



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**CRIMINAL CASE NO.249 OF 2003**

**REPUBLIC ..... RESPONDENT**

**- VERSUS-**

**JOSEPH KAMANDE MAU & 3 OTHERS .....ACCUSED**

**JUDGMENT**

The accused persons; Joseph Kamande Mau, Leonard Njoroge, John Ngugi, Ejidio Mungai Mau, are charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that on the 20<sup>th</sup> day of September, 1999 at Ngurweini village within Maragua District of the Central Province jointly murdered Godfrey Mau Mambo.

All the accused denied the offence. The prosecution called 6 witnesses in support of the state case.

**PW1, Rosemary Wangari**, Wangari, recalled the events of 20<sup>th</sup> September, 1999 at about 2.00 p.m. She was from hospital and found her husband. A1 had come for the funeral of the child of the fourth accused. It was her testimony that at the time of the burial a fight broke out. The deceased beat the third accused. She ran away.

**PW2, Nikes Bao Mau**, Mau, is the eldest brother of the accused. He came from work on 20<sup>th</sup> September, 1999. He heard children saying that his other brothers had gone to the valley. He decided to follow them but on the way met the accused persons. He proceeded to the valley and found the deceased lying in a pool of blood. He reported the matter to the area chief.

He arranged for the body to be taken to Muranga Mortuary. Subsequently he arranged for the burial.

**PW3, Joseph Ndungu Njoroge**, Njoroge, received information from members of the public that Mr. Godfrey Mau Mambo had been assaulted by his sons. He could, however, not remember the name of the informer. In company of A.P. CPL Kangage he proceeded to the scene and confirmed the fact of death.

On return to the Chief's Camp he found the accused persons there. On the same day at 9.00 p.m. he took the accused persons to Guitanjuri Police Patrol base.

He recalled family problem of the deceased. The deceased refused the accused persons to cultivate the shamba and also chased the mother of the accused persons from the home.

He equally recalled having negotiated a truce between the deceased and his sons. According to him, the deceased had initially agreed that his grandson be buried at his (deceased) shamba which was done. Later

the deceased changed his mind and exhumed the body. Information received by him was to the effect that the deceased assaulted his sons when they tried to re-bury the corpse of his grandson. It was his evidence that the deceased was a habitual bhang smoker and always had in his possession a sharp panga as his companion.

**PW4, Mercy Njeri Mathu**, Mathu, is the second wife of deceased. The accused persons are her step-sons. She was at her shop within the shamba at about 7.30 p.m. in the evening. She saw accused persons arrive in her home. Each one of them went to their various houses. A moment later she saw them come out each one of them armed with pangas. Sensing danger she locked herself in the shop. Having secured her safety she heard them walk away. She then ran to a neighbors place and hid there. She did not witness her husband being killed. She confirmed that prior to this incident, the accused persons had good relations with the deceased.

**PW5, Thomas Mbau Mau**, Mau, at the time of giving evidence is 17 years old. At the time of the incident he was in class 3 of Kawanyeki Primary School. His evidence is that on the fateful day he had gone to school and returned home at 1.00 p.m. About 5.00 p.m. he was in the company of the deceased. He saw the accused persons cut his father. He ran away to Ngurweni Police Station where he reported the incident.

**PW6, No.30959, Sergeant Francis Maina**, Maina, was in 1999 attached to Gichanjuri Police Post. While at the said post at about 8.00 p.m. the son of the deceased by name Mau (PW2) reported that his father had been murdered by his brothers. He booked the report in the OB. About 10.00 p.m. AP CPL Kangangi, A.P. Kaguhu and Assistant Chief Ndungu (PW4) arrived at the post in company of four suspects. He re-arrested them, locked them in cells and kept four pangas recovered from the accused as potential exhibits in the criminal trial.

He visited the scene where he confirmed the fact of death and took the body to Muranga Mortuary for post-mortem. Maina maintained that the pangas received were produced in this trial. However, it is significant that the same were not produced before this court. He prepared the exhibit memo. This witness produced the post-mortem report and the P3 forms in respect of the four accused persons by consent. Post-mortem report as exhibit no.1, P3 in respect of first accused as exhibit 2 (a), for second accused as exhibit 2 (b), for 3<sup>rd</sup> accused as exhibit 2(c) and the fourth accused as exhibit 2 (d).

At the close of the prosecution case neither the defence nor the prosecution made submission at that stage. Having considered all the evidence on record I came to a conclusion that the prosecution had established a prima-facie case warranting the accused being put on their defences. Accordingly I put the accused on their defences.

The first accused Joseph Kamanda Mau, Mau, in his sworn testimony denied killing the deceased. According to him the burial of the child of Ejidio Mungai (A4) was marred by controversy. At first the deceased refused the body to be buried on his land. Later deceased relented and showed them where to inter the body. Burial took place on 16<sup>th</sup> September 1999 and all the four of them returned to their various work places at Nairobi.

On 19<sup>th</sup> September, 1999 one Benson Gitau told him that the body had been exhumed. Promptly he informed Ejidio Mungai (A4). On 20<sup>th</sup> September they all went home. On the way they met one Ngaruiya who also confirmed the fact of exhumation. They all proceeded to the burial site where they confirmed the same.

