



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE 7 OF 1998

THE REPUBLIC PROSECUTOR

AND

DANIEL MUTHEE M'ITURUCHIU ACCUSED

JUDGMENT OF THE COURT

The accused in this case, Daniel Muthee M'Ituruchiu is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. He is accused of having murdered Catherine Kendi Mwiti and Allan Gikunda Mwiti on the 9th day of November 1996 at Kiirua village of Naari sub-location.

In his opening remarks, Mr. Muteti, learned state counsel told the court that he intended to call fifteen witnesses through whom the prosecution would seek to prove that the accused person acted with malice aforethought when he caused the death of the two deceased persons. That the prosecution would also seek to prove that at the time of the commission of the two murders the accused was of sound mind and capable of making sound judgment of the consequences of his actions. That further, the prosecution would seek to prove through medical evidence that the death of the two deceased persons was as a result of the injuries inflicted upon them by the accused.

The prosecution called nine witnesses from whose evidence the facts of this case emerge. PW1, Erastus Muthaura Ngaruthi stated that on 9.11.96 at about 11.00am, he was assisting one Mercy Kagwiria Muthomi who testified as PW7, to plant wheat. There were other people with him among them the 1st deceased PW3, John Mwiti Mungania and PW6, Gerald M'Iribi Kiogora. While they were so engaged, the accused then went to the shamba and started talking with the 1st deceased, Catherine Kendi. After a while, the accused went and sat down somewhere on the edge of the shamba. In the meantime, the 1st deceased continued with the planting. PW1 testified further that the accused got up from where he was sitting and went home. After a while, the accused returned to the shamba armed with a panga and made straight to where Catherine Kendi, the 1st deceased was planting wheat. According to PW1, he heard the accused telling the 1st deceased to leave the shamba but within no time the accused started cutting the 1st deceased on the head. The 1st deceased fell down. The accused continued to cut the 1st deceased.

Suddenly the accused started chasing the wheat planters from the shamba. The people planting the wheat ran for their lives. PW1 stated further that the accused chased them as far as the road and then he (accused) went to his home. It was then that John Mwiti Mungania (PW3) followed the accused to the home. Shortly after that, PW3 came running to the group on the road and informed PW1 and others that the accused had also killed PW3's child, the 2nd deceased. The two deceased persons were taken to the hospital by PW7.

When PW1 was cross-examined by Mr. Kibera advocate for the accused, PW1 admitted that he did not know the accused before and that he also did not know PW3 before. PW1 also told the court that the accused's home was within the shamba and that the shamba that was being planted with wheat had been bought by PW7. PW1 could not confirm that there was a police officer on the shamba when the planting was going on, although he agreed that sometime that morning he had accompanied PW7 to Kiirua Police Station. In answer to further cross-examination PW1 testified that he did not stop the accused from cutting the 1st deceased because the accused chased them away and they feared for their own lives. PW1 denied knowledge of any dispute between the accused and the 1st deceased.

In re-examination PW1 stated that because he arrived at the shamba when work had already started and there were about twenty people assisting with the planting, he could not say for sure whether there was a police man present at the shamba during the planting.

PW2, Stanley Mworio Mungania testified that on 9.11.96 he was a very young boy aged about ten years and had been left at home by the 1st deceased looking after the 2nd deceased. He testified that the accused's house and that of PW3 and the 1st deceased were in the same compound. He then saw the accused come to his house and then out of the house and headed for the shamba. PW2 testified that he could see the accused well from where he (PW2) was standing outside the house. That when the accused reached the shamba, he started talking to a policeman who was dressed in plain clothes and whom the witness knew well. Before long, the accused returned to his house and shortly after emerged from the house armed with a panga and headed again for the shamba going directly to where the 1st deceased was and cut her on the neck. PW2 stated that he was observing all that activity from a distance of about two hundred metres and added that after the 1st deceased fell down, the accused held the panga with both hands and continued cutting the 1st deceased. It was the further testimony of PW2 that after the accused had cut the 1st deceased he then started chasing the other people who were in the shamba. The accused then returned to his home and started chasing PW2 while armed with the panga. PW2 ran for dear life, leaving the 2nd deceased on the ground. The accused then stopped chasing PW2 and returned to where the 2nd deceased was and cut him across the face. The accused then ran away and disappeared into the forest. PW2 was cross-examined at length by the advocate for the accused. PW2 denied that he had been couched by PW3, who was his brother as to the evidence to give to the court. PW2 also testified that he and the accused are first cousins as their fathers are the sons of the same father, and that at the material time the accused and Mwitwi, PW3, lived in the same home but each had his own house. The witness could not say whether the shamba that was being planted with wheat that morning had earlier been planted with wheat. He could also not say whether the shamba once belonged to the accused before Muthomi bought it although Mwitwi, PW3 had told PW2 that the shamba belonged to Muthomi.

In further cross-examination, PW2 told the court that he knew the policeman who was at the shamba that morning and that he (PW2) had seen the plain clothes officer right from the moment the police officer arrived at the shamba at 9.30am. PW2 also testified that he did not understand why the policeman was guarding the shamba. This witness further testified that when the accused left the homestead the first time he saw him walk straight to where Catherine Kendi, 1st deceased was and that he did the same thing the second time round though this second time the accused was armed with a panga. Asked whether he had shouted to Catherine Kendi to warn her of impending danger, the witness said that he did not since he did not know that the accused was going to cut Catherine. As to whether or not there was a dispute between Mwitwi and the accused, PW2 testified that he did not know of such dispute and that it is only Mwitwi (PW3) who would know whether there were such disputes.

