



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

AT NYERI
HIGH COURT CRIMINAL CASE NO. 98 OF 2003

REPUBLIC PROSECUTOR

VERSUS

**1. CECILIA MUGURE
NDIRANGU)**

**3. GRACE WANGUI
NDIRANGU)**

**4. PHILIP KAGIO NDIRANGU)
ACCUSED**

J U D G M E N T

Cecilia Mugure Ndirangu, Grace Wangui Ndirangu and Philip Kagio Ndirangu (hereinafter referred to as the Accused 1, Accused 3 and Accused 4 respectively) were charged jointly with two others with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 17th day of June 2003 at Likii Village in Laikipia District within the Rift Valley Province they jointly murdered Robertson Kinyua Machina. The other two Accused persons who were James Mucheru Ngabi (Accused 2) and Samuel Mwirigi Thama (Accused 5) were acquitted at the close of the prosecution case under Section 306 (1) of the Criminal Procedure code.

Twelve witnesses have testified in support of the prosecution case. Their evidence was briefly as follows: _

Jane Wairimu Kariuki (P.W.1) and Patrick Wahome Mwangi (P.W.2) were the only eye witnesses to the commission of this offence. Both are neighbours staying in the same plot within Likii village. They were also neighbours to the deceased who was staying in the same plot with them. All were neighbours to Accused 1 and Accused 3 though Accused 1 and 3 were staying in a different plot but Accused 3 had a saloon within the same plot as P.W.1 and P.W.2.

On the night of 16th and 17th June 2003 at about 3.00 a.m. to 4.00 a.m. P.W.1 heard screams of “Thief Thief”, she came out of her house and heard the sound of something being hit. She moved to the gate and went into the plot occupied by Accused 1 and Accused 3. She met one Waweru a neighbour who was carrying a torch. P.W.1 grabbed the torch from Waweru and shone it to where someone was being beaten.

P.W.1 saw and recognised the person being beaten as the deceased. The deceased was pleading that he should not be killed. P.W.1 noted that the deceased was being beaten by a group of about 10 people out of whom P.W.1 only recognised Accused 3 whom she ex-changed words with when P.W. 1 pleaded with the people to leave the deceased alone as he was someone known but Accused 3 insisted that the deceased

was a thief.

P.W.1 maintained that Accused 3 was armed with a stick and that she saw Accused 3 hit the deceased on the head with the stick. P.W.1 ran back to her plot and called out to P.W.2 to go and help the deceased who was being beaten.

In the meantime P.W.2 had been woken up from his sleep by noises and a voice which he recognised as that of Accused 3 shouting “what had you come to do here” and the voice of a man pleading “don’t kill me.” P.W.2 went out of the gate and met P.W.1 who was coming from the direction where the noises were coming from. P.W.1 asked P.W.2 to go and help the deceased who was being beaten at the plot where Accused 3 resides. P.W.2 ran to the plot and found Accused 1, Accused 3, Accused 4 and two other men.

Accused 1 had a child strapped on her back and was holding a piece of wood about 3½ feet long. Accused 3 was also armed with a piece of wood, so was Accused 4. One of the other two men was also armed. P.W.2 noticed someone who was lying down and on shining his torch realized it was the deceased who had a cut on the head from the eyes. The deceased appeared to be already dead. P.W.2 asked them what they had done to the deceased and Accused 1 demanded to know who P.W.2 was. P.W.2 introduced himself as Baba Kama. Accused 1 took P.W.2 by the hand and led him to Accused 3’s door and demanded to know what the deceased was doing at the door. P.W.2 did not respond but went out of the plot and tried unsuccessfully to call the police.

Later the police came and P.W.2 went back into the plot and heard Accused 1 inform the police the dead man was a thief. The police then went away with Accused 3 and Accused 4.

At about 6.00 a.m. IP Patrick Mwita (P.W.8) who was the D.C.I.O. Laikipia received a report of the murder. He proceeded to the home of Accused 1 where he found a body which had multiple injuries lying near the gate. P.W.8 contacted the scenes of crime personnel. Cpl. John Mugo (P.W.10) of scenes of crime personnel went to the scene at 9.20 a.m. and took photographs showing various views of the deceased’s body and broken pieces of sticks which were near the body. In the meantime Oscar Munyua Wanjiru (P.W.4) a nephew of the deceased learnt of what had befallen his uncle. He went to the scene and saw the body of the deceased. P.W.4 contacted his brother Antony Kinyua Wanjiru (P.W.7) who also went to the scene.

