



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 6 OF 2000

REPUBLIC ::: PROSECUTOR

VERSUS

KITHEKA NTHIA ::: ACCUSED

Coram: J. W. Mwera J.
 Matata Advocate for Accused
 Orinda State Counsel for Republic
 C.C. Muli

J U D G E M E N T

The information laid against the accused herein fell under S.203 as read with S.204 Penal Code in that on 7.11.98 at Kilimani village, Kambu, Makueni, he murdered Wambua King’oo.

The State called seven (7) witnesses with effect from 12.3.2001 beginning with Dr. P. Lumumba (P.W.1).

P.W.1 performed a post mortem on the deceased Wambua on 17.11.98. He observed a cut on the right cheek and a penetrating injury into the lower abdomen. The intestines had been cut – probably inflicted by a sharp object. The doctor held the view that the deceased died because of this penetrating injury (Exh.P1).

Mbula Mailu (P.W.2) was at the home of the deceased’s (Wambua) mother with other people who included Maingi Kyalo (P.W.3) drinking local brew. Maingi however categorically denied this. P.W.2 said that she was first to arrive and the deceased served her. Then other patrons arrived. That the accused came and greeted the party. Then Maingi wondered why he was usually well turned out. That the accused answered that he wore clothes bought by his children and he washed regularly. That at that point, apparently without provocation Maingi (P.W.3) threatened to beat up the accused until he became dirty. That the deceased told these two old men to go from the place and solve their differences outside. That Maingi went round the house. The accused removed his coat and followed him. That then Maingi ran to his home nearby and returned armed with a bow and arrows. He aimed at the accused; the rest of the party fell in between and also shouted in protest. Maingi dropped his weapons into a sisal row there. The accused approached and boxed Maingi. The two fought. The deceased went there asking why the accused was hitting Maingi. The deceased then butted the accused with his forehead and he fell. Other patrons came up and separated the two. That this was at about 5 p.m. With the drinking spoilt the party left; Maingi’s bow and arrows were taken away by Agnes Muli, his younger sister.

That P.W.2 got home and proceeded to the home of the deceased to get some salt. He found the deceased present but his wife Priscilla had gone to milk cows at the home of the deceased’s mother. As

the 2 sat waiting in the approaching darkness, a figure appeared and the deceased thought it was his wife. It was a moonlight and P.W.2 said that it was the accused. P.W.2 recognised him. He ran there armed with a panga plus bow and arrows. That he slapped P.W.2 with a panga, she fell down and scampered under a chicken shed. The accused then ran into the door way where the deceased was standing and cut him with a panga on the right side of the head. That the deceased had recognized his assailant. From where P.W.2 was – not lying down, in his shed she saw the accused shoot the deceased with an arrow. That the deceased fell down and the accused fled. That all had taken place without the accused uttering a word and P.W.2 did not raise an alarm because of fear. That the deceased called out to P.W.2 to go and help him. He wanted her to remove an arrow lodged in his groin. That Mbula (P.W.2) did so – using her teeth since the arrow head had stuck far in the muscle on the right side of the abdomen. She then screamed as she headed home – not too far off. She vomited; she was carried back to Wambua's home (the deceased) and a motor vehicle came to take them both for treatment. Later Wambua died in hospital. P.W.2 could not say for certain that the arrow head produced in court was the one she had removed at night on the night in question..

In cross examination this court was told that the head butt cut the accused above the right eye. After the deceased and accused were separated and the accused went to his home, that the second fight took place at about 7.30 p.m. - this time at the deceased's home. That after being slapped by the accused using a panga, this witness, Mbula, who sat up but did not lie down in the kitchen shed saw all that went on between the accused and the deceased despite the darkness. It was a moonlit night and the whole thing took 5 minutes. He recognized the accused at this hour because they are villagers and neighbours for long.

That the P.W.2 took out the arrow head and threw it on the ground. When people came, they collected it. P.W.2 did not see its shaft.

As said earlier Maingi Kyalo (P.W.3) denied ever having been at the deceased's mother's home drinking as P.W.2 claimed. He took part in no fight and witnessed none. He had been at his home all the day – on 7.11.98 with an ailing eye. That he knew all the ailing people mentioned: the accused, the deceased, P.W.2 etc. He knew Wambua was killed by the accused from Peter, the deceased's younger brother.

Priscilla Musewa Wambua (P.W.4) is the widow of the deceased Wambua. She went milking cows at her mother-in-law's compound on 7.11.98. When she was finishing that, she heard screams from her own compound by people who were running away. She rushed home only to find her husband injured, lying down unconscious and bleeding. P.W.2 (Mbula) was there. P.W.2 told her that the accused shot at the deceased and herself. P.W.2 showed her the arrowhead used. People gathered and the deceased was taken to Makindu District hospital. There on admission he was stitched on the right side of the abdomen and over the right eye. Wambua died after 3 days. P.W.4 identified the body to the doctor who performed the post mortem. It was released for burial. That when P.W.4 heard the screams she ran to her compound with her mother-in-law. They found when the accused had ran off. P.W.2 told them that the accused shot the deceased. P.W.4 did not see it. That the accused ran off screaming.