On how the accused might have cut the 2nd deceased, Alan Gikunda Mwitwi, PW2 testified that when the accused stopped chasing the witness, the accused went back to the homestead and started cutting Alan and that it was only after the witness came back to the homestead that he saw for sure the part of the body of Alan that had been cut by the accused. Finally, this witness denied that he had been couched by his brother Mwitwi (PW3) regarding the evidence he gave to the court.

PW3, John Mwitwi Mungania testified that on 9.11.96 at about 10.00am, he set out for Kiirua Market. That on the way he met with Mercy Kagwiria (PW7) who asked the witness to accompany her to Kiirua police station as she had been informed that the accused intended to kill someone that day. On arrival at the

police station, PW7 handed some documents to the Officer Commanding Station (O.C.S.) after which the OCS availed one police officer who accompanied the witness and PW7 to the shamba where planting of wheat was taking place. According to this witness, Kiirua police station is only 150 metres away from the shamba where the planting of the wheat was taking place. As the planting proceeded, PW3 saw the accused come to the shamba and talk to the police officer, after which the accused went back to his house. A little later, the accused came back to the shamba and on reaching where Catherine Kendi was he (accused) asked Catherine to tell him who had authorized her to plant the wheat. PW3 said he was standing about five (5) metres from where the accused and Catherine Kendi were, and that Catherine Kendi did not respond to accused's question as to who had authorized her to plant the wheat. Then the accused took out a panga from the jacket he was wearing and started cutting Catherine Kendi on the head. PW3 identified a panga which was marked as MFI – 1 and later produced as P Exhibit 1 which the witness said was the very panga used by the accused to cut the deceased Catherine Kendi. PW3 went on to testify that after Catherine Kendi had been cut on the head by the accused, she fell down and everybody including himself started running away. After a short distance, PW3 turned back to where the deceased was lying but the accused started chasing him and chased him for about 70 metres before the witness stopped and picked up stones with which he pelted the accused. When PW3 pelted the accused with stones, the accused ran to his house. PW3 ran after the accused and on arrival, the witness saw the accused trying to set one of PW3's houses ablaze. Then the witness saw the accused cut Alan Gikunda before the accused ran away towards the hill. PW3 also testified that after the accused had cut Alan, PW2, Stanley Mworira Mungania ran away.

PW3 then made arrangements to take his wife Catherine Kendi and his son Alan Gikunda to the hospital. Catherine Kendi died while undergoing first aid while Alan Gikunda died while undergoing treatment. The police visited the scene of crime on 13.11.96 for photographs. Post mortem examination on the two deceased persons was carried out on 14.11.96. The witness identified the accused in the dock whom he said he knew before.

PW3 was cross-examined at length by learned counsel for the accused. From that cross-examination, the witness said that he did not know who had told Mercy Kagwiria (PW7) that the accused planned to kill somebody on that day. He testified that he and PW7 were given a police officer by the OCS and that even as they planted the wheat, he was aware of some imminent danger. He testified further that when the accused talked to and with the police officer he (the witness) did not get the to know details of the conversation that was going on between the accused and the officer. That even though he had heard that the accused would kill someone, he (PW3) was not unduly worried because he did not know who the victim would be.

In further cross-examination PW3 admitted that he was once employed as a police officer and that he was involved in crime detection but that on the material day he did not take any action to prevent the commission of the offence. He argued that he did not do so because there was a police officer on the shamba. PW3 stated further that when the accused cut Catherine Kendi the police officer who had come to the shamba to keep the peace did nothing to stop the crime. In answer to further questions from Mr. Kibera, PW3 testified that he and the accused had never had any land dispute between them and that he was also not aware of any land dispute between the accused and the witness's father. PW3 also testified that his father, M'Mungania Iraku and the accused's father, M'Ituruchiu Iraku were the sons of one lady called Julia Nchekei Iraku, the original registered owner of land parcel No. KIIRUA/NAARI/MAITEI/7, the very land on which the homesteads of the accused and the witness stand and it was the same land where the wheat was being planted on the fateful morning.

PW3 also testified that he was not aware of any succession cause having been filed in the estate of their deceased grandmother, Julia Nchekei Iraku. He told the court that the land sold to Muthomi was sold by his uncle one Stanley Manyara Iraku, but could not say whether the accused and the said Stanley Manyara had a dispute between them. On re-examination by the learned state counsel, PW3 testified that he was not involved in the sale of the land by Stanley Manyara to Muthomi.

