



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 99 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KARIUKI NJEHU.....1ST ACCUSED

SAMUEL KAGURU KARIUKI.....2ND ACCUSED

JUDGMENT

The accused, Joseph Kariuki Njehu (*hereinafter referred to as the 1st accused*) and Samuel Kaguru Kariuki (*hereinafter referred to as the 2nd accused*) were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the 2nd of October 2004 at Calvert Village Bagaria, Nakuru District, the accused persons jointly murdered John Waweru Muiruri (*hereinafter referred to as the deceased*). When the accused persons were arraigned before this court, they pleaded not guilty to the charge. The prosecution called a total of eight witnesses to establish the charge of murder brought against the accused persons. After the close of the prosecution's case, the accused persons were put on their defence. They gave sworn statements in their defence. Mr. Simiyu learned counsel for the accused made closing submissions urging this court to acquit the accused persons because, according to him, the prosecution had not established the charge of murder against the accused persons to the required standard of proof beyond reasonable doubt. Miss Opati for the State however urged this court to evaluate the evidence on record and find that the prosecution had established its case on the charge of murder against the accused persons.

I shall analyse the submissions made after setting out the facts of this case as narrated to the court by the prosecution witnesses. On the 2nd of October 2004 at about 6.30 p.m. PW1 Bernard Mwangi Muhoro was at his house at Bagaria Village within Naishi area of Nakuru District. He was visited by the 1st accused, who was his neighbour. The 1st accused informed PW1 that he had information that there was rampant theft of maize from the farms within the area. PW1 acknowledged this fact and told the 1st accused that it was due to the theft of the maize from the farms that he had made a decision to harvest his maize prematurely before they had properly dried.

The 1st accused informed PW1 that he had made a decision to guard his farm to prevent his maize from being stolen. The farm of the 1st accused was next to that of PW1. At about 7.30 p.m., PW1 escorted the 1st accused to the road leading to his home. 1st accused informed PW1 that he was going home to get his son so that they would return and guard the farm. At about 10.30 p.m., when PW1 was asleep in his house, he was woken up by the 1st accused. The 1st accused was with his son, the 2nd accused. They informed him that they had found the thief who was stealing their maize. They told PW1 that the thief was one Waweru (*the deceased in this case*) who was a heavy set young man and who wore dreadlocks.

They told him that they had chased the thief away from the farm using stones. PW1 did not know the said Waweru. After having the said conversation with the accused persons, PW1 went to sleep.

On the following day, i.e. the 3rd of October 2004, PW1 woke up early in the morning, at 6.00 a.m. He mobilized some of his neighbours and went to the home of Waweru. He arrived at the home of the deceased which was about five kilometers from his house. He found the mother of the deceased PW4, Lucy Ngina. He told PW4 that he had received information that the deceased had stolen maize from his farm. PW4 denied being aware of the fact that the deceased was a thief. She however led PW1 to the house of the deceased. The house was locked with a padlock. PW1 peered through the window and saw maize which he said appeared to be similar to the maize which were stolen from his farm. PW1 broke into the house of the deceased and took away some bags of maize that were in the house. During trial, PW1 was emphatic that the maize that he took from the house of the deceased was the maize which was harvested from his farm because of the manner in which the said maize appeared. He testified that he had planted hi-breed maize and the maize that he had recovered from the house of the deceased was the same hi-breed maize.

Meanwhile at 7.00 a.m. on the same day i.e. the 3rd of October 2004, PW3 Lucy Ngina Njuguna was walking from a shopping centre called Kalabat centre within Naishi area to her home. She had been sent to the shopping centre to purchase charcoal by her father. When she reached near Bagaria river, she saw a man lying under a tree. The man was not wearing any shirt. He appeared to be dead. When PW3 went close to the man, he recognized him. The man was the deceased, the brother to her mother. She gave the information to her parents who later informed the area chief. At about 9.00 a.m., PW1 left the house of PW4. PW4 was informed soon thereafter that her son had been killed.

PW4 immediately made the decision to inform the area chief. PW1 met with the 1st accused and they decided to go to the farm to see the place where the 1st accused claimed to have seen the deceased stealing maize. At the scene where the 1st accused claimed he saw the thief, they found a panga which the 1st accused confirmed to PW1 that it did not belong to him. PW1 also decided to inform the area chief of the recovery of the maize that he had made from the house of the deceased. Both PW1 and PW4 found the area chief at about 10.00 a.m. at the Bagaria Catholic church. The area chief, PW5 Peter Kamau Ndehi told them that he had already received the information and had notified the police to come to the area and investigate the case.

