



REPUBLIC OF KENYA

IN THE HIGH COURT OF AT NYERI

Criminal Case 6 of 2003

REPUBLIC PROSECUTOR

VERSUS

1. BLASIOUS MACHARIA WAMUKIRA

2. BRUNO KARIUKI WAMUKIRA

3. NATHAN MARINGA GACHOMO

4. BENEDICT WAMUKIRA KIHURA ACCUSED

J U D G M E N T

Blasius Macharia Wamukira, Bruno Kariuki Wamukira, Nathan Maringa Gachomo and Benedict Wamukira Kihura (hereinafter referred to as the 1st Accused, 2nd Accused, 3rd Accused and 4th Accused respectively) were 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 night of 7th and 8th November 2001 at Kabute village in Kirinyaga District within the Central Province they jointly murdered Joseph Irungu Gachomo (hereinafter referred to as deceased). Ten witnesses have testified in proof of the prosecution case. Briefly their evidence was as follows: On the night of 7th November 2001, at around 8.30 p.m., the deceased and his wife Anne Wanjiru Irungu (P.W.7) were asleep in their house when they were woken up by a knock on the door. On opening the door, 1st Accused, 2nd Accused 4th Accused and one Peter Wakabira entered the house. They took away the deceased demanding Kshs.3,500/= which they claimed the deceased had stolen.

As they were going away, P.W.7 stood at the door and observed the 4 men beating the deceased as they went with him. Shortly thereafter the 4 men and the 3rd Accused frog matched the deceased to the house of his grandmother Margaret Wangechi Gachomo (P.W.8). They woke up P.W.8 and her husband Gachomo Njachomba (P.W.6) and demanded to be paid money which the deceased had allegedly stolen. They threatened to lynch the deceased. Since neither P.W.6 nor P.W.8 could produce the money immediately, the Accused persons and their two colleagues pulled the deceased towards the tarmac road. P.W.8 pleaded that the deceased should not be harmed as she was going to look for money. P.W.8 went and sought help from her daughter Risper Wangui Bundi (P.W.2). P.W.2 borrowed Kshs.3,500/= from one Jenniffer Wambura (not a witness). P.W.2 then accompanied P.W.8 back to the road were they found the 4 Accused and others still beating the deceased. P.W.2 gave the Kshs.3,500/= to 4th Accused. He counted the money and then gave it to 3rd Accused who also counted the money and gave it back to 4th Accused who gave the money to 1st Accused.

The Accused persons were however not satisfied. They demanded that the deceased must produce the actual money which he had stolen. They continued beating the deceased until he became completely

helpless. The Accused persons then all left. P.W.2, P.W.7 and P.W.8 carried the deceased to his house. P.W.7 cleaned the deceased's wounds and they slept. At 5.00 a.m., the deceased asked P.W.7 for tea, but when she started making the tea, the deceased started vomiting and then died. P.W.6 proceeded to Sagana Police Station where he reported the matter to P.C. Evans Otieno (P.W.10) who contacted the scenes of crime personnel. Ag Inspector Ernest Maringa (P.W.1) of Embu Crime Scene support services proceeded to the house of the deceased and took photographs of the body showing different views including the injuries on the body of the deceased. P.W.1 also took photographs of a mill and shop belonging to 4th Accused which the deceased was alleged to have broken into. Dr. Abraham Gatangi (P.W.3) later performed a post mortem examination on the body of the deceased. He noted a fracture of the occipital bone of the skull and damage to the brain. He formed the opinion that the cause of death was severe head injury due to multiple blunt trauma.

P.W.10 later carried out investigations and arrested 2nd, 3rd and 4th Accused. Later 1st Accused was arrested by Cpl. Rowland Nyagah on 12th March 2004. The four Accused persons were subsequently charged with this offence. Each of the Accused persons gave an unsworn statement and called no witness. The 1st Accused stated that at the material time he was working at a construction site in Ngurubani. On 10/11/2001 which was a Saturday he went to his home and found that his father (4th Accused) and brother (2nd Accused) had been arrested and were at Sagana Police Station. The next day he went to Sagana Police Station and saw them and they told him that there was no need to worry. He went to Kagio where he continued working at a construction site until 12th March 2004 when he was arrested by officers from Kerugoya Police Station. He was escorted to Sagana Police Station from where he was taken to Nyeri Police Station subsequently he was charged with this offence which he knew nothing about.