After the body of the deceased was photographed, P.C. Timothy Kanake (P.W.11) moved the body from the scene to Nanyuki District Hospital mortuary.

When news of the deceased’s death spread through the village Peter Ndaiga Kinyua (P.W.5) and Philip Kiptoo (P.W.6) both residents of Likii village and members of the Youth vigilante group, recalled that during their patrol on the night of 16th and 17th March 2003 at around 2.00 a.m., they came across the deceased at the gate to the plot where the deceased was staying. The deceased was trying to open the gate using a small piece of wood. Members of the vigilante group, recalled that during their patrol on the night of 16th and 17th March 2003 at around 2.00 a.m., they came across the deceased at the gate to the plot where the deceased was staying. The deceased was trying to open the gate using a small piece of wood. Members of the vigilante group talked to the deceased who appeared drunk. They left the deceased still trying to open the gate. They were surprised to learn of his death the following morning and to find his body in the neighbouring plot.

On 26th June 2003 the deceased’s wife Mary Naisiae Kuseru (P.W.9) went to the mortuary and identified the body of the deceased to Dr. Macharia who performed a postmortem examination. The report of Dr. Macharia was produced in evidence by Dr. Walter Kayaywa (P.W.12) as efforts to trace Dr. Macharia were not successful. In the report Dr. Macharia noted that the deceased had several sharp cuts. These were on the head above the right eye and another on the left eye. There were also other penetrating sharp wounds on the skull. Internally the deceased had bonny tissue of the skull, dislocation at the lumbar axis joint, and injury to the spinal cord. Dr. Macharia concluded that the deceased died of cardio pulmonary arrest secondary to injury of the spinal cord, Dr. Macharia also examined all the 5 suspects

and prepared P3 forms showing that they were all mentally and physically fit to stand trial. The P3 forms were also produced in evidence by P.W.12.

When put to their defence, Accused 1, 3 and 4 each gave unsworn evidence and called no witness. Their evidence was along the same lines. Accused 1 is the mother of Accused 3 and Accused 4. On the material night they were all asleep in the same plot. They were woken up at around 3.00 a.m. by a lot of noises coming from the gate and dogs barking. Both Accused 1 and 3 came out of the house to find out what was happening. They saw people at their gate, they screamed and many neighbours came out with torches, it was then that they noticed the body of the deceased lying down. Accused 3 screamed and Accused 4 who was asleep in another room woke up with his friends and went to see what was happening. Many people had come around and two of the people claimed the deceased was a neighbour known as 'Baba Muthoni' Accused 3 and her brothers went and made a report to the police. All the three Accused persons maintained that they did not know how the deceased died.

It is clear from the results of the post mortem examination that the deceased sustained injuries on the skull, lumbar axis joint and the spinal cord, and that the deceased's cause of death was cardio pulmonary arrest secondary to injury of the spinal cord. The question is, how did the deceased sustain these injuries? Was it a result of any act or omission on the part of any of the Accused persons? If so were the Accused persons acting in common and did they have any intention to cause the death of the deceased?

P.W. 1 testified that she saw the deceased being beaten by a group of 10 people. P.W. 1 swore that she saw and recognised Accused 3 in the group and that Accused 3 was armed with a stick. P.W. 1 was certain that it was Accused 3 because when P.W. 1 pleaded that the deceased be left alone as He was someone known to be residing in the neighbourhood, it was Accused 3 who insisted that the deceased was a thief. P.W. 1's evidence is corroborated by the evidence of P.W. 2 who was woken up by a commotion and heard a voice He recognised as that of Accused 3 shouting and that of a man pleading not to be killed and that when P.W. 2 went to the plot of Accused 1 and 3 He found Accused 1, Accused 3, Accused 4 and 2 other men all armed with pieces of wood and the deceased lying down already dead. Against this evidence is the defence of Accused 1 and Accused 3 that they were woken up from sleep by noises. They saw people at their gate, raised an alarm and neighbours came in response thereto, and that it was then that Accused 1 and 3 noticed the body of the deceased.

