



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CRIMINAL CASE NO 116 OF 1999**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**DAVID RUO NYAMBURA**

**MATHEW OCHIENG**

**HARUN NGANYI**

**JOHN MWANGI**

**MICHAEL OUMA OBUYA .....ACCUSED**

**JUDGMENT**

David Ruo Nyambura (1st accused) Mathew Ochieng (2nd accused) Harun Nganyi (3rd accused) John Mwangi (4th accused) and Michael Ouma Obuya (5th accused) are charged with murder contrary to section 203 read with section 204 of the Penal Code. Particulars of this offence are that: on the 15th May, 1999 at Dandora Estate, Nairobi, within Nairobi Area, jointly with others not before the Court, murdered Joseph Kinyanjui Njiinu (the deceased).

The accused pleaded not guilty and their trial commenced on the 16<sup>th</sup> May, 2000. The prosecution has called twenty three witnesses while the accused have, each, given unsworn statement and called no witnesses. Initially there were seven accused persons who were charged with this murder offence in the Chief Magistrate's Court, Nairobi, in Criminal Case No 1297 of 1999. They included all these five accused persons and two others: Thomas Kagiri Karugu and James Omito Ikhori. Committal documents were presented to the Chief Magistrate and to the accused persons on the 29th October, 1999 and a ruling was delivered by the Chief Magistrate on the 15th November, 1999. He committed these five accused persons to this Court under section 232(2) of the Criminal Procedure Code for trial for murder, and he discharged Thomas Kagiri Karugu and James Omito Ikhori under section 233(1) of the Criminal Procedure Code, for lack of evidence.

Murder is defined in section 203 of the Penal Code. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused.

It is provided in section 107 of the Evidence cap 80 as follows:-

“107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person”

An accused person does not assume any burden to prove his innocence in a criminal case. He is obliged only, if he so wishes, to give an explanation or to raise a defence to the charge, which is probably or possibly true. If he does this, then he discharges his burden of proof and his explanation or defence must be accepted.

There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction, namely: (a) The death of the deceased, and cause of that death. (b) that the accused committed the unlawful act which caused the deceased's death and (c) that the accused had malice aforethought. The issue for determination in this case is whether these three ingredients of murder have been proved by the prosecution beyond reasonable doubt.

The background facts to this case are these. In 1994-1995 a group of *matatu* touts formed themselves into an association loosely called “*Kamjeshi*” whose main assignment was to manage *matatu* stages in Dandora and along route 32 and 42 (Dandora-Nairobi) and also to manage the *matatu* stages in the city centre covering these two routes. This management of the stages involved collection of money from *matatu* owners through their drivers to be paid to the members of “*Kamjeshi*” who were rendering *matatu* tout services. According to Mr John Macharia Maina (PW 7) a *matatu* operator himself along route 32, Thomas Kagiri was elected in 1995 as the Chairman of “*Kamjeshi*”. He headed this association upto 1998 when he was voted out. Ironically Thomas Kagiri did not own any *matatu* vehicle operating along those routes and it was therefore decided that he had no business managing *matatu* stages. When Thomas Kagiri lost control of “*Kamjeshi*” he started to cause trouble to *matatu* owners who had been opposed to his association.

The deceased was the Treasurer of Dandora Route Matatu Operators Association. He therefore was opposed to the activities of *Kamjeshi*. It is the evidence of Timothy Mwangi Njiinu (PW 5) a brother of the deceased, that he witnessed a quarrel between the deceased and Thomas Kagiri on 7th May, 1999 when the said Thomas Kagiri threatened to kill the deceased. It is the prosecution's case that members of *Kamjeshi* attacked and killed the deceased on that 15th May, 1999 at stage 41, Dandora Estate Nairobi. Death of Joseph Kinyanjui Njiinu, the deceased is not in dispute. Patrick Nganga Njiru (PW 4) went to Buru Buru Police Station on 17th May, 1999 and accompanied police constable Michael Magero (PW 22) to the City Mortuary where they identified the body of the deceased to Dr Alex Kirasi Olumbe (PW 19). It is the evidence of Dr Olumbe (PW 19) that the deceased's body was extensively soiled in blood and had multiple injuries which he recorded in the postmortem form to include: laceration of the left lower limb (4cm long), two incised wounds on the left side of the neck (6 cm long) stab wound on the right upper abdomen (4.5 cm x 1 cm), stab wound on the right loin measuring 4 cm x 1 cm, stab wound on the mid-path front of the right thigh measuring 5 cm x 1 cm, stab wound on the front of the lower part of the right leg 1.5 cm, stab wound on the lower part of the right leg 1.5 cm x 0.5 cm, stab wound on the lower part of the right leg measuring 4 cm x 1 cm, incised wound on the lower part of the right leg 6 cm x 2 cm, stab wound on the back of the left leg 6 cm x 1 cm, stab wound on the back of the left ankle joint measuring 8 cm x 1 cm, and stab wound on the right mid-back measuring 7 cm x 1 cm. Dr Olumbe found accumulation of the blood around the heart due to severing of the blood vessels at the root of the heart. Cause of death was loss of blood, coupled with accumulation of blood round the heart, all due to multiple wounds.

