



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 33 Of 2001**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**BENSON RWARO KARIUKI.....ACCUSED**

**J U D G M E N T**

The Accused, BENSON RUARO KARIUKI, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 30<sup>th</sup> of July, 2000 at Mukuru Kwa Ruben Village, Industrial Area, within Nairobi Area, murdered MWANGI, NYAMUBUA WAIGA. The Accused denied the offence and the case went on for trial.

Briefly, the evidence relied upon by the prosecution was as follows:-

The deceased, MWANGI NYAMBURA WAIGA, was at the time of his death on the 30<sup>th</sup> of July, 2000 aged about 20 years. He was staying at Mukuru Kwa Reuben, slum Village in Industrial Area, Nairobi. On the evening of 30<sup>th</sup> of July, 2000, one John Mwangi Njoroje (PW1) who was a barber at the said slum village, testified that the deceased who was his customer as well as a friend, went to his kiosk at about 5.30 p.m. He was then attending to a certain customer. The deceased then offered to go and buy him some tea in a nearby hotel. He waited for a while as he finished shaving the customer he was attending to. Thereafter they both left for the said hotel for some tea. As they were walking along the road to the said hotel side by side holding their hands, shoulder to shoulder, he was surprised when the deceased suddenly ran in front of him while holding this back. He noticed that he was bleeding from the back and when he turned back to see what could have happened, he saw the accused holding a blood stained knife just 1 meter away. He ran away while in a state of shock back to his barber's shop where he had left one Gitau. He narrated to Gitau what had happened and asked him as well as a few friends to accompany him so that they could rush his friend Mwangi who had been stabbed to the clinic. He told the court that the incident occurred while they were about 10 meters from the hotel where they were going to take some tea. The scene was about 20 meters away from his shop.

PW1 went on to testify that when they went back to the scene, they found the deceased lying down by the roadside in a pool of blood. The accused was then nowhere to be seen. They then carried the deceased to St. Marks clinic within the said slum village. This was confirmed by the clinical officer in charge of the clinic, Nahason Omari (PW3). He testified that while he was in his clinic on the evening of 30<sup>th</sup> of July 2000, a group of about 10 people brought the deceased to his clinic. He noticed that the said group of people were quite rowdy and were apparently drunk and were smelling alcohol. He asked them what had happened, and a member of the group who was sober told him that the deceased had been stabbed in the course of a fight. He noticed that the deceased was then bleeding profusely from a single wound on his back and he told the people who had brought him to place him on his examination table and then leave the clinic. He asked two of them to remain behind with him. As he examined the deceased, he noticed

that he was already dead. He had a single stab wound on his back. He then covered the said wound with a swab. He told the said man to carry the deceased out of his clinic to the mortuary. They carried him and placed his body outside the clinic. Many people gathered at the scene and later after about 30 minutes, police officers came and carried away the body.

In the meantime, members of the public and the Youth Wingers looked for the accused before the police officers arrived at the scene. They found him and beaten him up thoroughly and brought him back to the clinic where the deceased was lying. They also recovered from him a knife (exh.1). They made him to sit down next to the body of the deceased as they waited for the police whom they had telephoned to come. The murder weapon, the knife (exh.1) was placed next to the body of the deceased. This was confirmed by John Mburu Kinyanjui (PW2) who was among the people gathered at the scene outside the clinic. The same was also confirmed by C. I. Michael Toroitich (PW7) who was alerted over the incident by the police controller and proceeded to the scene in company of other police officers. He stated that he found the blood stained knife (exh.1) placed near the body of the deceased and the accused who was the suspect seated next to the body surrounded by a large group of people. He observed that the accused had physical injuries on his body and he was informed that he had been beaten up by the mob at the time of arrest. He called the scene of crime personnel to the scene. After the body was photographed he escorted the same together with the relatives of the deceased to the City Mortuary. The accused was detained at the Industrial Area Police Station for a while and later taken to the Hospital for treatment.

