



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 31 of 2003

REPUBLIC PLAINTIFF

VERSUS

- 1. JAMES NDUKU GITAU**
- 2. DANIEL NGANGA WANJIKU**
- 3. GEORGE KURIA**

WANJIKU DEFENDANT

- 4. FRANCIS KIBATHI KIHANYA**

J U D G M E N T

The accused persons are 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 4th day of June, 2000 at Githembe Village in Thika District of Central Province jointly with others not before the court murdered Peter Mwangi Mwaniki.

PW1, Timothy Kariithi Njoroge, Njoroge recalled events of 3rd June, 2000 at 9.30 when he received a report that his father's shamba boy by name Kinyua Njue had been knocked by a vehicle belonging to Maingi (deceased). Njoroge proceeded to the scene. On the way they called at Gatundu Police Station to collect a P3. Njoroge and his entourage met Maingi (the deceased) making a statement about the incident to the effect that he was attacked by some people and in a bid to escape he hit and injured one person. Maingi (deceased) was arrested as PW1 and his entourage were given escort to Gatundu Hospital together with the injured boy for the purpose of treatment.

On return to Gatundu Police Station Njoroge found Maingi (deceased) and they agreed that Maingi do compensate the injured boy in return for his freedom. Maingi was accordingly released by the police.

Njoroge dropped his entourage in this order: Kiiri first followed by Pastor, secondly, Njoroge then went home with his brother and the injured boy – Kinyua Njue.

On 4th June, 2000 – Sunday at about 3.00 p.m. Njoroge received a report that Maingi was found dead at Githembe. He then recorded his statement regarding the events of 3rd June, 2000..

PW2 No.54360 PC Julius Kivuva, Kivuva headed for Gatundu Market to look for accused 1 (A1) who had been identified at the scene of robbery where one Julius Kariuki a technician at Gatundu Hospital was killed. Accused 1 (A1) had been seen driving motor vehicle KAL 227 B a Nissan matatu which belonged to one Githinji; a Clinical Officer at Gatundu Hospital, who was the owner. Kivuva arrested accused 1 (A1). After interrogation first accused volunteered to take Kivuva and his team to his home where he confessed to have kept the weapon he used to kill Julius Kariuki and the money they robbed Kariuki off on the fateful night.

Kivuva and his team did not recover anything from the house of accused 1 (A1). Accused 1 then claimed that the money was at his (A1) girl-friend's house at Githunguchi near Gatundu market. On the way accused (A1) broke loose and ran away. Kivuva and his team opened fire and two bullets hit the accused whom they overpowered and re-arrested. Though accused (A1) was arrested in connection with the murder of Julius Kariuki, in the course of enquiry he confessed to having been involved in the killing of Maingi on 4th June, 2000.

PW3 NO.63917 PC Richard Tanui, Tanui was on duty together with PW2 (Kivuva) when they received information that accused one (A1) was involved in the murder of Kariuki. It suffices to say that Tanui's evidence is akin to that of PW2 (Kivuva) in material particulars.

PW4 NO. 42462, P. G. Jesse Wachira, Wachira recalled events of 24th July, 2000 in company of Inspector Njenga and Kinyua they went to OL JORO ROCK to arrest accused one Daniel Nganga (A2) who was implicated in the murder of Peter Maingi Mwaniki.

At the home of Gichohi the suspect ran away when he saw Wachira and his group. With the assistance of members of the public Wachira and his team subdued and eventually arrested Daniel Nganga (A2).

PW5, Mary Nduta Maingi recalled the events of 3rd June, 2000. She received information that her husband had been beaten by thugs and was at Gatundu Hospital. On arrival at hospital she was told her husband had passed on. Later she identified the body for post-mortem purpose.

PW6, John Njau Mwangi, Mwangi recalled 7.00 p.m. on 3rd June, 2000 while at a local bar he overheard some members of the public saying that Maingi had knocked somebody with a vehicle. On reaching the scene he saw two vehicles belonging to Goro and Wainaina chasing Maingi. About 30 minutes later another vehicle came and collected the accident victim. The following day (4th June, 2000) he met Maingi's son who informed him that Maingi had not come home the previous night. Maingi's wife also called to enquire about him (Maingi). It then occurred to Mwangi that a report to the police was necessary, which he did. At that stage he learnt that Maingi was at Gatundu Mortuary. About 2.00 p.m. the same day, he heard that one of Maingi's assailants had been found at Gitambe. He saw the body which had a cut on the back of the head. The probable weapon used according to him was blunt. He then made a statement at Gatundu Police Station.

PW7 No.32705, Corporal Stephen Kyalo, Kyalo, remembered that on 3rd June, 2000 at about 8.00 p.m. he found Constable Mohammed booking a report of malicious damage to property which was made by one Maingi.

He confirmed that Maingi and the accident victim agreed on compensation of hospital expense.