The 2nd Accused stated that on 7th November 2001, he was working at a posho mill and a retail shop belonging to his father. He closed the business at 8.00 p.m. and went home for supper. He thereafter went back to the shop. He was surprised to find one window to the shop broken. He screamed and neighbours responded and came. He explained what had happened. He opened the shop and some members of the public went into a nearby coffee plantation. The 4th Accused also came and they went into the shop and confirmed that some money and some items were missing. The 2nd and 4th Accused spent the night in the shop. During the night they heard noises coming from across the road just 3 metres away, but they never went to check. The next morning at 7.30 a.m. 4th Accused left the shop. Later P.W.2, P.W.6 and 3 of his sons together with the O.C.S. went to the shop asking for 4th Accused. 2nd Accused told them he had gone home. 2nd Accused later met the group but they claimed 4th Accused was being too smart and they left. At 2.00 p.m. on the same day, the O.C.S. Kianyaga came with P.W.10 together with scenes of crime personnel and P.W.6's daughter. They ordered 2nd Accused to lock the shop and accompany them. They then drove to the home of 4th Accused and arrested him. Both 2nd and 4th Accused were locked up at Sagana Police Station and later charged with an offence of which 2nd Accused claimed he knew nothing about.

The 3rd Accused testified that on 8th November 2001 his father (i.e. P.W.6) asked him to go and record a statement that the deceased had been beaten by 4th Accused and his sons. The 3rd Accused refused to record a statement over something that he did not know. The 3rd Accused claimed that he lost his job of sub-chief in 1998 because of the bad conduct of his stepbrothers. 3rd Accused therefore went about his own business. Sometimes in June P.W.6 claimed 3rd accused had not been fathered by him because 3rd Accused was unable to give him 2000/= which he had requested for. On 30th July 2002, while at Kagio Market 3rd Accused was arrested and taken to Sagana Police Station. He was asked by the O.C.S. to be a witness in this case and was told that if he refused he was also going to be charged. The 3rd Accused refused and he was indeed charged. The 3rd Accused also claimed that there was a land dispute over land which had been given to the deceased's grandmother (i.e. P.W.8). The 4th Accused testified that on 7th November 2001 at around 8.30 p.m., he was preparing to go to bed when he heard screams coming from the direction of his posho mill and kiosk. He went towards the kiosk and met 2nd Accused near the kiosk. 2nd Accused informed 4th Accused that a window had been broken and some timber removed. They went into the kiosk and confirmed the breakage. They entered the kiosk and 2nd Accused confirmed that some money and other items had been stolen from the kiosk. 4th Accused remained in the kiosk together with the 2nd Accused until the following morning when 4th Accused went back home.

As 4th Accused was preparing to go to report the breaking in, P.W.6 and his sons and daughters and son in law who is the O.C.S. Kianyaga Police Station went to 4th Accused asking for compensation for the blood of his grandson Irungu whom they claimed had been beaten by people who responded to the screams by 2nd Accused. 4th Accused informed them that that was a police case which had to be resolved in court. Later the O.C.S. Sagana and other police officers came accompanied by P.W.6. They took photos of the broken window and door. The Kianyaga O.C.S. then spoke to the Sagana O.C.S. and the 4th Accused together with 2nd Accused were arrested. The 4th Accused maintained that the allegations made against him by the witnesses were untrue. He denied having gone to Gachomo's home, or having beaten up the deceased or having taken any money. He urged the court to acquit him as he claimed the charge against him was a fabrication. Mr. Mahinda who appeared for the 1st Accused submitted that there was no proper identification of the 1st Accused as circumstances were not favourable for a positive identification. He further submitted that there was inconsistency between the evidence of P.W.10 and P.W.7 and that the other witnesses were biased as they were relatives of the deceased.

Mr. Macharia who appeared for the 2nd, 3rd and 4th Accused submitted that there was contradiction between the evidence of P.W.6, P.W.8 and P.W.7 as far as 3rd Accused is concerned. He submitted that the evidence of P.W.6 was doubtful as he had difficulties identifying the Accused persons in court. He could not therefore have positively identified the assailants at night and that there was bad blood between 3rd Accused and P.W.6. He submitted that no malice aforethought had been proved and that all the evidence in totality left a reasonable doubt and the Accused persons should therefore be acquitted. Learned Senior State Counsel Mr. Orinda submitted that the Accused persons had a motive to assault the deceased and that the deceased's death arose from the injuries sustained as a result of the assault. From the evidence adduced by P.W.3 it was evident that the post mortem examination revealed that the deceased had suffered multiple bruises and lacerations all over his body and that He also had a fracture of the occipital bone of the skull and damage of the brain. From these observations P.W.3 concluded that the deceased's cause of death was severe head injury due to trauma. There is no doubt therefore that the deceased's death was caused by the injuries apparent on his body. The issue is how did the deceased suffer these injuries. Was it as a result of an act or omission on the part of any of the accused persons? If so was there any intention to cause the death of the deceased, and were the Accused persons acting in concert.

There were 4 witnesses who testified that they actually witnessed the deceased being beaten up by the Accused persons. These were P.W.2, P.W.6, P.W.7 and P.W.8. P.W.2 testified that she accompanied her mother (P.W.8) who had gone to her to look for Kshs.3,500/= which was being demanded by the Accused persons. P.W.2 testified that they arrived where the deceased and the Accused persons were at about 1.00 a.m. She claimed all the 4 accused persons were present. She gave money to Accused 4 who gave to Accused 3 who counted and gave back to Accused 4 who gave to Accused 1. She maintained that despite giving the money all the 4 accused persons continued beating the deceased. The interesting thing however is that in her first statement to the police which was recorded on 10th November 2001 just a few days after the incident, P.W.2 only mentioned the presence of Accused 4, Accused 3 and Accused 1 and also talks of members of the public; it is only in a second statement made several months later but which is dated 2nd May 2001 that P.W.2 stated that He found all the accused persons mentioning them by name including the 2nd Accused beating the deceased. The question is why did she not state this in her first statement? P.W.2 also did not mention in her statement that any of the Accused persons were armed which was contrary to what she stated in the court.