PW5 accompanied by PW4, PW1 and the 1st accused then went to the scene where the body of the deceased had been discovered. PW5 corroborated the testimony of PW3 to the effect that the body of the deceased was only clad with a long trouser. The deceased wore nothing on his upper torso. PW5 saw that the deceased had a small wound on his shoulder. PW5 inquired from the 1st accused the circumstances under which he chased the maize thief from his farm. The 1st accused told PW5 that he had chased the maize thief using stones. The police officers, including PW6 PC Michael Nabiswa arrived at the scene on the same day and took the body of the deceased to Nakuru Municipal Mortuary where postmortem was later performed. They also searched the scene to see if they could recover any stone that the 1st accused claimed to have used when he chased away the maize thief. No such stone was recovered.

PW6 testified that the scene where the body of the deceased was recovered showed no signs of a struggle. According to PW6, it appeared as if the deceased had been killed elsewhere and his body dumped at the scene where it was found. PW5 testified that the scene where the body of the deceased was recovered was about half a kilometer from the farm of the accused persons. PW5 further testified that on the 10th of October 2004, the brother of the deceased called Kamau informed him that a shirt and a coat which the deceased had worn on the fateful day had been recovered about 100 metres from where the body of the deceased was found. The said shirt and coat were dirty and blood stained. The said shirt and coat were however not produced in evidence by the prosecution. Meanwhile based on the initial investigations at the scene, PW6 arrested the accused persons and PW1. He took them to Naishi police station and detained them.

After interrogating them, PW6 established that PW1 was not involved with the death of the deceased. He released PW1 from police custody after two days. Meanwhile, on the 9th of October 2004, during the burial of the deceased, PW5 received information from the villagers that on the night the deceased was killed, a bang was heard as if someone had fired a gunshot. PW5 relayed this information to PW6 at Naishi Police station. At the same time, PW6 had already received the postmortem report from the doctor who performed the postmortem on the body of the deceased. The doctor had established that the deceased had been killed after being shot by a bullet.

PW6 interrogated both accused persons and on the 10th of October 2004, the 2nd accused led PW6 to their home where a homemade gun with six rounds of ammunition was recovered hidden in some tall grass some two meters from the house of the 1st accused. The homemade gun was recovered having been wrapped and kept near the fence of the house of the 1st accused and that of his neighbour. PW6 had the said homemade gun examined by a ballistic expert. The said homemade gun was examined by PW7 Emmanuel Langat, a ballistic expert, who established that the said homemade gun was a firearm within the meaning of the **Firearm Act**. He confirmed that the said homemade gun could fire a bullet just like any convectional firearm. He could not however establish if the said homemade gun had recently been fired. The homemade gun was produced as *prosecution's exhibit No. 2*. The six rounds of ammunition were produced as *prosecution's exhibit No. 3*. The ballistic experts report was produced as *prosecution's exhibit No. 4*.

PW6 investigated the case and established that it was the accused persons who used the homemade gun to kill the deceased when they found him stealing maize from their farm. He made the decision to charge the accused persons with the offence of murder. PW6 was emphatic that the homemade gun which was recovered near the house of the 1st accused belonged to the accused persons and to no one else. PW2 Dr. Riro Mwitwa conducted the postmortem on the body of the deceased. He saw that there was penetrating wound measuring 1cm x 1cm just below the left clavicle. There was another wound at the back of the deceased measuring 2cm x 3cm. The fourth rib was fractured. There was massive haemothorax. PW2 formed an opinion that the cause of death of the deceased was a penetrative chest injury with the resultant massive left sided haemothorax. He was of the opinion that the penetrative wound was most probably caused by a bullet as there were entry and exit wounds consistent with wounds inflicted by bullets. The postmortem report was produced as *prosecution's exhibit No. 1*. During the postmortem, the body of the deceased was identified to the doctor by a relative of the deceased, PW8 James Gitiha Kinyua.

When the accused persons were put to their defence, they denied that they had killed the deceased. They testified that they had guarded their farm on the 2nd of October 2004 from about 6.00 p.m. to about 8.00 p.m. They thereafter went back to their home due to the fact that the 1st accused was not feeling well. They denied that they had seen any thief while they were on guard duty on the material night. They denied that they had told PW1 that they had seen the deceased and chased him away from their farm. They further denied that the homemade gun was recovered in their possession or in circumstances that would suggest that they had the possession of the said homemade gun. They urged this court to acquit them of the charge because they were innocent.