This evidence sufficiently established the death of the deceased and that he died from the multiple injuries which he had received during his attack. The first ingredient of murder has thus been proved by the prosecution. The second and equally important ingredient of murder to be proved by the prosecution is that the accused persons, jointly with others not before the Court, caused the death of the deceased

through their voluntary and unlawful act. The very fact that they have been jointly charged presupposes that they had a common intention to kill the deceased and they acted together, in concert. Has this been proved on the required standard?

The law on this point is clear. Under other criminal systems, for instance, in England and the United States of America, there is a distinction between principal offenders in the first degree and those in the second degree. Principal offenders in the first degree are the actual offenders, the persons by whom the actual wrongful deed was committed; while principal offenders in the second degree are the abettors and aiders.

Under the Kenya Penal Code cap 63, there is no such distinction. They are all grouped together under "Principal Offenders". This is clearly so from the provision of section 20 of the Penal Code, which provides as follows:-

"20(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids or abets another person in committing the offence;
- (d) Any person who counsels or procures any other to commit the offence;

And in the last mentioned case he may be charged with either committing the offence or with counseling or procuring its commission".

So that, in this case the prosecution must show that the accused persons, being members of *Kamjeshi*, were in the crowd which attacked the deceased, participating in the commission of this offence as principal offenders, in whatever degree and to whatever extent they may have done so.

The prosecution must not end there. They must further prove that the accused had a common intention to kill the deceased or to cause him grievous harm, and that they set out to do so. As it is provided in section 21 of the Penal Code:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

It thus becomes necessary that the prosecution place the accused persons in the crowd of people which was charging at the deceased and which eventually attacked and killed him.

To do this, the prosecution called several witnesses. I wish now to analyse that evidence to see whether sufficient evidence has been adduced by the prosecution.

The prosecution called James Mwaura Kinyanjui (PW 1) the deceased's driver. It is his evidence that on the 15th May, 1999 he picked the deceased from his residence in Dandora Phase II in the deceased's matatu Toyota Hiace registration No KAD 018L. The deceased sat at the co-driver's seat while another old man, whom he did not know, sat at the rear. He drove up to stage 41. When he arrived there he noticed a group of about twenty people approaching them. The deceased cautioned him, telling him that those people were members of *Kamjeshi* whom he did not agree with and that he, PW 1, must do everything so as to drive away from the scene. PW 1 said that he tried to drive away from the scene but he

could not do so because of the heavy traffic jam. He decided to drive off the tarmac into a side murrum road but unfortunately he collided with another *matatu* vehicle. He noticed the approaching crowd to be armed with crude weapons, stones, *pangas* knives. They started to stone the deceased's vehicle. Sensing serious danger, PW 1 said, he got out of the deceased's vehicle and ran away.

PW 1 testified that, during the attack, he tried hard to identify members of the *Kamjeshi* group who were attacking the deceased, that he was not able and did not therefore manage to identify anybody. He said he was only able to identify them later on after they had been arrested, and this was during the identification parades which were conducted at Buru Buru

Police Station where he identified all these accused persons. While under cross-examination by Mr Ombete, PW 1 conceded that he had known the 1st, 4th and 5th accused persons before the 15th May, 1999 and that, when he attended the identification parades, he had known them before.

While under further cross-examination by Mr Ombete, PW 1 said that he identified the five accused persons at the identification parades just because they were members of *Kamjeshi*.

The prosecution then called Timothy Mwangi Njiinu (PW 5) a brother of the deceased, who recalled that he was driving the deceased on the 7<sup>th</sup> May, 1999 when Thomas Kagiri confronted and issued a threat directed at the deceased that he would kill the deceased. The quarrel was about the control of *matatu* stages both at Dandora and the City Centre between the deceased's association and Thomas Kagiri's *Kamjeshi*.

