



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

CRIMINAL CASE NO. 29 OF 2000 & CRIMINAL CASE 12 & 13 OF 2002

REPUBLIC PROSECUTOR

AND

AYUB MEME PETER 1ST ACCUSED

CRIMINAL CASE NO. 12 OF 2002

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID KOBIA M'MINGAINE 2ND ACCUSED

CRIMINAL CASE NO. 13 OF 2002

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER M'MINGAINE 3RD ACCUSED

(All three cases consolidated and heard under Criminal Case No. 29 of 2000)

JUDGMENT OF THE COURT

All the three accused persons herein, Ayub Meme Peter, David Kobia M'Mingaine and Peter M'Mingaine face one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that:-

“On the 11th day of August 1998 at Kongo Anchabi village, Katherwa sub-location in Meru North District within Eastern Province jointly murdered IBRAHIM KAILEKI M’KAILANYA.”

Each of the three accused denied the charge of murder while the second accused, David Kobia M'Mingaine admitted hitting the deceased on the head in self defence.

The prosecution case rested on the evidence of four witnesses, among them Dr. Salasius Murungi who

testified as PW4. PW4 testified that Dr. A.K. Rintari performed a post-mortem examination on the body of the deceased on the 18.8.1998 at the Meru General Hospital. The witness stated that at the time in question he was working with the said Dr. A.K. Rintari. From the post-mortem report which was produced in court as P exhibit 2, Dr. Rintari formed the opinion that the deceased's cause of death was pulmonary failure due to head injury. PW4 further testified that the deceased suffered a fracture at the back of the head, a fracture of the bones of the sides of the head in addition to having blood clots in the brain.

PWI was Jacob M'Mithea. His evidence was that on the morning of 11.8.1998, he was together with the deceased and one Daniel Murungi, PW2 in the deceased's shamba which was the subject matter in a criminal case at Maua Law Courts in which the first accused herein, Ayub Meme Peter and Peter M'Mingaine, third accused were the accused. PWI testified that he had attended the court at Maua on 10.8.1998 in which the first and third accused herein faced a charge of malicious damage to property.

PWI stated further that while he, PW2 and the deceased were in the shamba the third accused and his four sons, among them the first and second accused went to the shamba and started pelting them with stones. The accused persons were also armed with pangas. On sensing danger, the deceased, PWI and PW2 started running away. The deceased, who could not run very fast was overtaken by the three accused persons and hit with stones. The first accused cut the deceased with a panga while the second and third accused continued hitting the deceased with stones.

PWI ran and reported the matter to the Assistant Chief and later on made a report of the incident to Maua Police Station. When PWI came back to the scene in the company of police officers from Maua Police Station, he found the deceased lying among a heap of stones. It was also PWI's evidence that there was a long standing land dispute between the families of the accused and the deceased.

PW2 was Daniel Murungi. This witness testified that on 11.8.1998, he was asked by Jacob M'Mithea, PWI to go and see their shamba. He was also informed by PWI that there was a dispute over the same shamba and that in fact there was a criminal case pending in court over the same. After PWI, PW2 and the deceased got to the shamba, the third accused came to the shamba and started screaming. The third accused was then joined by five of his sons. The accused persons then started throwing stones at PWI, PW2 and the deceased. The deceased, PW1 and PW2 then started running away with the accused persons in hot pursuit. PW2 testified that the accused persons were armed with pangas. PW2 ran away and hid himself in a bush. From that bush which was about 70metres away, PW2 saw the first accused cut the deceased with a panga. PW2 then ran away to his house when he saw the deceased being cut by the first accused. Later PW2 learnt that the deceased had died. PW2 also later recorded a statement with the police.