P. C. Onesmus Mutunga (P.W.5) was in the office when IP Garama instructed him to accompany him to view Wambua's body at the local hospital mortuary. An entry had been made in the occurrence book in respect of Wambua's death and an arrow head had been brought into the office and kept in the cash box. P.W.5 noticed a cut on the face and on the abdomen of the deceased probably caused by a sharp object. That on 9.11.98 Administration Police from Kambu District Officer's Office had delivered the accused at P.W.5's police station. They were with members of the public and that they also delivered an arrowhead, a bow plus two (2) arrow shafts (Exh.P2 A – C). P.W.5 had taken all of them into safe custody. None were however submitted to the government chemist for his examination and report. Indeed it may be added that in the whole evidence it is not shown who recovered the bow and two arrow shafts and from whom or whose home. For the arrowhead P.W.2 said that she retrieved it from the deceased body after the accused shot him and fled. P.W.2 showed it to P.W.4 who in turn with her mother-in-law handed it over to P.W.5.

P.W.5 told the court that in assisting IP Garama in the investigation, he recorded a statement from

Grace Nduku Kingoo, Wambua's mother who has since died. Her statement produced under S.33 Evidence Act (Cap 80) (Exh.P3A – B) more or less repeats what P.W.4 said about the arrival at the scene and finding P.W.2 there 20 with the accused lying down injured.

On cross examination P.W.5 told the court that when he received the arrow head, it had no blood stains or flesh on it. That the two arrow shafts had no arrow heads. P.W.5 learnt in the investigations that the accused was arrested when he went to the office of the District Officer (Kambu) to report an affray. P.W.5 did not notice if he bore any injury.

IP Benjamin Muli (P.W.6) was next. On 28.11.98 he took a statement under inquiry from the accused. The accused had told him that when they were drinking the deceased bore bow and arrows and in the disagreement that ensued, he shot first at the accused. That in turn the accused took up a bow and arrows. That the two met at a point and that is where the deceased shot first. He ensued. The accused then armed, shot and ran off before seeing where his arrow hit. Later day he learnt that Wambua died of an arrow shot. P.W.6 produced that statement (Exh.P6A – B) saying that it was voluntary. That P.W.6 learnt that Maingi Kyalo started the whole train of quarrels which ended with the accused and the deceased shooting at each other. That in that statement the accused had claimed that the deceased's brother, Kilaka, had at one point held the accused from the back as the deceased beat him. That after the incident of 7.11.98 on 8.11.98 the accused went to report the fight at the District Officer's office (Kambu). That at no time was he certain that his arrow hit the deceased. That closed the prosecution case.

The accused testified on oath. On 7.11.98 he had joined other revellers to drink local brew in the home of the deceased. He found Mbula (P.W.2) there. The brew ran out and the deceased told them that they proceed to have some more at his mother's house. They proceeded there and the deceased brought out the brew in mugs. As the party progressed Maingi Kyalo (P.W.3) asked the accused why he took beer alone and why he was always smart. Accused told P.W.3 to mind his business whereupon P.W.3 threatened to beat the accused badly. That P.W.3 went to his house and returned armed with a bow and arrows. Quite probably the accused sensed danger; he fled to hide in a chicken shed. Then at that point Nduku King'oo the deceased's mother arrived from the market. She held Maingi. Maingi dropped the arms and charged the accused. The accused did likewise and the clash got Maingi to fall on the ground. Kilaka Kingo ran and held the accused from the back. The deceased came and started beating him. The two brothers told their mother that they were beating the accused for assaulting Maingi – their relative. So Nduku told the accused to run home.. He obliged; he had been injured above the right eye. When he was at his home, it is nearby, he was able to see the deceased arming himself with a bow and arrows. The accused did likewise. The deceased shot at him first. The accused shot back and fled. He went home and slept. The following day he went to report the scuffle at the District Officer's office (Kambu). He wanted to be taken to hospital and then the police station. He was not hiding and he thought that his attackers had been arrested in the meantime. On 9.11.98 the accused was taken to the police station where he was remanded and not given a P.3 form he desired because he had been injured in the assault of 7.11.98. That when he shot at the deceased he did not know if his arrow got its aim. The accused denied and refuted Mbula's testimony that there were two fights on 7.11.98 and that the last one at 7.30 p.m. in the deceased's home resulted in the death. To him there was only one fight – at about 4.30 p.m. He denied murdering the deceased on the basis that when he shot back he did not even know if his error caught the deceased. That both of them including Mbula (P.W.2) were drunk.

In cross examination, the accused said that he had never had a quarrel with the deceased. And that Mbula's story that he cut the deceased with a panga and then shot him was not true. He wondered why she testified thus. That the accused on arming himself after seeing the deceased do so did not go into the compound of the deceased. That the two exchanged arrow shots on the land lying between their homes – on Mbula's land.

