



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 35 of 2001

REPUBLIC..... PROSECUTOR

VERSUS

1. JOHN MWANGI GACHOGU

2. SIMON GACHOGU GITHINJI ACCUSED

JUDGMENT

John Mwangi Gachogu and Simon Gachogu Githinji (hereinafter referred to as Accused 1 and Accused 2 respectively) are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 17th day of March 2000 at Kora Village in Murang'a District within Central Province they jointly murdered Peter Mwangi Macharia.

Six witnesses testified in proof of the prosecution case. Briefly their evidence was as follows:

Peter Mwangi Macharia (hereinafter referred to as the deceased) was the son of Jane Nduta Macharia (P.W.3) and John Macharia Githinji (P.W.4). The three were living together in one homestead at Kora village in Murang'a District. The homestead was on land belonging to P.W.4 which land bordered that of Accused 1 who was P.W.4's nephew and a son to Accused 2. P.W.4 and Accused 2 are brothers. On 14th March 2000 Accused 2 and P.W.4 went before Stanley Wathanga Mwangi (P.W.6) who was the then area assistant chief. The two brothers had a dispute, Accused 2 claiming that P.W.4 was bewitching him and had brought a "jini" while P.W.4 claiming that Accused had a bigger land than his. P.W.6 advised each person to come with elders on 17th March 2000 at 10.00 a.m. so that he could arbitrate upon the dispute with the assistance of the elders. On 17th March 2000, neither Accused 2 nor P.W.4 appeared before the chief as agreed.

On the same day after 1.00 p.m. the deceased was in his home with his mother P.W.3. The deceased's wife had gone to wash clothes at the river whilst the deceased's father (P.W.4) had also gone to take a bath at the river. The deceased and P.W.3 heard screams coming from the direction of the home of Accused 1. The deceased and P.W.3 went to check and they saw Accused 1 standing near a heap of stones, Accused 2, his wife, and Accused 1's two brothers were also there. The Accused 2's wife then commented that "not even a rat or cat should remain in that home." They all started throwing stones at the homestead of P.W.4 destroying the 3 houses which were in the homestead.

Accused 1 jumped over the fence into the homestead of P.W.4. Accused 1 who was carrying an axe and stones threatened to kill P.W.3 but she pleaded with him to spare her, Accused 1, was joined in the homestead by Accused 2, his two other sons and the wife of Accused 1.

Accused 1 then hit the deceased on the head with a stone, his two brothers followed suit and it was then a free for all, with the deceased being hit with stones and cut with axes.

The deceased's sister came and found deceased being beaten. She was chased away by Accused 1's two brothers. She ran to the river and alerted her father who ran back to his homestead and found Accused 1, Accused 2 and the others cutting the deceased with axes. The deceased who was still breathing died as P.W.4 was watching. P.W.4 inquired why they had killed his son, in response, he was also beaten and left bleeding. P.W.4 reported the matter to P.W.6 and thereafter to Kiria-ini Police Station where the report was recorded by P.C. Evans Machuki (P.W.1).

P.W.1 together with other police officers accompanied P.W.4 back to the village. P.W.4 led the police officers to the home of Accused 2 and the home of Accused 1 and both were arrested together with 3 other suspects. They then proceeded to the home of P.W.4 where they noted many stones scattered outside. The houses within the home were also damaged. The deceased was lying in a pool of blood with deep cuts on his head and a big stab wound on the left side of his chest and his throat slit open. The officers also recovered two axes which were bloodstained as well as a rungu. The deceased's body was taken to the mortuary.

Accused 2 and one Mary Waitihira were charged with the offence of malicious damage and causing grievous harm to P.W.4.

On 22nd March 2000 Accused 1 and Accused 2 were charged with this offence. On 24th March 2000 Dr. Paul Mbalu (P.w.5) a medical officer then attached to Murang'a District Hospital performed a postmortem examination on the body of the deceased which was identified to him by P.W.4. He found multiple cuts on the body which were penetrating the skull bone into the brain tissue. There was also collection of blood in the brain and all the vessels to the left side of the head were cut. P.W.5 formed the opinion that the cause of death was head injury plus acute haemorrhage due to multiple cuts which were due to an assault.

Accused 1 gave a sworn statement in his defence. He testified that on 17th March 2000 he had a strange ailment, as his hands were glued to his back and he was being beaten up by strange people whom he could not see. He claimed that he could not recall what happened because he was not fully conscious. He could not recall having left his home. He only came back to his senses 3 days later and found himself at the police station.

Accused 2 gave an unsworn statement. He claimed that the Accused 1 was living in his own home. On 17th March 2000 Accused 2 left his home after lunch and went to one Muraguri. He rested there for a while after which he went back to his own home and was surprised to find the door to his house broken and some photographs removed from their frames. He talked to a neighbour after which he went to the home of Accused 1. He did not find Accused 1 in, but there were many people on the road, before he could ask what had happened, the police appeared and arrested him. Inside the police vehicle, he found Accused 1, his wife, child and sister. They were taken to Kiria-ini Police Station where they were locked in for 3 days.

While in the cells Accused 1's hands were glued to his back and efforts to remove them failed. He had to be taken to Murang'a where he was given an injection and it was thereafter that the hands relaxed.