Police constable John Maina was PW3. This witness produced the statement by deceased police constable Francis Kitema who was also the investigating officer. The statement was produced as P exhibit 1. In the said statement, PC Kitema stated that on 11.8.1998, he received a murder report from Jacob M'Mithea, PWI. That he had proceeded to the scene where he found the body of the deceased lying among a heap of stones, and having multiple cuts all over the body. The statement further showed that on investigations PC Kitema established that the deceased's killers were the accused persons herein. The statement also spoke of a land dispute between the family of the deceased and that of the accused and further that there was a criminal case pending at the Maua Law Courts in which the first accused herein was charged with malicious damage and creating a disturbance. The complainants in the Maua case under police file No. 4733/66/98 were the deceased and PWI. Subsequently, all the three accused persons were arrested and charged with the present offence.

When called upon to defend themselves, the first and second accused gave sworn testimonies; while the third accused gave unsworn evidence. The third accused called one witness in his defence.

The first accused testified that there was a land dispute between the deceased and the third accused in which the deceased was unlawfully demanding land from the third accused. He stated that on the fateful morning, he had gone to Kangeta market to sell bananas and on coming back home, he found his mother

screaming and saying that they had been chased away from their land. He then decided to go to the shamba and on the way, he met with PWI who hit him on the head with a panga causing him some injuries. It was only later, according to the first accused, that he saw the deceased lying dead among a heap of stones.

The first accused also testified that when he was moving between their home and the shamba the third accused was attending a funeral at the home of one Charles Murungi. In brief, the first accused denied any participation in the crime and testified that the charge against him was a fabrication because of the land dispute between the two families.

The second accused, David Kobia M'Mingaine testified that on 11.8.1998, the deceased, Jacob M'Mithea (PWI) and another person went to the accused's home and informed them that they had gone there to kill somebody. He stated that the deceased was armed with a panga. It was the testimony of the second accused that he was together with the first accused and their mother when the deceased, PWI and the other person arrived in the home. An exchange of words then ensued, during which the first accused was cut on the head and face. At that point, the second accused ran to the house, armed himself with a wooden plank with which he hit the deceased on the head. While admitting that he participated in injuring the deceased, the second accused denied that he intended to kill the deceased. The second accused also testified that there was a long standing land dispute between his family and the family of the deceased and further that there was a pending criminal case at the Maua Law Courts involving the two families.

The third accused gave a brief unsworn statement in which he stated that he was not present at the scene when the deceased met his death. He also stated that there was a long standing dispute between him and the deceased.

The third accused called one witness, Wilson M'Mwereria, DWI. According to this witness, he and the third accused were at the home of Charles Murungi, a member of the family who had died, when they heard screams coming from the direction of the home of the third accused. When the two went to see what was happening, they found the deceased lying dead among a heap of stones. This witness denied that he was among those who killed the deceased.

In her final submissions, Mrs. Ntarangwi who appeared for all the three accused persons, submitted that the prosecution had not proved a case of murder against any of the three accused persons beyond any reasonable doubt. She urged the court to take cognizance of the fact that there was a long standing dispute between the families of the deceased and the third accused. She also urged the court to note that there was a pending criminal case involving the two families and further that the visit to the shamba by the deceased together with PWI and PW2 was sufficient to force the first and second accused persons to act the way they did. In this regard, Mrs. Ntarangwi cited the provisions of section 208(1) of the Penal Code. It was also contended on behalf of the accused persons that the fact that there was a heap of stones where the body of the deceased lay showed that members of the public participated in the fight that led to the death of the deceased. To support her case for the first and second accused, Mrs. Ntarangwi cited the following cases:-

- **Kahindi David Kenga – V - R. Criminal Appeal No. 90 of 1999.**
- **Kaingu Mwangandi Mumba – V – R. Criminal Appeal No. 75 of 2000.**

With regard to the third accused, Mrs. Ntarangwi submitted that he was not at the scene of the crime since he was attending the funeral of one Charles Murungi. It was contended on behalf of this third accused that the prosecution was not able to oust the defence of alibi put forward by him. She cited the following authorities:-

- **Wang'ombe – V – Republic – Criminal Appeal No. 49 of 1979.**
- **Charles Anjare Mwamusi & Another – V – Republic Criminal Appeal No. 226 of 2002.**

- **John Wandati Wamalwa & another – V – R. Criminal Appeal No. 49 of 1999.**

On the basis of those arguments, the court was urged to acquit the third accused of the charge of murder and to find the first and second accused guilty only of manslaughter.