About 5.00 p.m. they sent Ngaruiya to the Assistant Chief (PW3) to report the incident. They borrowed spades and jembes and embarked on the course of reburying the body. At this stage hell broke loose when the deceased appeared with a panga and a stick. Deceased went towards Ejidio Mungai (A4). John Ngige jumped on the deceased to disarm him and in the ensuing struggle was cut with a panga. Ngaruiya joined in the fray, disarmed the deceased and cut him. They made a report to the chief and were locked in and later charged with murder. He crowned his evidence that Ngaruiya was neither arrested nor charged along with them even though Ngaruiya is a one who cut the deceased.

Accused two, Leonard Njoroge, Njoroge, recalled going home for reburial of the body of the child, of Ejidio Mungai (A4). In the course of the reburial, the deceased went berserk and yelled: "you will not bury a dog here".

The deceased charged at Ejidio Mungai (A4) In the ensuing melee he was cut on the leg. He denied cutting the deceased.

Accused three, John Ngugi, Ngugi, confirmed having traveled home from Nairobi for reburial of the son of Ejidio Mungai (A4). During the burial, the deceased came brandishing a sharp panga and went for Mungai (A4). A fight ensued in which the deceased was cut by one Ngaruiya. He denied having cut the deceased.

Accused four, Ejidio Mungai, Mungai narrated events following the death of his child. He confirmed the burial was on 16<sup>th</sup> September, 1999, exhumation on unknown date and reburial on 20<sup>th</sup> September, 1999. He did not deny that a fight broke out during the reburial. Rather his testimony was that Ngaruiya is the one who had cut the deceased.

At the close of the defence case Mr. Njanja for the accused submitted that the deceased was a habitual bhang smoker and at the time of reburial deceased went berserk and with a sharp panga and attacked Mungai (A4). A fight erupted. In the ensuing melee one Ngaruiya cut the deceased. Accused two and three were also cut by the deceased during the fight. That there was sufficient provocation from the deceased having regard to the fact that his own children were trying to rebury the deceased grand-child.

That the action of Ngaruiya in cutting the deceased was an act in self defence. Thus the defence relied on both defences of provocation and self-defence. In this regard, I was referred to the case of Palmer –vs- Region [1971] Vol. 1 All. E. R. 1077 an authority for the proposition that where the evidence is sufficient to raise the issue of self-defence that defence will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of self-defence. If the prosecution succeed in this then the issue is eliminated from the cases. Other possible issues will remain; in particular the circumstances may be such as to raise an issue whether there was provocation which would justify a verdict of manslaughter or whether the intent necessary to constitute the crime of murder was lacking. That going by the actions of the accused even if the court is not persuaded by the defence of self defence then the court should entertain the defences of provocation which now reduces the offences to manslaughter. Counsel for the defence also referred me to the authority of SHAUSHI S/O MIYA (1951) VOL.18 EACA Page 188 for the proposition that the deceased stabbing of the applicant in the circumstances amounted to provocation. That the issue of provocation and self-defence merged and it matters little if the circumstances are regarded as acts done in excess of the right of self-defence or done under the stress of provocation. That the essence of the offence of murder is malice-afore thought and if the circumstances show that the fatal blow was given in the heat of a passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter. That the accused persons may have used excessive force in the circumstances obtaining but in the conditions prevailing that was the best considering that the deceased was the first to attack and cut accused two and three also.

Miss Mwanza for the prosecution was of the view that the prosecution proved its case beyond reasonable doubt. According to the prosecution the accused persons jointly and severally used excessive force on the deceased. That this is evidenced by post-mortem report exhibit E to the effect that the deceased suffered multiple injuries all over the body. That this position is also supported by evidence of Nikes Bao Mau (PW2). That further evidence of attack are borne out by the testimony of Mercy Njeri Mathu, PW4 who was threatened by the accused persons before the attack.

At the close of submission on both sides, I summed up for the assessors who later on returned a verdict of not guilty to the charge of murder in respect of all accused but guilty of manslaughter. I have on my own evaluated the evidence. On the evidence the deceased was not comfortable with the burial of his grandchild on his (deceased) land. Somehow he was persuaded to accept the burial. Subsequently, he exhumed the body. When his sons got wind of this they came home to rebury. The deceased resisted the

reburial and in the process cut the second and third accused. In the ensuing melee one Ngaruiya [who was not charged together with the accused] cut the deceased at least once. Then all the accused set on the deceased with assorted instruments culminating in his death. This in my opinion explains the multiple cuts as per the post mortem report exhibited herein.

In my judgment there is sufficient evidence to raise the issue of self-defence and the prosecution has not shown to me beyond reasonable doubt that what the accused did was not by way of self-defence.

Equally, there is evidence that the deceased agreed to the burying of his grandson. Subsequently he exhumed the body in absence of the parents. This coupled with the fact that he attacked his own sons while reburying amounts to double provocation. The defence of provocation and murder merged in point of time. The essence of the offence of murder is malice – aforethought. The circumstances show that the total cuts were made in the heat of a sudden unprovoked attack, which was sufficient to cause loss of control. The inference of malice is thereby rebutted as the offence is thus manslaughter.

Accordingly, I reduce the charge of murder to manslaughter and convict all the accused of the same. I sentence each accused to 1 year imprisonment considering the fact that they have been in custody since September, 1999. Right of Appeal 14 days.

**DATED and DELIVERED at Nairobi this 18<sup>th</sup> Day of October 2005.**

**N. R. O. OMBIJA,**

**JUDGE**