The two eye witnesses i.e. P.W.3 and P.W.4 both testified that they saw Accused 1, Accused 2 and their siblings cutting the deceased with axes and hitting him with stones. The two witnesses knew the Accused persons well as they were related. It was also broad daylight. The possibility of a mistaken identification was therefore not there. The evidence of P.W.3 and P.W.4 was consistent with that of P.W.1, who went to the home P.W.4 and found stones and axes, and the badly battered body of the deceased. The evidence of P.W.3 and P.W.4 was also consistent with that of P.W.5 who performed the postmortem examination on the body of the deceased and formed an opinion that the deceased's cause of death was head injury plus acute haemorrhage due to multiple cuts which were consistent with an assault.

Accused 2 denied having assaulted the deceased. He claimed that on the material day an time. He had gone to one Muraguri where he stayed for a while. When he went back to his home there was no one. He went to the home of Accused 1 to find out what was going on. He was however arrested by the police, and he found Accused 1 already arrested. Accused 2 cannot be true in the light of the clear and consistent evidence given by P.W.3 and P.W.4 that he i.e. Accused 2 was among the group that attacked the deceased. His alibi cannot therefore stand. Moreover there was evidence from P.W.6 that Accused 2 and P.W.4 had a dispute as Accused 2 was claiming that P.W.4 had a “jini” and was bewitching him (i.e. Accused 2) and his family. This was confirmed by P.W.2 who claimed she witnessed strange things going on at the home of Accused 1 which things were being attributed to P.W.3 who was alleged to be a witch. As held by Bosire J (as he then was) in **Republic v/s Chibatsi and Another [1989] KLR 333**.

· *“Mere belief in witchcraft does not constitute a circumstance or excuse or mitigation for killing a person believed to be a witch or wizard.*

· *When there is no immediate provocation, witchcraft as a provocative act can only avail an Accused as a defence where the victim is shown to have done an act in the presence of the Accused which he believed was an act of witchcraft against him and he was thereby angered as to be deprived of his self control.”*

In this case there is no evidence that the deceased was a wizard or that he did anything to provoke the Accused persons. To the contrary the allegations of witchcraft were against his parents.

It is evident that Accused 2 participated in the killing of the deceased as a revenge mission and his belief that the deceased’s parents were bewitching him, could not absolve him.

I do therefore reject the defence of Accused 2 and find that he unlawfully assaulted the deceased with the intention of either killing him or causing grievous harm to him. I concur with the unanimous opinion of the Assessors in regard to Accused 2 and find him guilty of the offence of murder.

As for Accused 1 he claims that he had a strange ailment which affected his senses and he could not therefore recall what happened as he only regained his senses after 3 days and found himself at the police station.

I believe and accept the evidence of P.W.3 and P.W.4 that they identified Accused 1 as having been among the group that assaulted the deceased. The defence being raised by the Accused 1 is one of insanity. Under section 12 of the penal Code a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission.

Under section 11 of the Penal Code every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. This presumption shifts the burden of proving the defence of insanity onto the Accused person. However, as stated by the court of Appeal in **Marii v/s Republic [1985] KLR 710**.

“The burden on the Accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the Accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.”

In this case there was the evidence of P.W.2 that Accused 1 was exhibiting strange behaviours and appears to have been possessed. It is normally standard procedure in cases of murder for the police to take murder suspects for Psychiatric evaluation and for evidence to be adduced showing that the mental status of an Accused person is normal or otherwise.

In this case however no such evidence was adduced by the prosecution notwithstanding that Accused 1

had in fact been examined by a Doctor whose statement was part of the committal bundle. The P.3 report prepared by the Doctor which was also in the committal bundle showed that although Accused 1's mental status was normal at time of examination, an injection of "diarepam" was indicated as having been administered once in March 2000. The Doctor also made a recommendation for further review by a Psychiatrist. In the committal bundle, there is also the statement of one IP Rufus Ndegwa (CD7) who states that on 17th March 2000 he was unable to record a statement under inquiry from Accused 1 as he appeared to be possessed by evil spirits which made his body stiff and he could neither move nor talk. This witness was also not availed by the prosecution.

It is thus evident that the prosecution was in possession of evidence which confirmed that Accused 1 did at the material time exhibit strange behaviours. The fact that the prosecution chose not to call this evidence, can only be construed that if called it would have been favourable to the Accused 1 in so far as his defence of insanity was concerned. I do believe and accept the evidence of Accused 1 that he was not in control of his mental faculties at the time the offence was committed. I do therefore differ with the unanimous opinion of the Assessors in regard to Accused 1 and find that he was guilty but insane.

The upshot of the above is that I find Accused 2 guilty of murder contrary to section 203 as read with section 204 of the Penal code. I convict him of this offence under section 322(2) of the Criminal Procedure Code. In respect of Accused 1, I make a special finding under section 166 (1) of the Criminal Procedure Code, that Accused 1 is guilty of murder but insane. Accordingly I order that Accused 1 shall be detained at King'ong'o Prison at the pleasure of the president, and that the case be reported to the president under section 166(2) of the Criminal Procedure Code.

Dated, signed and delivered this 4th day of February 2005.

H. M. OKWENGU

JUDGE