



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**H.C. CRIMINAL CASE NO. 207 OF 2003**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**JOHN KARIUKI NDACHU**

**JOHN KINYANJUI KAMAU ..... ACCSUEDS**

**SUMMING UP TO THE ASSESSORS** John Kariuki Ndacho and John Kinyanjui Kamau are alleged to have murdered Martin Kimani Kiambuthi at Muti mumu village in Thika District on the night of 5th October, 20003.

In law a person murders another when he with malice aforethought kills another human being unlawfully. It is a basic principle of Criminal law that the Prosecution is obliged to prove all ingredients of the offence beyond reasonable doubt and that onus does not shift to the accused person.

I shall give you in brief testimonies of all witnesses who came before the court.

P.W.1 – Dr. Nimrod Ngata Garoma performed Post Mortem on the body of the deceased. His examination revealed on external appearance that the deceased had swelling around left eyes and bleeding from right nostril. On internal examination he found that there was fracture of right temporal bone measuring 8 c.m., fracture around lamboid – left as well as massive Subdural Haematoma on right side. That means there was collection of blood below the dura covering of the brain. He as a result of examination formed an opinion that the cause of death was as a result of severe head injury- resulting in massive Subdural Haematoma. He also opined that the injury was consistent with blunt object.

The evidence of P.W.2 could be considered a bit closely as he is an important witness.

He was at Kiamwangi village on the material day and after watching a football match in that village he went to check on his girlfriend but did not find her. On his way back, he met Wairimu (P.W.6) & Kariuki (1st Accused). He heard P.W.6 telling 1st Accused that the affair between them was

finished. When P.W.6 saw him she called by his name ‘Njiange’ but 1st Accused told him to stay where he was. But P.W.6 asked him to run as 1st Accused had a knife. He saw 1st Accused slap P.W.6, ran and reached Kiamwangi Shopping Centre. There he met Martin (deceased), Harun (P.W.5), Waweru and Githinji. He told the deceased he had left his

girlfriend (P.W.6) being beaten by 1st Accused. Then they went to direction of Mutimumu where he had found P.W.6 and 1st Accused – and were met by P.W.6 and one Njeri. They told them that the 1st Accused had beaten them. Then he with the deceased and P.W.5, P.W.6 went to Mutimumu to get his jacket from the house of his girlfriend. Others did not join them. On the way at about 9 p.m. they met 1st and 2nd Accused. They just passed them and reached his friend's house but she was not there. On their way back they were confronted by 1st and 2nd Accused, who had rungu in their hands. 1st Accused pulled P.W.6 and asked her what she had to say as he was not leaving her like that. She reiterated that their affair has ended. One Mzee named Baba Ciru (P.W.3) arrived on the scene and asked 1st Accused to leave fighting –

but Kariuki (1st Accused) said to him he was not going to leave like that and slapped the witness. Harun (P.W.5) and deceased were seated and 2nd Accused was standing there. The witness gave two blows to 1st Accused and ran away and waited at a distance from where he could see what was happening and found the deceased was lying down. He got hold of a stick nearby and approached where deceased was lying. Baba Ciru (P.W.3) said I should not create any further problem. He tried to give some help to the deceased who was unconscious and was bleeding from nostrils and mouth.

When he woke up he told the deceased to go back.

Before they had gone not far both Accused persons reappeared. The deceased could not run and they got hold of him and started beating him with rungu or sticks. He did not identify a rungu which was shown to him in court stating the stick used by the 2nd Accused were bigger than those shown to him. When they were beating the deceased, he came out from his hiding but when 1st accused saw him he came where he was. He again started running as he saw rungu in his hand.

It seems the deceased took his chance to escape when the

witness was followed by the Accused. He hid in nearby plantation. After sometimes when he found the deceased he was not in a position to get up. He held him by shoulder and carried him. On the way they were joined by P.W.3 and P.W.5 and they all went back to their houses. P.W. 3 and deceased went to his house. He went home but one Githinji came and they both went back to the deceased's house who complained of headache and they took him to Gatundu Hospital. He reiterated that he saw both the Accused persons as there was moonlight.

During his cross-examination he clarified the times when he met 1st Accused and P.W.6 as well as when they decided to go back to his girlfriend. It was 7 p.m. and 8 p.m. respectively.

He denied their purpose was to take revenge on 1st Accused who had beaten P.W.6. They reached his girlfriend's house at around 9 p.m. He also said some of his friends named Waweru, Njeri and Githinji did not come but stayed at village Kagio. He emphasized that if they wanted to take revenge they all could have beaten 1st Accused when they met him with 2nd Accused earlier. He clarified his statement where he

had stated that he could not distinguish who was beating the deceased since there was darkness.