PW4, Police Constable Joseph Kambo told the court that about 10.00am on 9.11.96 he was at Kiirua Police Station on duty. Then one Mercy Muthomi (PW7) went to the station and reported that one Muthoe

(the accused) had prevented her from planting wheat. The report was made to the OCS Police Inspector Soita, PW5. That PW7 served the OCS with a court order allowing her to plant the wheat. PW4 was dispatched by the OCS, to the home of the accused to ask the accused to avail the title document to the disputed land. When PW4 asked the accused who was at the shamba for the documents, the accused requested to be allowed to go to his house where he said the documents were but on coming back from the house the accused went straight to where Catherine Kendi, the 1st deceased was and started cutting the said Catherine on the head and neck. PW4 further testified that after Catherine Kendi was cut on the head and neck, she fell down and while the deceased was on the ground, the accused continued cutting her on the back. The accused then started chasing everybody away and this witness also ran for dear life along with the other people. After he had run for about 100 metres, PW4 stopped and watched the accused from a safe distance. According to him he saw the accused going to Mwiti's (PW3) house where he cut the 2nd deceased once on the head with a panga. After cutting the 2nd deceased, the accused ran away towards the main road. PW4 went back to the shamba where Catherine Kendi was lying and took her away in the vehicle belonging to Mercy Kagwiria (PW7) to the hospital at Meru General. Catherine Kendi died on arrival at the hospital, while Alan Gikunda died later that day. The witness removed both bodies to Isiolo District Hospital mortuary for preservation. The witness also testified that he knew the accused before the fateful day.

When cross-examined by the accused's advocate, the witness told the court that he only went to the shamba that morning to summon the accused to the police station and not to provide security during the planting of the wheat. He also testified that though Mercy Muthomi PW7, had served the OCS with the court order, the witness did not have personal knowledge of the content of the order. He also testified that he did not know whether the accused and the deceased had a land dispute between them. It was PW4's further evidence that when he was dispatched by the OCS to call the accused, he found the accused near the shamba that was being planted, although the accused did not tell this witness that he (accused) had already planted his wheat on the same land that was being planted that morning. PW4 said he could not hear the conversation between the 1st deceased, and the accused since he was standing far from the pair. PW4 also testified that by the time he arrived at the shamba where the accused was, there were people already on the land planting wheat. The witness admitted that he knew the accused before because they used to meet frequently at the market and that at one time, the accused was taken to the police station on an assault charge though the witness did not think that the accused was a violent man. PW4 also testified that it was within his knowledge that the accused was jailed on the assault charge.

PW5, No. 218665 Chief Inspector Soita Mwanja testified that on 9.11.96 at about 11.30am, he was at Kiirua Police Station where he then worked as officer commanding station. While there he received a report from one police constable Kamole (PC Kamole was not called to testify) that the accused had attacked Catherine Kendi by cutting her with a panga. After receiving the report, he went to the scene in the company of PC Kambo (PW4) where he saw blood stains in the shamba and also noted that there had been struggle. By then both deceased persons had been taken to the hospital, so PW5 followed them to the hospital where he confirmed that 1st deceased had died on arrival at the hospital while the 2nd deceased Alan Gikunda was still fighting for his life. The witness testified further that after confirming the death of Catherine Kendi, he started a manhunt for the suspect. At about 11.30pm that same day he was informed by OCS Meru Police Station that the suspect had already surrendered. On 10.11.96, after the accused had been taken to Kiirua police station, PW5 interrogated. That during the interrogation, the accused confessed to the killings and also volunteered to show the witness where the murder weapon was. Together with the accused and other police officers, PW5 recovered the panga some five (5) kilometers away from Kiirua Police Station. The panga was produced as P Exhibit 1.

During cross-examination, PW5 stated that he only found a report of the murder when he returned to the station at about 11.30am on 9.11.96. He also testified that during investigations, he established that there were land disputes between the accused and the husband of the 1st deceased. As to whether or not Mercy Kagwiria had gone to the station on the morning of 9.11.96 to report about accused preventing her from planting wheat, the witness said he could not remember nor could the witness remember whether there was a police officer present at the scene of crime when the offences were committed.

When the witness was re-examined by the learned state counsel, he told the court that when he checked

the Occurrence Book (O.B.) that morning at about 11.30am, he did not come across any report in the OB by Mercy Kagwira that she was being prevented from planting wheat. The witness could also not say whether or not there was an officer present when the incident occurred.

PW6 was Gerald M'Iribi Kiogora who said he was one of the people planting wheat that morning. According to his testimony, he is a cousin to Mercy Kagwira, PW7. PW6 testified that there were many people on the shamba that morning among them Mwiti PW3, and his wife Catherine Kendi, 1st deceased. That while they were thus planting, a man whom the witness later learnt was the accused went to the shamba and asked them to stop planting wheat. The accused then went away only to return later carrying a panga and some other sharpened piece of metal. That after talking briefly with the 1st deceased, the accused started cutting her with a panga felling her to the ground. According to this witness, he was standing some eight (8) metres or so away from the pair and he saw the accused cut the 1st deceased on the right side of the head. It was also the testimony of PW6 that even after the 1st deceased fell down, the accused continued cutting her. Then the accused started chasing everybody else away from the shamba. The witness ran for about 80 metres towards the road and when he stopped he saw the accused going to Mwiti's (PW3) home. The witness testified that he also saw Mwiti following the accused to the home. Later on, PW6 saw Mwiti (PW3) running towards where the people were on the road carrying his badly injured son who was bleeding profusely from the back of the head. Later, the two injured persons were taken to the hospital for treatment. He accompanied the injured who were taken in the vehicle belonging to Mercy Kagwira Muthomi (PW7).

On cross examination, PW6 told the court that he did not pass through the police station on the way to the shamba for the wheat planting. He also testified that the accused went to the shamba twice – once when he asked the whole group to stop planting the wheat and secondly when accused went to the shamba and talked to 1st deceased shortly before he started cutting her with the panga. That the second time round, the witness heard the accused telling the 1st deceased, to stop planting wheat as claimed to have already planted wheat on the same shamba. PW6 further testified that when the 1st deceased replied that she would plant the whole shamba the accused descended upon her with the panga and cut her and that when the accused started cutting the 1st deceased, everybody else fled for their lives. The witness said he did not see what transpired at the home where the 2nd deceased was cut by the accused. He stated that the reason why he was not able to see what took place at the home was because of the big fence around the home. He said the fence was made of maize stalks.

