



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL CASE 16 OF 1997

BETWEEN

REPUBLIC PROSECUTOR

AND

STEPHEN KILEMI ACCUSED

JUDGMENT OF THE COURT

The accused, Stephen Kilemi was initially jointly charged with his brother, one Ernest Kiriamburi, now deceased, with one count of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the charge being that:-

“On the 12th day of October, 1996 at Gitu sub-location Tigania East Division of Nyambene District within the Eastern Province jointly murdered GEREMANO M’AMURU.”

The facts of this case are that on the 12.10.1996, the deceased Geremano M’Amuru met his death as a result of panga cuts inflicted upon him. According to the prosecution, these fatal panga cuts were inflicted upon him by the accused and his deceased brother Ernest Kiriamburi, also known as Mbiti. According to the accused, the fatal injuries were inflicted upon the deceased by Ernest Kiriamburi, now deceased.

The prosecution called six witnesses. The two eye witnesses were PW1, Theresa Mutea and PW2, Joseph Mwiraria. PW1’s evidence was that on 12.10.1996, the deceased, their son Joseph Mwiraria (PW2) and herself were walking home from the shamba at about 3.00pm. She was walking behind PW2 while the deceased was walking about fifty (50) metres behind her. As they walked along the deceased was cut by Mbiti who was in the company of the accused. Both the accused and Mbiti were armed with pangas and standing near the fence to Mbiti’s house. When PW1 saw what had happened to her husband, she raised an alarm. PW1 also testified that when she turned to see what was happening, the deceased was lying some 15 metres away from Mbiti’s house. PW1 also testified that the accused attacked her and cut her on the hand as he also hit the deceased with a stick on the ribs. Reports of the incident were made to the sub-chief and later to Mikinduri p/station.

PW2, Joseph Mwiraria gave a similar account of the events of that fateful day only adding that as he and PW1 and were passing, he saw the accused and his brother Mbiti armed. That Mbiti was armed with a panga while the accused was armed with both a panga and a stick. In his further evidence during cross-examination, PW2 testified that there was a land dispute between the deceased’s family and that of the accused. That PW2, who had been allocated a piece of land next to the accused’s family land, and particularly next to Mbiti’s farm had had his “sukuma wiki” uprooted and that he in turn had uprooted

Mbiti's soya beans. PW2 admitted that there was a grudge between him and Mbiti and that he had asked his father, the deceased, to intervene in the matter by asking Mbiti to stop destroying PW2's crops.

The third prosecution witness was George Mithili Mailanyi the then assistant chief of Gitu sub-location. His testimony was that on 12.10.96 at about 8.00pm, the accused, in the company of his brother Mbiti informed him that he (Mbiti) had killed M'Amuru Mucheke, the deceased. PW3 also testified that Mbiti had carried with him a blood stained panga.

PW4, Inspector of Police Musembi Kaloki testified that on 13.10.96, while he was at Mikinduri Police Station, he received a report from Mbiti that Mbiti had cut the deceased after the latter had attacked him in his (Mbiti's) home. PW4 visited the home of Mbiti but was unable to see any blood stains in the compound where it was alleged that the deceased had been attacked and later killed. This witness also confirmed that Mbiti had panga cuts on the head and that he had in fact been taken to hospital for treatment. It was the further testimony that whereas Mbiti had admitted to killing the deceased in self defence, the accused had denied killing the deceased.

Further evidence by the prosecution came from the testimony of PW5, M'Nchebere M'Nabea a sub-area from Gitu sub-location. His evidence was that on 12.10.96 between 7.00 and 8.00pm, while he was at his home, he heard some screams and as he went out to answer to those screams, he met one Gichunge, a son of the deceased who led him to the scene near Mbiti's home. At the scene, PW5 met PW1 and her daughter. It was then that he was informed that the deceased had been killed by Mbiti. He recorded his statement with the police on 13.10.96.

PW6 was Dr. Isaac Mwangi Macharia who produced the post-mortem report. According to this witness, the cause of the death of the deceased was severe head injury. PW6 also testified that the deceased had cuts not only on the head but also had bruises on the lower part of the back. PW6 also told the court that the cuts on the deceased's head were deep and had penetrated the brain.