In his submissions, Mr. Muteti, learned state counsel submitted that the prosecution had proved the offence of murder against each of the three accused persons beyond any reasonable doubt. He submitted that the doctor's evidence corroborates the evidence adduced by both PW1 and PW2 as to proof of malice aforethought.

It was contended on behalf of the state that the defence offered by the accused persons was too lame to be of any consequence against the evidence adduced by the prosecution. Mr. Muteti urged the court to find that the first accused lied on oath when he alleged that he was not at the scene particularly when the second accused testified that the two of them were together when the fracas started. It was further contended by the prosecution that the defence of provocation cannot be availed to the first and second accused persons who had every opportunity to cool off or act otherwise in the circumstances.

On the defence of alibi put forward by the third accused, the learned state counsel submitted that this defence ought to be weighed against the evidence adduced against the accused persons. He submitted that since the offence took place in broad day light, both PW1 and PW2 had the opportunity to identify their attackers. It was further submitted that the third accused had not given any reason as to why PW2 would have lied against him. It was further submitted on behalf of the state that both the third accused and his witness DW1 told a pack of lies when they both alleged that they did not witness the incident during the ten minutes they said it took them to reach the scene.

Regarding the land dispute between the two families, the learned state counsel submitted that though the same may have made emotions run high, nonetheless, the three accused persons did not have to take the law into their own hands.

Mr. Muteti also sought to distinguish the **Kahindi David Kenga** case (above) by stating that unlike the circumstances in this case, the appellant in that case went completely wild and lost the power of self control when he saw the deceased on his homestead.

From the evidence on record and from the submissions made on behalf of the state and the accused, there are only two issues to determine. One is whether the act of killing the deceased by the accused persons was done in the heat of the moment induced by the appearance of the deceased, PW1 and PW2 on the disputed land as contended by the defence and as defined by section 208 of the Penal Code. In other words, does it come out clearly from the evidence that the first and second accused persons had no time for the heat of passion to cool? The second issue is whether as contended on behalf of the third accused, the third accused was not at the scene when the confrontation between the deceased and the first and second accused took place.

I shall first deal with the defence of alibi put forward by the third accused. Mrs. Ntarangwi referred this court to the decision in the **Wangombe case** (above) in which the Court of Appeal dealt at length with the defence of alibi. As I have also said elsewhere in this judgment, Mrs. Ntarangwi submitted that the prosecution had not adduced any evidence to show that the third accused participated in the attack that led to the death of the deceased. It was further contended on behalf of the third accused that PW2 having admitted that he did not know the third accused person before, it was most likely that PW2 could not positively say that it was the third accused who came screaming into the shamba before the first and second accused, among others, joined him.

In the **Wang'ombe Case** (above) it was held that:-

“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the

alibi wherever possible, but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”

In this case, both PW1 and PW2 were emphatic in their testimony that as they were working on the shamba, the third accused went there screaming and that soon thereafter, the third accused was joined by four (according to PW1) or five (according to PW2) of his sons whereupon they started chasing the deceased, PW1 and PW2. When PW1 was cross-examined, he stated that the funeral of Charles Murungi, which the third accused was alleged to have been attending that morning was in fact not on that day. He also stated that as he and the deceased and PW2 ran for their lives, the third accused was also running behind his sons and loudly instructing them (the sons) to kill the deceased, PW1 and PW2. PW2 also testified that “that old man” referring to the third accused entered the shamba where deceased, PW1 and PW2 were while screaming and was soon joined by his sons and all of them started throwing stones at the deceased, PW1 and PW2. PW2 testified further that he was about 10 (ten) metres away from the third accused when the third accused entered the shamba. It was thus the evidence of PW2 that taking the proximity he had to the third accused and the fact that the incident took place at 10.00am, he had no doubt in his mind that he saw the third accused at the shamba on that morning of the attack.