PW7 was Mercy Kagwira Muthomi. This witness told the court that on 9.11.96 at about 11.00am, she was at Kiirua where she was planting wheat. That she was together with many other people, among them Muthaura, PW1 Gerald Kiogora, PW6 and Mwiti, PW3. It was the evidence of PW7 that she did not pass anywhere else before going to the shamba, and in particular that she did not pass through Kiirua police station which was only about 500 metres away from the shamba. PW7 testified that while they were planting wheat the accused went to the shamba and started talking to the 1st deceased who was about 50metres from where the witness was. PW7 could not follow what the accused and the 1st deceased were talking about but she stated that after the brief conversation between the accused and the 1st deceased, the accused went away to his home which was about 100 metres away. The witness could not tell how long the accused stayed away before coming back with the panga. She again saw the accused and the 1st deceased engaged in some conversation but shortly thereafter she saw accused cut the 1st deceased with a panga. The 1st deceased fell down. On seeing what was happening, PW7, like the rest of the people ran away. She then drove to the police station for police escort back to the shamba. She drove the two deceased to the hospital where the 1st deceased was pronounced dead on arrival. She later helped to transport the two bodies to Isiolo District hospital mortuary.

During cross-examination PW7 testified that she did not know from whom her husband had bought the shamba on which she was planting wheat on that fateful day. The witness confirmed that on that morning she did not pass through the police station before starting work on the shamba and that as far as she could remember, there was no dispute over that shamba. PW7 also testified that she could not see what was happening in the homestead from where she was, but stated that when the accused went back to the shamba the second time, she could see that he was carrying a panga although she said she was more than 100 metres away from where the accused and the 1st deceased were. On whether or not the shamba had

been previously planted with wheat, PW7 said that there were no signs that the shamba had been previously planted with wheat.

In re-examination, the witnesses testified that it was her husband, Joseph Muthomi who bought the shamba but she could not tell from whom the shamba was bought. In further re-examination, she said she did not hear the accused say anything to 1st deceased when accused returned to the shamba carrying a panga.

PW8, was Dr. Gitonga Mwenda David. He produced the post-mortem reports on Alan Gikunda Mwiti dated 14.11.96 and on Catherine Kendi also dated 14.11.96 respectively. According to the post-mortem reports, the cause of death for each of the two deceased persons was cardio-respiratory arrest due to head injuries caused by cut wounds. The two post-mortem reports were produced as P exhibits 2 and 3 respectively. The reports were prepared by one Dr. Ngure with whose handwriting the witness was familiar and both of which forms were filled and signed by the said Dr. Ngure.

The last witness called by the prosecution was PW9, No. 64175 Police Constable Kainyu Nyaga. PW9 testified that on 9.11.96 at about 7.30pm, while she was on duty at Meru Police Station, the accused surrendered himself to the police alleging that his life was in danger and wanted to be put in cells. When the witness called Kiirua Police Station, she was informed that the accused had killed two people. After receiving that information, she booked the accused in cells before the accused was handed over to Kiirua Police Station the following day.

At the close of the prosecution's case, Mr. Kibera for the accused opted not to make any submissions on a no case to answer. After carefully examining the evidence laid before it by the prosecution, the court ruled that the accused had a case to answer on each of the two counts and put the accused on his defence.

In his opening remarks, Mr. Kibera for the accused submitted that the events of the fateful day arose out of serious provocation by the 1st deceased and her husband, PW3. According to Mr. Kibera there had been several land disputes all of which were aimed at removing the accused from the shamba and that those disputes led to the grizzly fight. The accused gave unsworn evidence and called no witnesses.

In his unsworn statement, the accused did not deny killing each of the two deceased persons. He told the court that he was aged 44 years, married and with seven children. That on 9.11.9 at about 10.00am, he decided to go around his shamba where he had planted wheat and to check whether the wheat had germinated. That he was armed with a panga which he intended to use to cut grass for his cattle. He also testified that before he went to the shamba, he saw from outside his house that there were people working in the same shamba, he decided to go and see what was happening. That when he got to the shamba, he told the people to stop planting but that instead of stopping to plant as requested, Mwiti (PW3), the husband of the 1st deceased, hit the accused with a stone on the left eye. According to the accused, PW3 also went towards him, intending to cut the accused with a panga but the accused struggled and managed to throw an empty sack at PW3. Then they got hold of each other and fell down in the process. It was at that point, according to the accused that the 1st deceased, went to where the accused and PW3 were struggling and started hitting the accused with a karaya on which she carried wheat seeds. The accused testified that as he tried to prevent the 1st deceased from hitting him, he accidentally cut her on the head and she fell down. That after he had cut the deceased, PW3 managed to get up and the accused also got up and ran towards his house. Mwiti, PW3 followed the accused and when the accused reached the gate of his house, he met Mworira, PW2 who was with Alan Gikunda, the 2nd deceased. That as PW2 and Alan Gikunda gave way to the accused, the accused saw the 2nd deceased being hit by a stone and the child fell down. The accused stated further that since he was being pursued by Mwiti, PW3 and two other men, he ran towards the forest and later boarded a vehicle to Meru town. He went to his advocates who escorted him to Meru Police Station where he was locked in before being handed over to Kiirua Police Station on 10.11.96. The accused added that when he was escorted to his home by the OCS, Kiirua Police Station on 13.11.96 he found his two houses had been burnt down. The police recovered a panga, one jacket, a shirt and a trouser before going back to the station. The accused added that he regretted the deaths of the two deceased persons, which death, according to his testimony occurred accidentally.