When called upon to defend himself the accused gave sworn evidence. He told the court that on 12.10.96 at about 7.30pm, he was asleep in his home. Then he heard screams and decided to go out to investigate. On the way out he passed by Mbiti's house and while passing by the said house, he heard Mbiti's wife warning her husband not to go to Geremano M'Amuru's house. The accused stated further that because it was night he shouted his brother's name. The accused then asked Mbiti why he had fought with M'Amuru and that is when Mbiti told him that the fight had erupted because Mwiraria (PW2) had uprooted Mbiti's beans. The accused denied that he had any confrontation with the deceased and also denied that he assaulted PW1 as alleged by PW1. The accused however stated that he escorted Mbiti to the home of PW3, George Mithili Mailanyi.

The accused further testified that Mbiti's house was about 100 metres away from the accused's house and that at the time he heard the screams, he also heard people were being told not to fight. It was also the accused's evidence that when the accused went out, he found his brother Mbiti still armed with a panga and that that was the reason he had to call out Mbiti's name lest he should be mistaken to be M'Amuru and attacked by Mbiti.

From the above evidence, there is no doubt that the deceased was killed by a panga wielding attacker. The prosecution maintains that it is the accused, acting together with his brother Mbiti in their execution of a common intention with malice aforethought who killed the deceased. According to the accused, it was Mbiti who killed the deceased and the reason for the attack was the dispute over the uprooted beans belonging to Mbiti by PW2, Joseph Mwiraria.

After the summing up, the assessors who had sat with me throughout the trial retreated to consider their verdict. On the 29.9.2005, all the three assessors returned a unanimous verdict of guilty. In the assessors' view, there was overwhelming evidence to support the charge of murder against the accused.

The only question for determination of this court is whether the accused acted together with his deceased brother Mbiti in the murder of the deceased. PW1 told the court that she saw Mbiti cut the deceased,

though from other portions of her evidence, by the time she turned back the deceased had already been cut. PW1 also testified that both the accused and Mbiti were armed with pangas when she saw them before the deceased was cut. PW2 also said that he saw Mbiti armed with a panga while accused was armed with both a panga and a stick. Is it believable that the accused was at present during the time of the attack by Mbiti upon the deceased? Both PW1 and PW2 stated that both the accused and Mbiti his deceased brother were standing over the body of the deceased after the latter had been cut and fallen down with the accused hitting the deceased on the ribs with the stick that the accused carried. Is there sufficient circumstantial evidence to connect the accused with the offence or is it true that the accused was a mere victim of circumstances after he had escorted Mbiti to both the home of PW3 and to the police station on 13.10.96? Is it also possible that PW1's statement connecting the accused to the offence was a mere afterthought, especially when that statement was made sometime in June 1997? Or can one safely conclude that the accused was part and parcel of the intent by Mbiti to kill the deceased because of the land dispute? If indeed the accused participated in the deceased's killing, was the pair provoked into killing the deceased by the deceased who attacked them first? What time did the killing take place? Was it 3.00pm or 7.30pm? Is the accused's defence of alibi sustainable? It was submitted on behalf of the accused at the close of the case for both the prosecution and defence that there were many doubts raised by the defence and that these doubts should be for the benefit of the accused person. It was argued that the fact that Mbiti presented himself to the authorities both on the day the deceased was killed and on the following day, was a point in favour of the accused who should be exonerated from blame for the death of the deceased. Further that Mbiti having admitted to killing the deceased should be a clear indication that the accused was not party to the commission of the offence.

I have considered the evidence on record and also considered the defence case and find as a fact that whether the deceased was killed at 3.00pm (as testified to by the prosecution) or between 7.00 and 8.00pm on the fateful night, as per the evidence of the accused, I am convinced that the accused was present at the scene. There is also evidence to show that there was indeed a dispute between the deceased's family and Mbiti. I have therefore reached the conclusion that because of the simmering dispute between Mbiti and the deceased's family both the accused and Mbiti looked for and found an opportunity for revenge against the deceased's family as the deceased, PW1 and PW2 passed by the accused's home on that afternoon of 12.10.96.

In deciding whether or not the accused can be said to have been one of the two perpetrators of this heinous act against the deceased, I refer to the provisions of section 21 of the Penal Code which state as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence.”

It was the prosecution's contention in their opening remarks that the accused jointly with Mbiti acting with malice aforethought cut the deceased severally without any justification and that the deceased died as a result of the injuries inflicted upon him by the accused in the manner aforesaid.