P.W.2 noted in her statement that there were many other members of the public present. The impression one gets is that this was a case of mob justice. The evidence of P.W.7 probably explains why an accusing finger was being pointed at the Accused persons. She testified that 1st Accused, 2nd Accused, 4th Accused and one Peter Wakabira are the ones who collected the deceased from his house on the material night at 8.30 p.m. demanding that he refunds the sum of Kshs.3,500/= which the deceased had stolen. There was light inside the house of P.W.7 and she was able to see and identify these persons. The strange thing however is that P.W.7 testified that she never saw 3rd Accused on that night which contradicts the evidence of all the other eye witnesses who clearly mentioned 3rd Accused. The impression one got is that P.W.7 was withholding information in a bid to protect 3rd Accused. The evidence of P.W.6 particularly on identification was not very reliable as it was apparent that P.W.6 has a problem with his

eyesight. Indeed he had a problem even identifying the Accused persons in court. It would therefore have been even more difficult for him to identify the accused persons at night with the aid of moonlight. The evidence of this witness also appears to have been tainted by some strained relations he appears to have had with 4th Accused since he admits having been previous jailed for stock theft over cattle, 4th Accused alleged belonged to his father in law. The relationship of P.W.6 and Accused 3 was also not good.

In her evidence in court P.W.8 stated that it was 1st Accused, 2nd Accused, 3rd Accused and 4th Accused who beat up the deceased, but again this differed from her statement which she had made to the police on 8th November 2001, just a day after the incident when she stated that when 3rd Accused called her and she woke up and went out she found “very many people outside” and that when they failed to pay the Kshs.3,500/= which was being demanded 3rd Accused “instructed the group either to beat him to death or burn him and they all set upon him with everything they had” P.W.8 did not mention any member of the group by name. In fact according to her statement the 4th Accused appears to have cooled things a bit when He requested for his cash so that the deceased is not beaten but it is 3rd Accused who told the people to continue beating him and “people pulled the deceased to the road beat him up and left him there.” P.W.8 does not identify the “people”. The sum total of the evidence of P.W.8 as per her statement is that the deceased was beaten up by a mob at the instigation of 3rd Accused. This was however not consistent with the evidence she gave in the court.

Given the defence of 4th Accused and 2nd Accused that the shop/kiosk of 4th Accused was broken into on the material night which evidence was confirmed by the evidence of P.W.10 and P.W.1 who visited the shop/kiosk and even took photos of the scene, and also noting that there was no other independent witness who was called apart from the immediate relatives of the deceased. I find it probable that the deceased was a victim of mob justice as he was suspected of breaking into the kiosk of 4th Accused and stealing therefrom. The 4th Accused and his sons were clearly targeted because they were the complainants and had also participated in bringing the deceased from his house as they demanded the money stolen from the kiosk. I find that the evidence by the eyewitnesses is insufficient to prove beyond doubt the identity of the persons who assaulted the deceased given the contradictions and inconsistencies apparent in their evidence as aforesaid. The fact that the 4th Appellant and his sons may have had a good motive does not necessarily prove that they did actually participate in assaulting the deceased. Moreover the prosecution did not inquire into the alibi of the 1st Accused with a view to showing that it was untrue.

As for 3rd Accused it is evident that He was not in good terms with P.W.6 and P.W.8 One Wonders why it took so long to have the 3rd Accused arrested if He had participated in the assault against the deceased as contended. The defence that 3rd Accused was being implicated in the case because of refusing to testify and also because of the existing family land dispute cannot be ruled out. Although all the Assessors were of the opinion that the Accused persons were guilty of manslaughter it is evident from their comments that their opinion was not consistent with their reasoning as they did not seem to have been satisfied with the identification of the Accused persons. They appear to have concluded that this was a case of mob justice which the Accused persons appear to have participated in. With respect I differ with the opinion of the Assessors and find that the prosecution failed to establish beyond any reasonable doubt the identity of the persons who inflicted mob justice on the deceased, nor did the prosecution prove that the deceased suffered his fatal injuries as a result of an act or omission on the part of one or more of the Accused persons or that the Accused persons had a common intention of causing the death of the deceased.

I therefore find each of the Accused persons not guilty and acquit them of the offence charged under section 322(2) of the Criminal Procedure Code. The Accused persons shall each be set free unless otherwise lawfully held.

Dated, signed and delivered this 5th day of August 2005.

H. M. OKWENGU

JUDGE