Mr. Kibera submitted at length and contended that the prosecution had failed to prove the offence of murder to the required standards. He particularly attacked the evidence of PW1, Erastus Muthaura Ngaruthi and that of PW2, Stanley Mworio Mungania which evidence he said was well rehearsed and specifically tailored to tally with the events of the material day. Mr. Kibera submitted that though PW3, told the court that there was no grudge between him and the accused, there existed a big grudge between PW1, PW2 and PW3 and the 1st deceased on the one hand and the accused on the other hand and that therefore it was this grudge that provoked the accused into killing the 1st and 2nd deceased persons respectively. Relying on the case of *Morris Aluoch V. R Criminal Appeal No. 47 of 1996*, Mr. Kibera submitted that the prosecution had not shown, through the evidence adduced before court that there was pre-meditation on the part of the accused before he killed the two deceased persons, and that for this reason, the accused should be acquitted of both counts. According to Mr. Kibera, there was extreme provocation from the 1st deceased, who inspite of being asked by the accused to stop planting, she refused to do so and that the 1st deceased's refusal to heed the accused's warning was enough provocation to make the accused kill her.

Regarding the killing of the 2nd deceased, Mr. Kibera submitted that since that killing came hot on the heels of the killing of the 1st deceased, there was no time within which the accused could have formed malice aforethought for the killing of the 2nd deceased and that for that reason, the accused ought to be acquitted of the charge of murder in respect of the 2nd deceased. The defence advocate relied on the decision in *Lereson Leburta V. R. Criminal appeal No. 4 of 1998*.

Mr. Kibera also attacked the prosecution case for inconsistencies in its evidence. He singled out the evidence of PW1, PW3, PW4, PW5 and that of PW7. Whereas PW1, PW3 and PW4 talked of PW7 having gone to the police station to ask for help of a police officer before going to the shamba to start planting wheat, PW5, Chief Inspector Soita the then OCS of Kiirua Police Station testified that he could not remember such a visit by PW7 and that he could also not remember availing a police officer to accompany PW7, to the shamba on that morning of 9.11.96. That PW7 herself also denied making that early morning visit to the police station. According to PW7, the only time when she went to the police station was after the accused had cut the 1st deceased.

The court has of its own motion also noted these inconsistencies in the prosecution's case, but the point that Mr. Kibera seemed to be making is that there was no police officer present at the shamba, and that the absence of any report having been made to the police goes a long way in proving that the accused did not have the malice aforethought when he killed the 1st deceased. Mr. Kibera also submitted that the evidence of PW3, corroborated the evidence of the accused as to the fact of an exchange of stone throwing between the two. I have also myself considered that evidence but what comes out of the evidence of PW3 is that he threw stones at the accused after the accused had already cut the 1st deceased, whereas the accused alleges that PW3 threw stones at him before the struggle that led to the cutting of the 1st deceased by the accused. It was Mr. Kibera's contention that all this evidence taken together negated any malice aforethought on the part for the accused person who, it was argued, should get the benefit of doubt.

Finally, Mr. Kibera contended that the fact that the accused gave himself in to the police, should be interpreted to mean that he could not have had the malice aforethought to commit the offences of murder. Mr. Kibera also submitted that the extent of the injuries inflicted upon the two deceased persons showed clearly that the accused was out of control of himself and particularly when the accused cannot explain how the 2nd deceased died. The court has found from the record that what the accused said in his defence regarding the death of the 2nd deceased was that the 2nd deceased was hit by a stone which came from behind the accused as he ran away from his pursuers. That in my view is the explanation given by the accused for the death of the 2nd deceased.

In his submissions, the learned state counsel urged the court to find that the prosecution had proved beyond any reasonable doubt the case against the accused person on each of the two counts of murder, and that the two ingredients of murder had been proved. Mr. Muteti dismissed the defence contention that the accused was provoked into killing the two deceased persons, and particularly the killing of the 2nd deceased who was an innocent child, a child who had nothing to do with whatever disputes if any that

may have been between the accused and the 1st deceased and her husband Mwit, PW3. The learned state counsel also submitted that the injuries inflicted upon each of the two deceased persons, as confirmed by the evidence given by PW8, Dr. Gitonga showed that the accused knew exactly what he was doing, and that he ensured that neither of the deceased persons would survive by inflicting serious head injuries to his victims. Mr. Muteti submitted that the accused should have appreciated the risk he took of cutting each of the deceased on the head.