In criminal cases, the onus of establishing the guilt of an accused person to the required standard of proof beyond reasonable doubt is on the prosecution. The prosecution is required in law to adduce evidence that will establish the guilt of an accused person. An accused person is under no obligation in law to prove his innocence. In the present case, no one saw the accused persons kill the deceased. There was no direct evidence connecting the accused persons with the death of the deceased. The prosecution however adduced circumstantial evidence in its bid to establish the guilt of the accused persons. It is often said that circumstantial evidence is the best form of evidence because it excludes any other person other than the accused persons as the persons who committed the crime. As was held by the Court of Appeal in the case of **Sawe vs Republic [2003] KLR 364** at page 372;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening

the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

In law, if the prosecution is relying on circumstantial evidence, it must establish that it is only the accused persons and no one else who could have killed the deceased. The evidence adduced against the accused persons must establish the guilt of the accused persons to the exclusion of any other person. The evidence must point to the accused persons and no one else. The evidence must establish that the acts done by the accused persons pointed to their guilt and cannot in any circumstances be said to be innocent acts.

In the present case, it is the prosecution’s case that the accused persons used a homemade gun to shoot the deceased who had gone to their farm to steal maize. The prosecution called PW1 who testified that the accused persons had informed him that while they were guarding their farm at about 10.00 p.m., they saw the deceased attempting to steal maize from the farm of PW1. They managed to chase the deceased from the said farm using stones. The accused persons told PW1 that the person whom they had chased from the farm was Waweru (*the deceased*). They described Waweru as a heavy set man and who was wearing dreadlocks. The accused persons did not tell PW1 how they were able to be positive as to the identity of the deceased yet they claimed that the deceased had ran away when they chased him from the farm. Acting on the information given to him by the accused persons, PW1 went to the home of the deceased on the following day and retrieved maize which he claimed was stolen from his farm.

On the same day, the body of the deceased was found. The body of the deceased was found about half a kilometer from the farm of the accused persons. The police were called. They took the body of the deceased to the Nakuru Municipal Mortuary. A postmortem was performed. The postmortem established that the cause of death of the deceased was a gunshot. PW6 investigated the case. He interrogated the accused persons. The 2nd accused then led the police to some tall grass near their house where the homemade gun and six rounds of ammunition were recovered. The homemade gun was examined by a ballistic expert (PW7) who established that the same was a firearm within the meaning of the **Firearm Act**. The homemade gun, when fired, is a lethal weapon.

When the accused were put on their defence, they denied that they had given the information to PW1 concerning a thief they had confronted in their farm. They further denied that they had seen any thief while they were on guard duty on the material evening. They further denied that the homemade gun was recovered in their possession.

I have carefully evaluated the evidence that was adduced by the prosecution witnesses. I do hold that the prosecution established to the required standard of proof that it is the accused persons who killed the deceased. My analysis of the evidence establishes that the accused persons, while armed with the homemade gun, went to guard their farm. While guarding their farm, the deceased went to the farm with a bag and a panga. Unknown to the deceased, the accused persons were guarding the farm. It is not clear from the testimony of the prosecution witnesses whether the accused persons challenged the deceased before he was shot by the homemade gun.

What is however clear, is that the accused persons shot the deceased and fatally injured him. The deceased died on the spot. The accused persons realizing that they had killed the deceased, decided to conceal the fact. They removed the shirt and the coat that the deceased was wearing. This was obviously to conceal the gunshot marks that would have appeared on the said shirt and coat. Furthermore, the said shirt and coat were bloodstained. The accused persons then carried the deceased to a spot near Bagaria river where his body was discovered on the following day in the morning. PW6, the investigating officer in this case, confirmed that there was no evidence to suggest that there was a struggle at the spot where the body of the deceased was found. The accused persons then threw the shirt and the coat of the deceased some distance of about 100 metres from spot where they had dumped the body of the deceased.