In the case of **Ezra Kyabanamaizi and others v. R. (1962) E.A. 309**, which decision was applied in the case of **Andrea Obonyo V. R. (1962) E.A. 542**, the Court of Appeal observed that in a charge of this nature, the essential issues which had to be determined were (1) whether the murder of the deceased was committed in the prosecution of a common unlawful purpose of the gang and was a probable consequence of the prosecution of that purpose, and (2) whether the individual appellants have been shown to have been members of that gang sharing the common purpose.

In this present case, I find that both the accused and Mbiti shared a common purpose of revenging against the deceased's family following the uprooting of Mbiti's beans by PW2 and the intervention of the deceased by which he sought to have Mbiti stop interfering with Mwiraria's (PW2) shamba. Both the accused and Mbiti were duly armed in readiness for the attack when the deceased and his family were in the vicinity of the home of the accused and Mbiti in order to effect that purpose. I have no doubt in my

mind that what the accused and Mbiti purposed was to murder the deceased and indeed that was what happened. In my considered view and taking all the circumstances of the case into account, I can safely say that the deceased met his death at the hands of the accused and his brother Mbiti as they prosecuted their common intention of killing the deceased.

The fact that Mbiti surrendered does not, in my view exonerate the accused from blame. There is evidence that even after the deceased had been felled down by the panga cuts on the head, the accused continued to hit him on the ribs with a stick. Mr. Kibera has contended on behalf of the accused that the use of the terms “stick” “rungu” and “club” has created such doubts in the prosecution’s case that the accused should be given the benefit of those doubts. Taking the totality of the evidence into account, the interchangeable use of those three words does not in any way weaken the prosecution’s case against the accused person. In any event, the evidence of the post-mortem report produced by PW6 showed that there were bruises on the back. This evidence tallies with the evidence given by PW1 that the accused hit the deceased with a stick on the ribs. There can be no other hypothesis than the fact that both the accused and Mbiti intended to kill the deceased and that they went ahead and accomplished that intention.

I now turn to the statements made by PW1 to the police. It was contended on behalf of the accused that the statement made by PW1 on 17.6.1997, implicating the accused in the murder was an afterthought. Going back to the pre-statement period, PW4 stated that he arrested the accused on 13.10.96 after he had carried out thorough investigations at the scene of crime and also after sifting the theory given to him by Mbiti as to how and where the deceased was killed. This witness stated that after those investigations, he reached the conclusion that the version of the story as given by PW1 and PW2 was more credible than what the accused and Mbiti told him. He especially testified that he was unable to find any blood stains in Mbiti’s compound despite Mbiti’s contention that the fight took place in Mbiti’s compound. According to this witness also, the accused had informed him that he (accused) rushed to Mbiti’s house where he found Mbiti and the deceased fighting. That piece of evidence was not controverted during cross-examination and I therefore find that the defence’s inference that PW1’s assertion that accused participated in the murder was an afterthought could not be farther from the truth.

I have also considered the defence contention that there is discrepancy in the prosecution’s case as to the time when the offence was committed. According to the evidence of PW1, she screamed soon after the deceased was attacked by the accused and Mbiti and also later on around 7.00pm after she had been to her home and was now returning to the scene accompanied by her daughter. It is not surprising therefore that PW5, M’Nchebere M’Nabea heard screams at about 7.00pm for that was the time PW1 said she returned to the scene in company of her daughter. I have considered the accused’s sworn testimony but I find that I am unable to believe the same. It is highly improbable that the accused, upon hearing screams coming from his brothers house which was hardly 100 metres away, could have gone out to answer those screams with his bare hands. The accused’s defence in my view did not dislodge the prosecution’s evidence against him. I therefore find that the accused was at the scene of the murder together with Mbiti, and that he was armed with both a panga and a stick, and that after the deceased had fallen down, the accused continued hitting the deceased with the stick on the ribs.

In the result, I do concur with the assessors who listened to the hearing with me that there is overwhelming circumstantial evidence to connect the accused to the offence with which he is charged. I therefore have no hesitation in finding the accused guilty of the offence of murder and to convict him accordingly.

It is so ordered.

Dated and delivered at Meru this 25th day of October 2005.

RUTH N. SITATI

JUDGE

25.10.2005