



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Criminal Case 4 of 2002

REPUBLIC
PROSECUTOR

VERSUS

1. ERICK MUGO MWANIKI)

2. JOHN NYAGA KARIUKI) ACCUSED

J U D G M E N T

Erick Mugo Mwaniki (hereinafter referred to as the 1st Accused) and John Nyagah Kariuki (hereinafter referred to as 2nd Accused) were jointly arraigned before this court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 22nd day of December 2000 at Kamagambo village in Kirinyaga District within the Central Province jointly with another not before the court they murdered Mukono Kariuki (hereinafter referred to as deceased).

Eight witnesses have testified in proof of the prosecution case. Briefly the prosecution evidence was that on the night of 22nd December 2000 the deceased was sleeping in a kitchen at the home of his sister, Theresia Waguthi Wagondi (P.W.4), when he was attacked and assaulted by the two Accused persons together with one Gichobi. The attack was witnessed by P.W.4 who identified the 3 men who attacked the deceased by the aid of the moonlight. P.W.4 got hold of the 2nd Accused as he was hitting the deceased, whilst the other two managed to escape. The deceased who was injured was taken to Kianyagah P.S. and thereafter to a private nursing home owned and operated by Stephen Mureithi Njeru (P.W.3) a Kenya Registered Nurse.

P.W.3 admitted the deceased at the nursing home with head injuries as well as cut wounds which he stitched. He also noted that the patient had bronchitis and a tropical ulcer on the left leg. The deceased remained in the Hospital until 13th January 2001 when he died. A post mortem examination performed by Dr. Paul Mbalu (P.W.1) revealed that the deceased had a subdural haematoma pressing on the brain and that the cause of death was head injury due to a blunt trauma.

Prior to his being assaulted, the deceased and his brother Joseph Nyagah Kariuki (P.W.5) had approached Jeremiah Muchiri (P.W.6) seeking his assistance in financing them to file for rectification (or objection) in respect of a grant confirmed to their elder brother Samuel Mwaniki (P.W.7) who had excluded the deceased and P.W.5 in the distribution of their father's estate and instead included 2nd Accused who is a son to P.W.5. It was agreed that the deceased would in consideration of a sum of Kshs.110,00/= transfer ½ an acre of the land he was entitled to in his father's estate to P.W.6.

P.W.6 successfully financed the succession cause and the rectification was done. On 20th December

2000 the land was distributed to the deceased, P.W.5 and P.W.7. The distribution to 2nd Accused being reversed. It was alleged that this is what led to the 1st Accused who is a son to P.W.7 and the 2nd Accused attacking the deceased as they believed P.W.5 and the deceased wanted to dispose off the land.

According to P.W.6, after the death of the deceased, P.W.6 who had only paid 7,000/= for the succession matter backed out of the deal and introduced P.W.5 to one Peter Kinyaro (not called as a witness) who paid P.W.5 Kshs.420,000/= for 1½ acres of his share in the inherited land. This was however denied by P.W.5.

In their defences each Accused person gave unsworn defence denying having been present at the scene of the assault or having participated in the assault. Each claimed to have been asleep in their respective homes, and only learnt of the deceased having been assaulted from P.W.4. They visited the deceased in Hospital and were only arrested after the death of the deceased. Both Accused claimed that P.W.4 had lied against them. The 2nd Accused claimed he had a problem with his father i.e. P.W.5 who wanted to sell his land to the detriment of 2nd Accused who was an only son.

In his submissions Mr. Macharia who appeared for both Accused noted that crucial eye witnesses such as one Ngondi and Elias Nyagah who were alleged to have witnessed the deceased being assaulted and one Chomba who assisted in taking the deceased to the Hospital were not called as witnesses. He further submitted that P.W.4 who was the only witness who identified the two Accused persons as the assailants did not mention any of the Accused persons to the Sub-Chief to whom she made the report. He submitted that the two Accused persons appear to have been implicated in the matter purely because of the dispute over the land. He urged the court to accept the alibi defence of the Accused person and acquit them of the charge.

Mr. Orinda who appeared for the State urged the court to find that the two Accused persons were properly recognized by P.W.4 with the aid of a moonlight. He further submitted that the persons mentioned and not called as witnesses would not have added any value to the prosecution case as their evidence was no more than hearsay. He urged the court to accept the evidence of P.W.4 which placed the Accused persons at the scene at the time of the assault. He urged the court to reject the defence as no more than mere denial.

It is evident that the deceased died on 13th January 2001 at a nursing home owned by P.w.3 after having been admitted there on 22nd December 2000 with a history of assault.

There is only the evidence of P.W.4, i.e. a single witness who purported to identify the assailants of the deceased at 2.00 a.m. with the aid of a moonlight. There is therefore need to exercise extreme caution in considering the evidence of this witness. Although the persons she claimed to have identified were persons known to her the possibility of a mistaken identification must be ruled out given the difficult circumstances under which the identification was done.

Although the attack is alleged to have taken place at a homestead wherein there were other persons, none of the other witnesses said to have been present were called to testify. This coupled with the fact that P.W.4 does not appear to have reported the assault to any person prior to the death of the deceased makes her evidence questionable.

Moreover there was inconsistencies and contradictions in the prosecution evidence as P.W.7 testified that P.W.4 claimed she did not know who assaulted the deceased. Indeed P.W.4 in her evidence claimed the deceased told her he was assaulted by the two accused. This was an indication that she was not relying on her own observation or knowledge but on what she was told by the deceased. The fact that no action was taken against any of the accused persons until after the death of the deceased which was about 3 weeks after the assault is an indication that P.W.4 did not name them immediately after the assault.

Further both the Accused persons put forward an alibi defence, no efforts was however made by the prosecution to disprove the alibi defence.

There is only the evidence of P.W.4 as against that of each of the accused and that was not sufficient to disprove the alibi.

Finally it is evident that the deceased, the prosecution witnesses and the Accused persons were all involved in a succession dispute and the relationship was acrimonious. This was however not sufficient to prove that the Accused persons are the only persons who had the motive to murder the deceased.

P.W.4, P.W.5 and P.W.7 all of whom stood to gain by the death of the deceased were all prime suspects. Indeed there was evidence that P.W.5 attempted to sell the land immediately after the death of the deceased.

The upshot of the above is that the prosecution failed to prove that the deceased died as a result of an act or omission on the part of any of the Accused persons. With due respect I disagree with the unanimous opinion of the Assessors as they failed to weigh the evidence of identification by P.W.4 and failed to take note of the unfavourable circumstances prevailing at the time of identification and the conduct of P.W.4 in failing to name the Accused at the initial report of the assault. The Assessors also failed to consider that the alibi defence of each of the Accused was not dislodged.

I find each of the Accused person not guilty and acquit them of the offence charged.

Each Accused shall be forthwith released unless otherwise lawfully held.

Dated signed and delivered this 19th day of September 2005

H. M. OKWENGU

2JUDGE