You may recall the witness had run away and hid himself at a distance. He stuck to his testimony that he identified both the accused in moonlight. He also was confronted with his statement where he said there were two Kariukis. Please note that in his statement he first had stated "On the way we met Kariuki and Kinyanjui going opposite direction but we never talked" and later he stated that they went back after not finding Wanjiku at home. "Then immediately at Wanjiku's gate Kariuki Kinyanjui and another met us while armed with rungu" you may look at his statement if you wish.

The evidence of P.W.3 is different and you shall have to consider it along with other testimonies therein. He stated that at about 10 p.m. on the material date when he was escorting his visitor out he saw three men seated along the side of his fence. When he returned he saw Kariuki, 1st Accused) Kinyanjui (2nd Accused) and a lady. 1st Accused was quarreling with the lady. When he intervened 1st Accused told

him what those people wanted from him as they would beat him anywhere. He told 1st Accused to leave the lady alone. 1st Accused also went to where three men were sitting and asked them why they were following him. They got up and started beating 1st Accused. Kinyanjui (2nd Accused) who was standing aside joined in with a long stick. No one else had anything with them. All were fighting and he saw 1st Accused and other two running towards plantation and one of them fell. He, the lady, 2nd Accused and the deceased were left there. He looked closely at the person who fell with his torch and saw his teeth were with blood and he had an injury at the back of his head. He asked 2nd Accused why they were stupid to beat the man like that and he responded he wanted to know what they had with 1st Accused. While he was checking on the person who was injured, the lady and 2nd Accused went away. While he was wondering he heard someone calling 'Martin'. He called that person, he had a long stick. He asked him not to cause any trouble. The person removed Martin's (deceased) shirt and started fanning the injured person. After some time deceased opened the eyes and he advised them to go home

and stop fighting you may compare this evidence with that of P.W.2. He later learnt that the injured person died. He specifically mentioned 2nd Accused as the one who hit the deceased. In cross-examination he reiterated that the three persons who were sitting did not have any weapon, and were not from Mutimumu and that both Accused persons were friends. Mostly he reiterated what he had stated in examination – in - Chief.

P.W.4 Gabriel Kaba Kiambuthi is brother of the deceased. He was told by his mother at around 11 p.m. on the material date that the deceased was in great pain and asked his neighbour to assist and took him to Thika Police Station where he died at 5.45 a.m. next day while under treatment.

He also said how he helped to arrest suspects including one Edward Kariuki and did not know why he was not before the court.

P.W.5 Harun Kanyoike Kimani recalled that on the material date he accompanied P.W.2, P.W.6 and deceased to collect P.W.2's jacket. They were in all seven but the three stayed back who were Njeri, Githinji and Waweru. On the

way they met both accused persons coming from opposite direction. When they did not find girlfriend of P.W.2, they sat on the road side but after about two minutes both the Accused persons appeared. 1st Accused pulled P.W.6 and asked her who her boyfriend was. That is the time P.W.3 Baba Ciru appeared and Wairimu P.W.6 told 1st Accused that their affair was finished. Then 1st Accused slapped P.W.2 and he ran away and hid himself. After 15 minutes he came out and met the deceased and P.W.2 as well as on the way they met P.W.6. They all went back home. According to him both the Accuseds had sticks on them. During cross-examination he said how he met others after a football match in which he was a player. P.W.2 did not tell him about a fight or an encounter with 1st Accused before. They had gone to pick up his jacket. He just accompanied them and did not know details of houses at Mutimumu. He clarified his statement to the effect that it was not Edward Kariuki who was standing behind 1st Accused he did not know him but it was the 2nd accused. On the way the deceased was saying that 1st Accused should not step in Kiamwangi. He did not see fight and who beat the deceased.

P.W.6 Mary Wambui Nyambura was admittedly a girlfriend of 1st Accused and their relation had gone sour as the deceased arrived on the scene. She recounted several encounters with the 1st Accused on the material day in all of which the issue of their relationship was raised and all the time she stated that their relation was ended. She also stated of the incident where P.W.2 Paul was passing by and she told him to run as 1st Accused had a knife and 1st Accused beat her with a belt. At about 9 p.m. after going in and out of her house, she was with one Njeri (not called as witness) who also complained that 1st Accused had beaten her while going to Kiamwangi. They met Martin (deceased) Harun and P.W.2. The latter requested her to go with him to his girlfriend's house at Mutimumu. On the way, according to her, they met 1st Accused at about 9.30 p.m but did not talk to him. They were returning after not finding the girlfriend and met both Accuseds with sticks in their hands. 1st Accused held her and hit her with the stick and asked her who was her boyfriend. To avoid the fight she replied that none of them was her boyfriend. As everyone has stated, she also said that Baba