Obviously both versions cannot be correct. I find that it is the version given by Accused 1 and Accused 3 which was not true. This is because both P.W. 1 and 2 gave a very clear, concise credible and consistent account of the events. Both witnesses were neighbours of Accused 1 and Accused 3 and had no reason to lie against them. I have taken note of the fact that the evidence against Accused 1 and Accused 3 is basically that of identification and there is therefore need to critically analyse and test the evidence.

Although it was at night both P.W. 1 and 2 were able to see and clearly identify Accused 3 with the aid of a torch. P.W. 1 also spoke to Accused 3 and recognised her by voice, whilst P.W. 2 also heard and identified the voice of Accused 3 in the commotion even before He actually saw her. I am satisfied and do find that Accused 3 was positively identified by both P.W. 1 and 2. As regards Accused 1, she was only identified by P.W. 2. Although it was dark P.W. 2 not only recognised Accused 1 with the aid of a torch but also spoke to Accused 1 and was therefore able to positively identify Accused 1. Taking into account that the deceased was assaulted within the plot of Accused 1 and that Accused 1 was well known to P.W. 2 the possibility of a mistaken identification was virtually nil. I believe P.W. 2 and accept that He positively identified Accused 1.

It is further evident that P.W. 5 and P.W. 6 who were youth wingers saw the deceased at around 2.00 p.m. struggling to open the gate to the plot where the deceased was staying. The deceased appeared to be drunk. It is not clear how the deceased ended up at the plot of Accused 1 and 3 which was said to be across the road about 20 metres away. It is apparent that the deceased must have either intentionally or unintentionally ended up at the plot of Accused 1 and Accused 3 at that ungodly hour of 3.00 a.m. It is not surprising that Accused 1 and 3 concluded that the deceased was a thief and raised an alarm causing the deceased to be subjected to mob justice. The evidence of P.W. 1 and 2 regarding the noise, the group of people, the conversation between P.W. 1 and Accused 3, the conversation between P.W. 2 and

Accused 1 and the fact that Accused 1 and Accused 3 were armed with pieces of wood all clearly confirms that the deceased was being subjected to mob justice because it was believed He was a thief. I do therefore reject the defence of Accused 1 and Accused 3 and do find that they did actually participate in beating up the deceased. I find further that the deceased died as a result of the injuries received from this beating. I have no doubt that Accused 1 and Accused 3 were acting in concert. Their intention however was not to kill the deceased but simply to punish him as they believed He was a thief. I find therefore that both Accused 1 and Accused 3 did not have any malice aforethought to cause the death of the deceased. Accordingly I find Accused 1 and Accused 3 not guilty of the offence of murder but concur with the majority opinion of the Assessors and find Accused 1 and Accused 3 guilty of manslaughter contrary to Section 202 (1) as read with Section 205 of the Penal Code.

As concerns Accused 4 P.W. 1 did not identify him as one of the persons she saw beating up the deceased. It is P.W. 2 who maintained that He identified Accused 4 as one of the persons whom He found at the scene armed with a piece of wood. It is evident that visibility at that time was not very good as it was still dark. P.W. 2 was therefore using a torch and also maintains He was able to identify Accused 4 with the aid of a moonlight. Unlike Accused 1 and 3 there is no evidence that Accused 4 spoke or did anything that could have assisted P.W. 2 to positively identify him. It is evident that there were many other people around and in the absence of any other evidence implicating Accused 4, the possibility of an honest mistaken identification cannot be ruled out. I do therefore reject the opinion of the Assessors in regard to Accused 4 and give him the benefit of doubt and find Accused 4 not guilty of the offence of murder.

The upshot of the above is that I acquit Accused 4 and order that He shall be forthwith set free unless otherwise lawfully held. I convict Accused 1 and 3 of the offence of manslaughter.

Dated, signed and delivered this 23rd day of December 2004.

H. M. OKWENGU

JUDGE