While at the police station, the accused was on the 14<sup>th</sup> of August 2000 taken before I.P. Baraza (PW4) to record a statement under inquiry from him. He made a statement which was admitted in evidence without any objection by the defence (exh.2). It was a defensive statement in which the accused confirmed to have stabbed the deceased and gave the circumstances of the assault which he said was in self defence. He repeated the same in his defence during the trial as I will set out shortly.

On the 25<sup>th</sup> of August 2000, the accused was taken before a police 00000surgeon, Dr. Sephania Kamau (PW5). He found that he was aged about 50 years old and was mentally stable. He had visible injuries on his body with a fracture of the nossal bridge which was swollen. He had scars and healing wounds on his body. He gave the doctor a history of having been assaulted in the course of a fight by the deceased and later by his friends. He assessed the degree of injury of the accused as grievous harm.. He completed the P3 form which he produced in evidence (exh.3).

On the 8<sup>th</sup> of August 2002 of August 2002, Dr. Paul K. Maundu (PW6) of the Medical Legal Department of the Ministry of Health, performed post mortem examination on the body of the deceased at the city mortuary after the same had been duly identified to him by the relatives of the deceased. He found the deceased to have been aged about 20 years and of good nutrition. He had sustained a single deep penetrating wound on the posterior side of his chest between the 11<sup>th</sup> and 12<sup>th</sup> rib. The wound was measuring 2 inches in width and gapping of  $\frac{3}{4}$  inch. It penetrates the left lung and the heart. There was heamotharax – blood in the chest cavity. As a result of his examination, he formed the opinion that the cause of death of the deceased was caused by the stab wound on the chest with an injury to the left lung and heart which was probably caused by a sharp object. He prepared and signed the post mortem report which was produced in evidence (exh.4). The accused was later charged with the offence of murder.

The accused in his defence elected to give un sworn evidence in which he reiterated the contents of his statement under inquiry (exh.2).

He testified that on the material day, he returned from work at around 6 a.m at his house at Kwa Reuben slums village. He then carried house chores. Later at 10.30 a.m. his friend, Mwangi Wabata came to see him and they left for some traditional liquor within the village. While in the bar, his brother Muturi came with one Nganga who we had once visited. They told him that Nganga had been robbed of his luggage by the villagers boys who alleged that he had hit a certain child with the said luggage. He left with them to look for the said boys and found them Njoroge and Ngumi. He asked for the luggage and also where the child who had bee allegedly hit by the said luggage was so that he would take him to the hospital but instead, both Njoroge and Ngumi just demanded for him shs. 400/- so that they could return the said luggage. He told them that he had no money. At that stage, the deceased appeared ad started hitting him

with his fist demanding to know what he had just stated. He decided to escape from that place and went up to the Kiosk where his wife sells some water to look for some money. The said boys followed him to the said place and he told them that he had no money. He then advised them owner of the luggage to report the matter to the village Chairman. Later in the evening, while on his way back to his house to prepare to leave for his night duties, he met with the said boys who again started demanding the money from him. They again started beating him and in the process he sustained loose teeth. The accused was among the said boys who were beating him. As he struggled with the deceased who was then armed with a knife, he managed to snatch the knife from and used it to stab him in self defence. He had this to say:

"I am the one who had stabbed him with that knife as we struggled. After I had stabbed him, he left me."

Later he stated as follows in his evidence:-

"In short, I wish to say that I had stabbed the deceased in self defence using his own knife. That is all."