The learned state counsel also contended that the weapon used is key when considering whether or not malice aforethought can be inferred. He urged the court to find that the use of a panga by the accused to inflict multiple head injuries on the two deceased persons was sufficient to infer malice aforethought on the part of the accused. That the accused's conduct on the fateful day was that of a wild man who deserves no mercy from the court and whom the court should find guilty as charged and convict him accordingly. It was the view of the learned state counsel submitted further that the case of Morris Aluoch (above) was distinguishable from this case on the ground that in that case, only one single blow was used and that was why the charge of murder was reduced to one of manslaughter. In the present case, argued Mr. Muteti, the accused repeatedly cut the 1st deceased even after the said 1st deceased had fallen to the ground. On whether or not the defence of provocation was available in this case, Mr. Muteti submitted that for this defence to succeed, the accused has to show that he was totally out of control of himself, which he said was not so in this case. The learned state counsel also submitted that if the court should find that there was provocation, which the prosecution denied then the court should also examine the accused's reaction to the alleged provocation to find whether responding with a ferocious panga attack was reasonable when all that the accused may have been responding to were mere words by the 1st deceased. It was further submitted that accused person did not have to kill the two deceased persons. That the accused need not have taken the law into his own hands. It was also submitted that the killing of the two deceased persons was a well planned and pre-mediated matter, and that the totality of the prosecution's case clearly points to the only logical conclusion that the accused planned the two murders with no probability raised of absence of malice aforethought. Further that the prosecution has also established the second ingredient of the offence of murder, namely that it is the accused and no one else who cut both the 1st and 2nd deceased and that the two deceased persons died from the panga cuts inflicted upon them by the accused.

On the issue of whether the fact of surrendering to police should be used in favour of the accused, learned state counsel urged the court to ignore the same, especially because, he argued, the accused only surrendered himself at 7.00pm when the offences had been committed at 9.00am. The learned state counsel concluded his submissions by asking the court to find the accused guilty on each of the two counts of murder and to convict him accordingly.

After the submissions, the court summed up the evidence to the assessors, highlighting the main pieces of evidence, both from the prosecution and the defence side. As required by law, the assessors were to make their own conclusions as to whether the accused was guilty or not guilty on either both of the counts as charged, or whether the evidence adduced before court supported and proved the lesser charge of manslaughter on either both or one of the counts. The assessors were reminded that the act of cutting the 1st deceased was proved and the same was in fact not denied by the accused. The assessors were also reminded that though the accused in his unsworn evidence denied cutting the 2nd deceased, the fact of the accused having cut the 2nd deceased came out clearly from the submissions by counsel for the accused. The assessors were also reminded of the onerous duty upon the prosecution to prove its case against the accused beyond any reasonable doubt a duty that never ever shifts to an accused person. The assessors were duly advised that if they must return a verdict of guilty, they had to be fully convinced that the evidence adduced by the prosecution not only pointed to the general direction that the accused killed the two deceased persons but that in doing so, he acted with malice aforethought in each case. The assessors were also reminded that if they were to return a verdict of guilty, they had to be satisfied that at the time of the commission of the offences, the accused was in full control of his mental faculties and capable of making sound judgment of the consequences of his actions. The assessors were also advised about the defence of provocation put forth by the accused and asked to consider whether the defence of provocation was available to the accused in the circumstances of this case.

The assessors gave their verdict. The first assessor, Geoffrey Mburugu's verdict was that the prosecution had proved its case beyond any reasonable on each of the two counts against the accused persons and found him guilty as charged on each of the two counts.

The second assessor, Fredrick Mwenda found the accused guilty of manslaughter in respect of the first count whereas he found the accused guilty of murder on the second count.

The third assessor Alexander Kirimi, like the second assessor, found the accused guilty of manslaughter on the first count and guilty of murder on the second count. This court has taken time to carefully peruse and consider all the evidence that has been adduced before it including exhibit evidence. The court has also considered the submissions by both counsels appearing in this case on matters of both fact and law and also taken into account the respective verdicts of the three assessors.

There is no dispute that the accused cut the 1st deceased on the head and neck on the morning of 9.11.96 while the latter was in the shamba planting wheat with a number of other people among them PW1, PW3, PW6 and PW7. The accused pleads that the killing was not intentional and that he had been subjected to cumulative provocation by the 1st deceased and her husband PW3, John Mwiti. As regards the death of the 2nd deceased, the accused in his own evidence denies that he cut the 2nd deceased but in the submissions made on his behalf by learned counsel, it is admitted that the accused actually cut the said 2nd deceased but pleads provocation for the offence. The medical evidence by PW8, Dr. Gitonga Mwenda David was to the effect that the 1st deceased died from cardio respiratory arrest due to head injuries caused by cut wounds. Dr. Gitonga's evidence also gave the cause of death for the 2nd deceased as cardio respiratory arrest due to head injury.

In examining and considering the evidence adduced by the prosecution, the court has noted some discrepancies which the accused's counsel also pointed out in his submissions. There is discrepancy in evidence as to whether PW7, Mercy Kagwiria Muthomi sought the help of the police before she went to the shamba to plant the wheat. PW7 denies that she did so, while PW1, PW3 and PW4 alleged that PW7 went to the police station and reported the matter to the OCS. According to PW1 and PW3, the OCS availed a police escort to the shamba. On the other hand, PW5, Chief Inspector Soita Mwanya, the then OCS of Kiirua Police Station could not remember PW7 going to the station under the circumstances described by PW1 and PW3.