Ciru (P.W.3) arrived and asked 1st Accused to stop the fight but he did not take heed. She also said 1st Accused hit P.W.2 Paul and fight started. She said it was 1st Accused who hit the deceased and ran away. She left the scene and met one Edward Kariuki who with 1st Accused went back where fight was. After going some distance she decided to go back and

check and met the deceased, P.W.2 and P.W.5. Deceased was hit on head and she went with him to his home. At home he complained of headache and she called his mother who in turn called his elder brother (P.W.4) who looked for a vehicle and took him to hospital.

She testified that even though the deceased was unhappy on learning from P.W.2 that 1st Accused had hit her, he was not angry enough to take revenge. She also conceded in cross-examination that she did not see the 1st Accused hitting the deceased but was told so by P.W.2. Here you would recall P.W.2 stating he could not distinguish who was beating the deceased. She was also arrested and stayed in cells for about two weeks. She also stated the presence of Edward Kariuki

during material time and that he was also arrested. This Edward Kariuki has not been called as witness in this case.

P.W.7 took the two Accused persons to the Doctor to assess their ages and mental capacity to stand trial.

P.W.8 James Kiambuthi is a warden attached to Nairobi Remand and is a cousin to the deceased. On learning of death, while he was on leave, he moved to the scene and arrested two Kariuki's and 2nd Accused.

P.W.9 Police Constable Francis Kaba deposed that brother to the deceased (P.W.7) called him and informed him (P.W.7) about the offence and death at about 6 a.m. He reached Kiamwangi at about 7 a.m. He searched for suspects along with members of public and arrested them.

He also identified the body at Gatundu Hospital Mortuary for Post Mortem. The names were given by P.W.6 to the police. Both the accused persons were found around their houses and did not resist the arrests.

P.W.10 Police Constable Dominic Sele accompanied the relatives to identify the body of the deceased before post mortem was performed.

Both Accused persons denied any involvement in their unsworn statements. According to them 2nd Accused was escorting the 1st Accused back home after his visit. Near his home he heard voice of P.W.6 along with others whom he could not recognize and asked her who were her friends and whether one of them was her boyfriend. She denied and they started talking about their affair and invited her to come inside and at that juncture those people got up and surrendered them. They were five. Fight ensued and 2nd Accused joined in and he ran to his house. In the morning he was arrested.

2nd Accused's version of the night is similar to that of the 1st Accused.

The submissions were made. The learned state counsel emphasized on malice and common intention.

He also submitted that there is enough corroboration. He also contended that the Accuseds had enough opportunity to hide murder weapon and thus its non-production cannot defeat the prosecution case. Furthermore, Postmortem

produced is consistent with the injury that could be caused by

a blunt object.

Both Defence Counsel stressed on non-production of the murder weapon and insufficiency of and contradiction in evidence of eye-witnesses which has created enough doubt. They questioned the presence of the deceased and Prosecution witnesses P.W.2, 5 & 6 around the village which is far from their home which is Kiamwangi. Absence of one Edward Kariuki in the trial who was named as well as arrested, also is stressed.

Whether reasonable doubt is created, has to be decided by you.

Lastly I shall have to give you some explanation on the law.

This case is based on the evidence of witnesses who were present around the scene of crime and not on circumstantial evidence. Yes you have to decide on the credibility or otherwise of their evidence. You shall also decide whether the contradictions (which I have mentioned and brought to your attention) are so material that you will entertain doubt as to

involvement of each of the Accused persons. If you believe that testimonies of all of them are not straightforward then of course, you cannot rely on them. You have also to consider whether their testimonies or that of anyone is so impeached as to create suspicion in you mind, you shall have to discard the same.

Lastly the law on common intention is trite which is: if several persons join together for an unlawful purpose and one of them in furtherance or execution of that common intention kills a person all joined in are guilty of murder. Furthermore it is to be noted that while acting jointly each of them did not have to know that his act or acts would probably cause grievous harm.

I may also state that malice is defined inter alia, as intention to cause death or grievous harm to any person whether that person is killed or not and – more relevant to this case, is knowledge that the act or omission causing death probably would cause death or grievous harm to some person and it does not matter whether that person is killed or not or that it is accompanied by indifference whether death or

grievous harm is caused or not or more importantly that he does not wish that it may be caused.

With the above I am sure you shall be able to bring forth your opinion which may be unanimous or otherwise.

Dated and delivered at Nairobi this 3rd day of June, 2004.

K. H. RAWAL  
JUDGE.