The accused also said that Priscilla (P.W.4) had returned from the market with her mother-in-law when they got home they found the two Kingoo brothers assaulting him. At no time did he arm himself to hunt the deceased down. He denied further that he had been at the deceased's home at about 7 p.m. when Mbula, who was milking cows, heard screams from there. The accused attributed that stand by P.W.4 on the basis that it was being claiming that he had murdered her husband otherwise the two had no grudges

between them.

After final submissions, summing up to the assessors and all, the assessors returned oral opinions that the accused was guilty of manslaughter.

Indeed from all the evidence a charge of murder has not been proved. Malice aforethought was not established, despite Mbula (P.W.2) claiming that two fights took place, with the one at 7.30 p.m. ending in the death of the deceased. All are agreed that there was drinking of local beer first. Maingi (P.W.3) denied it but this court is inclined to believe the accused and Mbula up to this point that he was the source of whatever fracas followed at the drinking on 7.11.98. Both the accused and P.W.2 say that Maingi used rather insulting language against the accused wondering why he drunk beer alone and wore smartly. Then from the blues he threatened to beat the accused to pulp. P.W.3 (Maingi) looked quite an old man and one cannot say that the accused is any younger either. Again both the accused and P.W.2 are agreed that Maingi went to his home and returned armed with bow and arrows to attack the accused. That when that did not materialise he dropped the weapons and there was a scuffle between the two. That at that time deceased joined on the side of Maingi and butted the accused causing him injury above the right eye. P.W.2 did not say that Kilaka, the deceased's brother joined his brother to assault the accused. The accused testified so. So far no shooting or cutting.

When the deceased was operated on by Dr. Lumumba (P.W.1) he bore a cut on the head and a penetrating injury into the abdomen cutting the intestines. The accused denied causing such injuries especially the panga one. However this is where his story and that of P.W.2 Mbula comes in sharp contrast.

Mbula (P.W.2) told the court that after the initial fight wherein Maingi had been the cause the deceased and the accused went there separate ways. But that in the evening at about 7.30 p.m. while P.W.2 was in the deceased's home to borrow some kitchen item the accused showed up armed with a panga, bow and arrows and attacked P.W.2 first. He slapped her with a panga and she ran to take refuge in a nearby chicken shed from which point, in the gathering night, she saw her neighbour and villager, the accused, first cut the deceased with a panga and then shot him with an arrow. That he did all this without uttering a word then he ran off. But that Mbula had recognized the accused in the moonlight. She had not screamed then for fear, but she did so when the accused ran away. That when the deceased called to her to go and remove the arrow lodged in his groin, she did so with her teeth and retrieved an arrow head which was produced in court. She could not identify it.

On his part the accused denied that there was a second fight in the evening at the home of the deceased. To him, and he maintained this as per P.C. Mutunga (P.W.5) and IP Muli (P.W.6) as well as his evidence here, that there was one continuous fracas and during the day. That after he had clashed with Maingi and the two (2) Kingoo brothers including the deceased, had assaulted him for it, their mother Nduku came home from the market and told them to stop it. That when they did so the deceased ran to his house and took up a bow and arrows. He had seen the doing accused likewise and the two met on a neutral ground, on Mbulas land. That the deceased shot at the accused first. Apparently he missed. Then the accused took his aim at the deceased, released his arrow and ran off before knowing whether it hit its target or not. That he went home and slept – no inquiries or disturbances from the deceased's family. That when he went to report the scuffle at the District Officer's office, (Kambu) his arrest followed.

Now these two stories from P.W.2 and the accused are totally opposed. Priscilla (P.W.4) told the court that when she answered screams from her home on 7.11.98 after she had been milking cows at her mother-in-laws house, she found the deceased lying down injured, unconscious and bleeding. There P.W.2 told her that the accused had caused the injury. P.W.4 did not witness the event.

In this state of things this court cannot believe P.W.2 more than the accused. It can be presumed that the accused's arrow caught the deceased in the groin and injured him because he told the court that he shot at the deceased. But it cannot be said that that arrow is the one whose head was produced in court. If the deceased was bleeding that head ought to have had bloodstains and a government chemist would have said if the blood on it belonged to the deceased. That bit of evidence was omitted by the State. Further,

where did the bow and arrows shafts produced in court come from? Did they belong to the accused, to Maingi or to the deceased?

This court is of the view that the accused was assaulted in the deceased's home. He was injured. Him and the deceased armed themselves and they shot at each other with similar weapons – bows and arrows. While the deceased's arrow, he shot first, missed that of the accused caught him. No doubt both were engaged in an unlawful act and the accused went to report the affray at the District Officer's office (Kambu). But it turned out his victim died. Other than being in the deceased's home initially, the deceased first assaulted the accused for fighting with Maingi. Both the accused and P.W.2 are agreed on this. However this court was unable to believe that from there the fight was continued later in the evening. Both the deceased and the accused armed themselves with bows and arrows and fought on – on Mbula's land. The overall picture is that the deceased took the upper hand in this. Accordingly this court is not inclined to find the accused guilty even on the lesser charge of manslaughter. He is acquitted of the offence as laid.

Judgement accordingly.

Delivered on 7.5.2001.

J. W. MWERA

JUDGE