There is also another piece of evidence that has drawn contradictions from the witnesses. Both PW2, and PW3, testified that there was a plainclothes policeman at the shamba keeping watch while the planting of the wheat was going on. PW4, PC, Kambo testified that he went to the shamba on the instructions of PW5 to call the accused and not to keep watch while the planting was going on. There is agreement however as testified to by PW2 and PW3 that at some point before the accused cut the 1st deceased person, he (accused) talked to a police officer who was PW4 though the court found some difficulty in believing PW2 when he alleged that he could tell the person the accused was talking to was a police officer from a distance of about 100 metres. The court has carefully considered these contradictions and reached the conclusion that the same do not go to the root of the prosecution's case. PW2 and PW3 are brothers and first cousins to the accused. The 1st deceased and the 2nd deceased were the wife and child respectively of PW3 and one can understand the pressure upon PW3 to find evidence that would connect the accused to the two killings.

I now turn to consider the defence of provocation put forward by the accused for his actions on the fateful morning of 9.11.96, and whether the same is available to him in the circumstances of this case. The main contention by the accused, though not directly from his own unsworn testimony, is that there were long standing disputes between him and his cousin John Mwiti Mungania, PW3 over land. That the situation was made worse when the 1st deceased decided to plant wheat over the same portion where the accused had planted his own wheat. That worse still on the fateful morning, PW3 attacked the accused with stones hitting him on the left eye and also went towards the accused wielding a panga with the intention of cutting him. That he (accused) cut the 1st deceased when he was trying to protect himself from being hit by the 1st deceased who was hitting the accused with a karaya.

I have carefully considered the evidence given by PW3, both in examination in chief and also while under cross-examination. I have particularly considered PW3's evidence given while under cross-examination. No suggestion was made by the defence that PW3 was armed with a panga and that he made attempts to cut the accused nor was any suggestion made to PW3 that there was a physical struggle between him and the accused person. There is also no evidence suggesting that the 1st deceased was trying to hit or was actually hitting the accused with a karaya that contained wheat seeds. The only time PW3 mentions the use of stones on the accused (and it was not shown that PW3 actually hit the accused with any of the stones) was after the accused had cut the 1st deceased and after PW3 had first ran off for his life and just made a come-back. No questions were put to PW3 by the defence counsel to press PW3 to either admit or deny that indeed he attacked the accused with stones and a panga before the accused attacked and cut the 1st deceased.

From that evidence of PW3, it also came out clearly that the shamba on which the wheat was being planted was part of land parcel No. KIIRUA/NAARI/MAITEI/7, once registered in the name of Julia Nchekei Iraku the common paternal grandmother to both the accused and PW3. PW3 testified that he was not aware of any open grudge between him and the accused person and that the said parcel of land was subdivided and shared out before Julia Nchekei Iraku died. It was also the evidence of PW3 that the person who sold the shamba to Muthomi (husband of Mercy Kagwiria Muthomi, PW7), was one Stanley Manyara Iraku, an uncle to both the accused and PW3. This piece of evidence as to the person who sold the land to Muthomi was not challenged by the accused, either by his own testimony or through cross-examination and submissions made on his behalf. So, the question that now remains begging is this; can it be said that the land disputes revolving around the shamba were such as would have provoked the accused to cut the deceased persons on that fateful day? Is there evidence to suggest that it is either the 1st deceased or PW3 who sold the shamba? From the evidence adduced before me, I am unable to find such commulative provocation or any other momentary provocation as would excuse the accused's killing of the two deceased persons.

What about the conduct of the 1st deceased? Was it provocative? According to the evidence of PW1, Erastus Muthaura Ngaruthi, when the accused first went to the shamba he talked with the 1st deceased. This version of PW1's evidence is confirmed by that of PW3 and PW7. None of these three witnesses however testified that the 1st deceased attacked the accused. What they all said is that after talking to 1st deceased, the accused went away to his home before he came back with a panga and cut the 1st deceased. PW1 added that before the accused went home that first time he (accused) went and sat down somewhere on the shamba and then later he rose up and went home to fetch the panga that he used to cut the 1st and 2nd deceased persons. None of the witnesses, including PW7 who appeared independent and honest to me mentioned in their evidence that the 1st deceased conducted herself in such a manner as would have likely deprived the accused of his power of self control and to induce him to commit the offence that he committed.

That was the evidence against the accused person. It seems to me therefore that the accused's testimony was an afterthought and one that was at variance even with the submissions made on his behalf by his advocate as to what led the accused to commit the ghastly acts.

Provocation is defined in section 208 of the Penal Code in the following terms:-

“208(1) The term “provocation” means and includes except as hereafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master and servant to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

The definition given above means therefore that if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self control an act of killing resulting from such striking would amount to manslaughter rather than murder. In the instant case, I find no evidence to suggest that the accused struck the 1st or 2nd deceased in the heat

of the moment. The accused planned in his mind to kill the deceased persons first when after the first visit to the shamba he took time and sat down and pondered and then rose up, went home and took a panga and went straight to where the 1st deceased was and struck her down. The accused did not dispute the fact that on the second time he went to the shamba while so armed with the panga he did not give time to the 1st deceased to reply to his command to her to leave the shamba. That was the evidence of PW1. According to PW3 also, the 1st deceased, did not respond to the accused's question as to who had given them the authority to plant wheat. The accused just proceeded to cut the 1st deceased. PW6 and PW7 testified that when accused returned armed with a panga, he went to where the 1st deceased was talked briefly with her and the next thing they saw was the accused cutting her.

