours of not only the deceased but also of PW1, PW2, and PW3? How about the attack itself? Did the deceased attack the accused persons with bows and arrows as alleged by the accused persons or was the deceased attacked by the deceased in the manner described by PW1? Was there a scuffle between the deceased and the four accused persons as suggested by the defence and if so, what was the cause of that scuffle? Was it the dispute over the use of the footpath near the deceased's home by the accused persons as suggested by the defence? If indeed it is true that there was that dispute, were the accused persons entitled to beat the deceased to the point of killing him?

What about the accused's separate yet similar defences? Each one says he was walking from a canteen when he saw a group of six people ahead of him fighting with bows and arrows. Could this story be true or is it a mere sham as contended by the prosecution? Can one infer that infact each of the four

accused persons was among the six persons whom each one of them alleges to have seen fighting, and that the other two people were the deceased and his wife, PW1? If the death occurred because of that dispute and the ensuing scuffle, has the prosecution proved the offence of murder or manslaughter?

There is also the issue of the witnesses. The defence contends that only relatives have testified in this case against the four accused persons. Is there any legal bar against relatives being the only witnesses in a criminal case?

Lastly, was the body upon which Dr. Gichere performed the post-mortem the body of the deceased or was it somebody else's body? Did someone identify that body to the doctor before the post mortem examination was done?

I have carefully examined the whole of the evidence on record. I have also considered the law. At the conclusion of my examination of the evidence, I have no doubt in my mind that the four accused persons attacked the deceased in the manner that was so vividly described to the court by the wife of the deceased, PW1 I am also satisfied that the deceased was not armed with a bow and arrows as alleged by the defence. I believe that as the deceased and his wife approached their gate, they found the four accused persons waiting at the gate and they all pounced upon the deceased and started beating him. I am satisfied that the deceased died as a result of the injuries inflicted upon him by the four accused persons. The evidence given by both PW2 and PW3 confirms what PW1 told the court for it was only at the point when PW2 and PW3 appeared at the scene after the screams by PW1 that the four accused persons ran way. I have no reason to doubt the veracity of these witnesses.

Although the defence has contended that it was the deceased who attacked the accused persons with a bow and arrows, there is no evidence by the defence to that effect. The issue of the attack arose only during cross-examination of prosecution witnesses but the accused never talked about it. I therefore find that the prosecution evidence that the deceased was attacked by the four accused persons as the deceased and PW1 arrived home from the market has remained unshaken throughout the trial. I am also satisfied that the attack took place at 6.00pm East African time and therefore the suggestion by defence that there was a possibility of mistaken identity is not supported by any evidence. The four accused persons were armed with sticks, except for the third accused who was armed with a panga and it was those sticks that they used to inflict the injuries upon the deceased. The extent of the injuries shows clearly the ferocity with which the four accused persons attacked the deceased causing frontal bone multiple fractures.

Even if it were to be accepted by this court that the accused persons acted in self defence after the deceased attacked them, the court is unable to agree that the four accused persons should have beaten the deceased to the point of killing him. If the footpath was on the deceased's land, the deceased had a right to protect his property against the four accused persons and others. If that theory is correct, I am satisfied that the two accused persons intended to kill the deceased for apparently stopping them from using the footpath through his shamba. In the circumstances, the defence of either provocation or self defence is not available to any of the accused persons.

I have also carefully considered the separate yet similar defences put forward by each of the four accused persons but find that the defences have not in any way dislodged the prosecution's case against any of them. My reading of those defences suggests to me that the six people who were fighting (if there was any fighting at all) were the four accused persons on the one hand and the deceased and PW1 on the other hand. Those defences are therefore of no evidential value to the accuseds' case.

The defence has raised the issue of the witnesses who testified in this case and urged the court to find that the fact of calling only relatives to testify in this case is fatal to the prosecution's case. I have looked at PART 11 – COMPELLABILITY AND PRIVILEGES OF WITNESSES – of the Evidence Act, Cap 80 and find no provision barring relatives from being the only witnesses in any particular case. Further, by the provisions of Section 143 of Cap 80, the prosecution can call any number of witnesses that it deems fit to prove any fact that it seeks to prove. In essence, the court finds no merit in that contention made on behalf of the accused persons.

Finally, the defence contended that the post-mortem examination may not have been done on the body of the deceased . The post-mortem report tendered in evidence as P exhibit 1 clearly shows that the deceased was one JOSHUA KANGARIA and that his body was identified by SABASTIAN MUTUA and DAVID KABERIA, the deceased's relatives. It is not clear how and why the defence believes that the body upon which DR. GICHERE performed the post-mortem examination was not that of the deceased.

In the result, I am satisfied that the prosecution has established its case against each of the four accused persons beyond any reasonable doubt. Accordingly, each of the four accused person is found guilty of the charge of murder and is accordingly convicted.

Orders accordingly.

Dated and delivered at Meru this 25th day of July, 2006.

RUTH N. SITATI

J U D G E