I have given careful consideration to the evidence that was adduced in this case by the prosecution witnesses and the accused in his defence. I am satisfied on such evidence that prior to the incident which took place at about 5.30 p.m in which the accused admittedly stabbed the deceased with a knife on the posterior side of his chest thereby causing his death, there must have been another incident during the day as narrated by accused in which he had been assaulted by the deceased and his friends as narrated by the accused when he failed to raise shs. 400/- which they demanded before they could release to his visitor the luggage which they had snatched from him for having alleged he had hit a certain child with such luggage as he was walking along the road within the slum village which was busy with human traffic. Another incident later erupted in the evening of that day shortly after 5.30p.m. During this 2<sup>nd</sup> incident, John Mwangi Njoroge (PW1) who is a great friend of the deceased, testified that the accused ambushed him and the deceased from behind as they were walking from his barbers shop to a nearby hotel to take some tea. It was his case that he was surprised to see the deceased with man he was walking shoulder to shoulder running a head of him while bleeding from the back and when he looked behind to see what could have happened, he was surprised to see the accused holding a knife just one meter away from him. He was scared and he ran back to his shop to alert his friend Gitau whom he had left behind and other people to go and assist the deceased.

The accused on the other hand, testified that it was the accused and his friend who again followed him on his way back home where he was going to prepare to leave for his night duties and again attacked him while still demanding the money from him. He even lost two teeth in the process. He testified that the deceased was then armed with a knife which he managed to snatch from him and stabbed him in self defence. He maintained that he had resisted to stabbing the deceased just in self defence. The deceased and his friends then left him only for his friends to return later with a mob, beat him up and took him to the place where the deceased was lying dead outside the clinic from where he was arrested by the police.

The assessors considered version of the prosecution regarding the incident as narrated by the friend of the deceased, John Mwangi Njoroge (PW1) who was an eye witness to the said incident on the one hand, and the testimony of the accused on the other hand. They preferred the defence of the accused to that of the prosecution regarding the cause of the said incidents. As mentioned to the assessors during my address in the summing up, I wanted them to thoroughly consider the cause of the incident as I find it strange that the accused who was then aged approximately 50 years would decide to stab to death the deceased who was a young man aged only 20 years without any cause. They came to the unanimous conclusion that the accused who had been covered by the deceased and his friends who were fighting him, must have acted in self defence. They returned a verdict of not guilty.

I have also evaluated the evidence in record in its totality, I am in agreement by the unanimous opinion of the assessors that the accused must have acted in self defence. Indeed Dr. Paul K. Maundu (PW6) who carried out the post mortem examination of the body of the deceased found that the fatal deep stab wound was on the posterior side of the chest between the 11<sup>th</sup> and 12<sup>th</sup> rib. This means that the wound was inflicted on the deceased on the front side as opposed to the back as stated by PW1. The position of the stab would to my mind therefore indicates that it could have been inflicted by someone who had attacked

the deceased from the front as opposed to someone who had attacked him from behind. The injury could therefore have been inflicted by the accused in self defence as he stated. Moreover, it would appear that the deceased must have been in company of drunkard youth as stated by Nahason Omari (PW3), a clinical officer at St. Marks clinic with the said slum village where the deceased was first taken. He told the court that almost all the youths numbering about 10 who had taken the deceased to his clinic were quite drunk except one who told him that the deceased had been injured during a fight. That person who spoke with PW3, who stated that there was a fight in which the deceased was injured ought to have been called as a witness in different angle consistent with the testimony of the accused as opposed to that of PW1 who merely stated that they had been ambushed by the deceased from behind when he stabbed the deceased. I do not find PW1 to have told the court the whole truth.

The conclusion to which I have reached is that the accused must have stabbed the deceased in self defence while he was under attack by rowdy youths who were trying to demand shs. 400/- from him by unfair means. The defence of the accused has not been satisfactory rebutted by the prosecution. I accept it. It is a complete defence to the charge against him.

For reasons stated, I do not find the accused guilty of the offence of murder. I acquit him of the offence. I order that he shall be set at liberty and be released forthwith.

Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2002.

S. O. OGUK

JUDGE

Order: I direct that the defence counsel be paid for his brief and all the assessors be aid their expenses and allowances in this case. It is so ordered.

S. O. OGUK

JUDGE

**6/11/02**