After dumping the body of the deceased (*about ½ a kilometer from their farm*), the accused persons went to the house of PW1 and gave him of story on how they confronted the deceased and chased him away

from the farm. They told PW1 that they had chased the deceased using stones. However they betrayed the fact that they were in close proximity with the deceased when they described him to PW1. They further told PW1 that they had identified the thief to be one Waweru (*the deceased*). It is clear to this court, taking into consideration that it was at night and further, taking into consideration that there was no evidence to suggest that there was moonlight, that the only way that the accused persons could have been able to positively identify the deceased was after they had shot and killed him.

The accused persons conveniently skirted telling the court the circumstances under which the deceased was shot. They even denied that they had told PW1 that they had found a thief in their farm and chased him away from the said farm. I believed the testimony of PW1 when he testified that the accused persons woke him at about 10.30 p.m. when he was asleep in his house and informed him that they had found the thief who stole maize from their farm. I observed the demeanour of PW1. He was a truthful witness. There was no reason why PW1 would offer false testimony against the accused persons. Relying on the information received from the accused persons, PW1 went to the house of the deceased and retrieved some bags of maize which he was informed by the accused persons had been stolen from his farm.

When PW1 asked the 1st accused to show him where he had confronted the thief, the 1st accused took him to a spot on the farm where they found a panga on the ground. The 1st accused told PW1 that the panga did not belong to him. It is obvious that the panga belonged to the deceased. The said panga was left at the scene where the deceased was shot by the accused person. Although the accused person denied that the homemade gun was found in their possession, it is clear from the testimony of PW6 that it is the 2nd accused person who led him and other police officers to the spot in the tall grass behind their house where the homemade gun was retrieved.

No one else knew of the existence of the homemade gun other than the accused persons. PW6, the investigating officer, and PW5, the area chief did not at first suspect that the deceased could have been killed by a gunshot. It is only after the postmortem was performed that PW6 concentrated his investigations on the recovery of the homemade gun from the accused persons. PW6 separated the two accused persons, who are father and son, while in custody, interrogated them separately and was able to obtain information from the 2nd accused that led to the recovery of the homemade gun. PW5 testified that on the night the deceased was killed, some villagers within the vicinity heard what they perceived to be a gunshot being fired. They gave this information to PW5 during the funeral of the deceased.

It is therefore clear that the prosecution has established to the required standard of proof beyond reasonable doubt that it was the accused persons who killed the deceased. The postmortem report that was produced in evidence revealed that the deceased had been shot and had sustained fatal injuries. The homemade gun was test-fired by the ballistic expert (PW7) who confirmed that the said homemade gun could fire a bullet and was a firearm within the meaning ascribed to it by the **Firearm Act**. The said homemade gun was positively established by the prosecution to have been found in possession of the accused persons. The prosecution established, on circumstantial evidence, that it was the accused persons and no one else who killed the deceased.

The last issue that is left for determination of this court is whether the accused persons killed the deceased with malice aforethought. As stated earlier in this judgment, this court is unable to reach a determination on whether the accused persons first warned the deceased before they shot him. These facts are uniquely within the knowledge of the accused persons. The accused persons however failed to give an explanation on the circumstances under which the deceased was shot. From the evidence on record, it is clear that the accused persons shot the deceased when they found him stealing maize from their farm. The accused persons were justified in using reasonable force to protect their property. The circumstances of this case however reveal that the accused persons used excessive force in their quest to protect their property. I therefore find the accused persons guilty of the lesser charge of manslaughter. I accordingly convict them for the lesser offence of manslaughter contrary to **Section 202 as read with section 205 of the Penal Code**.

The assessors who assisted this court during the hearing of this case reached a verdict that the accused persons were guilty of murder. However, I have disagreed with them on the reasons stated in this

judgment. The accused persons in this case ought not to have been in possession of the homemade gun. It was unlawful for them to be in possession of the said home made gun without a licence issued by the relevant authorities as provided for under the **Firearm Act**. This court however can empathise with the frustration felt by the accused persons when their maize was stolen from their farm when they were just about to harvest the same. It is apparent from the evidence adduced by PW5, the area chief, that the theft of maize was rampant in the area. The accused persons however took the law into their hands when they made the decision to use the homemade gun, which they had managed to conceal from the authorities, to shoot the deceased when they found him stealing maize from their farm. It is clear that the accused persons are persons of good standing within their society, and before then, had not been involved in any criminal activities.

The upshot of the above is that the accused persons are convicted of manslaughter in accordance with the provisions of **Section 202 as read with Section 205 of the Penal Code**.

DATED at NAKURU this 30th day of November, 2006.

L. KIMARU

JUDGE