After carefully weighing this defence of alibi by third accused against the evidence adduced by the prosecution, I have no doubt in my mind that the third accused was at the scene and that he is the one who led the attack on the deceased and his two companions, namely PW1 and PW2. Further, I am satisfied that the prosecution has discharged its onus of proving beyond any reasonable doubt that the third accused was indeed at the scene of crime and that he actively participated in the commission of the offence alongside the first and second accused.

I now turn to the first issue as to whether or not the defence of provocation is available to the three accused persons. It is not in dispute that there was a long standing row between the families of the accused and the deceased, involving the portion of the land upon which the deceased, PW1 and PW2 were on that fateful morning. There is also no dispute that there was a criminal case pending in the court at Maua against the first accused herein in which the deceased and PW1 were complainants respectively on charges of malicious damage and creating a disturbance respectively. There is evidence on record to show that on 10.8.98 when the criminal case was supposed to proceed, the first accused did not attend court. It would seem to me that there was no love lost between the two families. In my view therefore, the events that took place on 11.8.1998 were a natural consequence of the history of the land dispute between the two families. According to the prosecution, and especially both PW1 and PW2, it was the third accused who called the first and second accused to action when he screamed on seeing the deceased, PW1 and PW2 on the shamba. The first accused then cut the deceased on the head, and the second accused followed it up by hitting the deceased on the head with a plank of wood.

Section 207 of the Penal Code, on which the accused’s counsel relied during her submissions on the defence of provocation provides as follows:-

“207. When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, he is guilty of manslaughter only.”

Section 208 then goes further to define what provocation means and is said to include the doing of any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to deprive that person 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.

Considering all the circumstances of this case and in light of the authorities cited to me and in particular in light of the decision in the **Kahindi David Kenga – V – R.** (above) and **Kaingu Mwangandi Mumba - V- R.** (above) cases, I do find that this was a case of grave provocation by the deceased. PW1 testified that the deceased was armed with a panga when they went to the disputed land. Although it is not clear whether the deceased used that panga on the first accused as stated by the second accused or not, the

appearance of the deceased on the disputed land was enough to raise the adrenaline levels among the accused persons in this case. The situation was made worse by the fact that only the day before, the dispute was in court. The same was still pending. It is clear to my mind that the conduct of each of the three accused was that of a man who was completely out of control of his emotions and one who had in effect lost his power of self-control as soon as the deceased was sighted on the shamba. It would also seem to me that the deceased's visit to the shamba was ill-timed and like the honourable judges of appeal remarked in the **Kahindi David Kenga case** (above), the act of visiting the shamba by the deceased that morning "..... Constituted grave provocation on his part." Indeed the accused persons were still embroiled in the court battle with the deceased's family and nothing worse could have been done by the deceased than appearing on the disputed shamba on that fateful morning.

Although the learned state counsel submitted that the accused persons had other options to take in the circumstances and also that there was time for any passions to cool down, the evidence on record does not support that view. I think, and as pointed out by Mrs. Ntarangwi during her submissions, that the provocation was so sudden and grave that none of the accused persons had the time to consider what other options, if any, were available for the situation in hand and secondly there was no moment within which the heat of passion so raised by the deceased's provocation could have cooled.

In their considered opinions, the three assessors, separately returned verdicts of guilty on the charge of murder against the first and second accused and one of not guilty against the third accused. As I have indicated elsewhere in this judgment I have carefully sifted the evidence that was placed before the court by the prosecution. I have also considered the defences put forward by each of the accused persons. I am satisfied that the prosecution has proved beyond doubt that each of the three accused persons was a party to the events of that morning but find each one of them guilty on a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

In the result, each of the three accused persons, Ayub Meme Peter, David Kobia M'Mingaine and Peter M'Mingaine is convicted of the offence of manslaughter.

Orders accordingly.

Dated and delivered at Meru this 10th day of November 2005.

RUTH N. SITATI

JUDGE

10.11.2005