I also find it strange that the accused should have directed his passion at the 1st and 2nd deceased when all the evidence pointed to the fact that the shamba in dispute was owned by the husband of PW7 after the same was sold to him by Stanley Manyara Iraku. My own considered view is that the accused nursed a secret grudge against the 1st deceased and also against the 1st deceased's husband PW3, and that the occasion that fateful morning provided a perfect opportunity for the accused to do what he had always wanted to do – revenge. Although the versions vary slightly as to whether the accused carried the panga openly in his hands for all to see or whether he only removed it from inside his jacket, the truth of the matter is that the accused went and armed himself before returning to the shamba where he executed his plan with precision, first on the 1st deceased and secondly on the 2nd deceased. The wheat that was being planted was not the 1st deceased's wheat; it was for PW7 and this is the reason why I believe and find that the accused had no excuse for killing the two deceased persons. As pointed out by the learned state counsel, the accused had other options to take if he was indeed aggrieved by the goings on that morning. Ordinarily, he would have proceeded to the police station which was said to be only 150 metres away and reported the matter. He even had the opportunity to talk to a police officer that morning. What would have been easier than the accused getting the police to round up all the persons working on the shamba that morning for trespass? From the facts before me there was no or no sufficient provocation which would have led the accused to kill the two deceased persons.

What about cumulative provocation which Mr. Kibera for the accused seemed to suggest gave rise to the unfortunate events of 9.11.96. According to Mr. Kibera there had been several land disputes all of which were aimed at removing the accused from the land and that it was those attempts that led to the fight that morning. The court notes that apart from those allegations that came out from the submissions, the evidence from the cross examination and the accused's own unsworn testimony did not allude to the existence of such existed cumulative provocation over land between the 1st deceased, the 1st deceased's husband, PW3 and the accused. PW7 said she was not aware of any disputes between the accused and the family of the 1st deceased. The defence counsel put one question to PW5 – Chief Inspector Soita Mwanja – regarding those disputes to which the witness states as follows:-

“I established that there were disputes between the accused and the husband of the deceased.”

It never came out from that piece of evidence that there were long standing disputes over that such disputes indeed existed, and which disputes were for the removal of the accused from the land by 1st deceased and PW3, then perhaps, looking at the matter from the angle of an ordinary person who has been subjected to such disputes for long the accused could fall back onto them in finding a defence for his actions. In the circumstances of this case, I do not find that the defence of cumulative provocation over alleged land disputes is available to the accused. Contrast this with the Court of Appeal decision in *Cheboi v. Republic* (2002) KLR 790. In that case, there was a long history of disagreements between the appellant and his deceased wife during which the deceased continually told the appellant that the appellant was useless and that the deceased was more interested in another man. The Court of Appeal found that that long history of disagreements amounted to cumulative provocation. That unfortunately is not the position in the instant case. In *R. V. Humphreys* (1995) 4All ER 1008 the Court of Appeal in England held that in a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter the judge ought to give a careful analysis of those strands so as to enable the court to understand their potential significance.

As I pointed out earlier, no history of the alleged disputes between the accused and PW3 has been given and I find that none exists.

What about the intensity of the attack on the 1st deceased in particular? The evidence before the court as given by PW1, PW4 and PW6 was that after the 1st deceased fell down on being cut on the head and neck by the accused, the accused continued to cut her. In a manner of speaking the accused was determined to ensure that the 1st deceased had no chance of survival.

Regarding the 2nd deceased, the evidence is that the accused cut him on the head. The 2nd deceased was only one year old according to the evidence of PW8 as confirmed by the P3 form being exhibit 2. The accused knew that even one single blow with a panga on the head of a one-year-old child was sufficient to completely destroy the life of that person. Mr. Kibera for the accused argued that since the killing of the 2nd deceased came immediately after the killing of the 1st deceased, the accused had no time to have malice aforethought for the second killing. Mr. Kibera relied on the case of *Lereson Leburta V. R. Criminal Appeal No. 4 of 1998* (above) as an authority for his argument. Mr. Kibera urged the court to acquit the accused on this charge for failure by the prosecution to prove that the accused had the malice aforethought which is one of the two essential ingredients on a charge of murder. Mr. Muteti, learned state counsel on the other hand submitted that the nature of the weapon used should also be considered and that in this instant case, the use of a panga on a one year old can show that there was malice aforethought on the part of the accused. Mr. Muteti relied on an authority relied on by the Court of Appeal in the case of *Morris Aluoch V. R. Criminal Appeal No. 47 of 1996*. That was the case of *Rex V. Tubere S/O Ochen (1945) 12 EACA 63*. At page 4 of the *Morris Aluoch* case, the Court of Appeal stated the following:-

“With regard to the use of stick(s) in cases of homicide, this court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used and the part of the body injured in arriving at a conclusion as to whether malice aforethought has been established and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick. That is not to say that the court takes a lenient view where a stick is used. Every case has of course, to be judged on its own facts. The same remark applies as regards the view which this court takes where a ruptured spleen is the cause of death.”

In the present case, I have no doubt in my mind that there was malice aforethought in the killing of the 2nd deceased person and that the accused intended to finish both the 2nd deceased and his mother.

In the circumstances of this case, and on the evidence adduced before this court and applying the principles enunciated above, I am satisfied and I do find that the prosecution has proved its case against the accused person beyond any reasonable doubt on each of the two counts of murder. Accordingly, I find the accused guilty on each of the two counts of murder as charged and convict him accordingly.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

RUTH N. SITATI

JUDGE

28.7.2005