Kyalo saw Maingi's car going towards Kararu direction while his vehicle carrying the accident victim went towards Gatundu.

The following day at about 2.00 p.m. he came to learn that Maingi had been murdered the previous night.

PW8, Paul Kuria, Kuria was informed about the accident at Hakiarie Trading Centre involving Robert Kinyua. In company of his brothers Timothy Kariithi and John Nyaraini, he drove to the scene of the accident. His brothers, took the boy to hospital. He remained behind.

On 4th June, 2001 he received information that Maingi's body was found at Githembe area, about 2 – 3 km from Gatundu Police Station.

PW9 No.217729 Inspector Isaac Njenga was summoned to the office of DCIO Thika, who was in company of an informer who knew that accused No.2 was hiding at Ol Joro Rock.

The DCIO ordered him to proceed and have the said accused apprehended which was done..

That prior to arrest of 2nd accused he had recorded a statement under enquiry from the 1st accused who had given him names of people who had murdered Maingi. That 1st Accused (A1) implicated Kuria Wanjiku (A3) and Kibathi Kihanya (A4).

Later Njenga charged Nganga, (A2) and James Nduku Gitao (A1)

Much later, the third accused (A3) and fourth accused (A4) were arrested by the OCS Gatundu Police Station and charged with murder.

PW10, No.213673 Chief Inspector Crispus Muriuki, Muriuki officer in-charge of Gatundu Police Station was informed of presence of a dead body near Githembi River. He proceeded to the scene where he found the corpse of an African male. He searched the corpse clothes and recovered a driving licence bearing the name peter Maingi Mwaniki. He arranged for the body to be taken to Gatundu Hospital Mortuary where scenes of crime personnel photographed the scene and the body respectively.

On 1st July, 2000, Muriuki received another report of robbery. He followed the lead near Gathimbi river, a dead body of a laboratory technician by name of Kariuki was found. An informer gave Muriuki information that first accused, Nduku Gitau, had been seen by a driver and conductor of a matatu driving the motor vehicle of the deceased. Interrogation by CID Officers at Thika lead to a confession by first accused of the commission of the offence and the complicity of the other three accused.

The fourth accused had been charged jointly with others offence of robbery with violence at Thika and were convicted and sentenced to death by the said Court. The other three were acquitted of the charge.

PW12: No.61852 P.C. Albert Kiaria, Kiaria was attached to scenes of crime C.I.D Headquarters. He took photographs of the deceased at Gatundu Hospital Mortuary. The photographs were admitted in evidence along with the report as exhibitson these proceedings.

PW13. Dr. Samuel Kariuki Ngugi, Ngugi conducted a post-mortem on 6th June, 2000 on the body of Daniel Matheka, which he produced as exhibit 2 in these proceedings.

Ngugi also examined and filled P3 form of James Nduku Gitau who was alledged to have gun –wounds after his arrest.

The P3 form in respect of James Nduku Gitau was admitted as exhibit 3 in these proceedings.

At the close of the prosecutions case the defence counsel submitted that there is no case to answer.

Inter-alia the defence urged that the prosecution has not adduced sufficient evidence to warrant the accused being on their defences. That there is neither mens-rea nor actus rea established to have coincided in point of time to sustain the charge of murder.

That the only piece of evidence that would have connected the accused person with the offence was confession which is excluded by reason of introduction of section 25 A by Section 99 of the Criminal Amendment Act No.69. The amendment took effect on 25th July, 2003 and hence the subject confession or admission is subject to it. That the accused did not repeat the said confession in Court. Accordingly, the first accused confession was ordered inadmissible

The prosecution on the other hand entered that a prima-facie case had been established good enough to put all accused persons on their defence. The prosecution relied on the evidence of the thirteen prosecution witnesses and rested its case on that note.

Murder is committed when a person of *malice afore thought* causes the death of another person by an unlawful act or omission - Section 203 of the Penal Code. The penalty for murder is death (See Section 204 of the Penal Code).

The 2nd, 3rd and 4th accused persons were arrested on the basis of the confession of first accused which the court ruled as admissible by reason of the introduction of section 25 A by Section 99 of the Criminal Procedure Amendment Act No.69 which amended Section 25 of the Evidence Act(Cap 80) Laws of Kenya.

Section 25 A provides:

“A confession of a fact lending to the proof of guilty made by an accused person is not admissible and shall not be proved as against such person unless it is made the court”.

The amendment took effect on 25th July, 2003 and therefore the subject confession or admission is subject to it. That confession is therefore in admissible in these proceedings against the accused unless the repeat the same in court.

In my judgment that confession was the only evidence connecting the accused persons with the offence. Having rejected it there is no other credible and substantial evidence connecting the accused with the offence of murder.

Accordingly, I acquit the accused person of the offence of murder. They are set free unless held for some other lawful purpose.

DATED at NAIROBI this 28th day of February, 2005.

N.R. O. OMBIJA,

JUDGE.