It is the evidence of PW 5, however, that he was not at stage 41 Dandora on the 15th May, 1999 when the deceased was killed. Then the prosecution called Alice Muthoni Mwangi (PW 6) a cashier on routes 32 and 42 at Dandora stage. She told the Court that on 18th May, 1999 at around 3 pm one Leah Nyambura told her that she had been sent by Thomas Kagiri to inform her that Thomas Kagiri would do to her (Alice Muthoni Mwangi) what he had done to the deceased and people would watch helplessly. The prosecution did not call Leah Nyambura to confirm that evidence. The result is that the evidence of PW 6 is the worst and weakest form of evidence so far, being uncorroborated hearsay evidence, and therefore of no evidential value.

The prosecution also called John Macharia Maina (PW 7) a *matatu* operator who owned a *matatu* vehicle reg No KWC 168 and used to drive it along routes 32 and 42. It is his evidence that Thomas Kagiri was elected in 1995 to manage *matatu* stages in Dandora and City Centre using route 32 and 42. At the elections of 1998 Thomas Kagiri was voted out of office, principally because he did not own a *matatu* vehicle along that route or at all. The voting out of Thomas Kagiri was the starting point of trouble. PW 7 recalled that the 1st, 3rd and 5th accused are employees of the said Thomas Kagiri but that he does not know the people who killed the deceased. He further recalled that Thomas Kagiri had stabbed him on 14th April, 1999 and had threatened the deceased.

The prosecution called Stephen Wanyoike Ndungu (PW 9) a *matatu* driver of motor vehicle reg No KAL 149 B along route 32 and 42. He recalled how the deceased was at stage 41 on 15.5.1999 at about 8.30 am and how the deceased's driver tried to drive away from the scene but ended colliding with his *matatu* vehicle. He told the Court that he did not identify the people who were attacking the deceased and does not know who killed him.

Then the prosecution called Melubo Ole Meleta (PW 12) a *matatu* tout employed by the deceased. He recalled that on the 15th May, 1999 he did not go to Dandora. He, however, learnt later that the deceased had been killed. He and other *matatu* touts organised themselves in groups and started to look for the deceased's killers.

He recalled on 29th May, 1999 how he saw two suspects boarding a *matatu* at Mlango Kubwa in Pangani Area. His attention was drawn to the fact that those two suspects were collecting money and issuing receipts within the *matatu*. He alerted the police and those two suspects were arrested.

They are the 4th and 5th accused. While under cross-examination PW 12 told the Court, however, that he does not know whether the 4th and 5<sup>th</sup> accused participated in the killing of the deceased.

I note that these are the only civilian witnesses who were called by the prosecution. Several police officers, who took part in the investigation of this case in one way or another, were called.

There is police constable Bernard Munderu (PW 2) who testified that on the 18th May, 1999, he and other policemen received instructions to round up all youths found moving suspiciously at *matatu* stages in Dandora.

While in the company of other policemen, he arrested several youths at various *matatu* stages and took them to Buru Buru Police Station. He did not know the names of the youths he arrested but he later learnt that they were the 1st, 2nd and 3rd accused. It is his evidence, therefore, that he did not arrest these accused persons for their participation in the killing of the deceased, but because they were among the youths who were moving suspiciously at *matatu* stages.

IP Geoffrey Moses Mukano (PW 3) conducted an identification parade

on 24th May, 1999 in which the 3rd accused was the suspect and in which

Evans Kimani and David Mathai were the identifying witnesses. However, the prosecution did not call Evans Kimani and David Mathai to give evidence. Evidence of that identification parade is therefore not of any value.

IP Wilfred Mbatia (PW 8) recorded a charge and cautionary statement from the 3rd accused on May 1999 (Exhibit 2) in which the 3rd accused said he was not involved in the killing of the deceased.

IP Moses Sang (PW 11) and police constable Joseph Kaunda (PW 14) visited the scene of murder, preserved the scene, called the scenes of crime to take photographs and then escorted the deceased's body to chiromo mortuary. Police constable Edward Muhia (PW 17) took photographs of the scene and of the deceased, dead in his vehicle. Those photographs have been tendered into evidence as exhibits No 6. The prosecution called IP Andrew Nyarindo (PW 15) who recorded a charge and cautionary statement from the 1st accused which he tendered into evidence as exhibit 4. In his statement the 1st accused denied killing the deceased and raised the defence of alibi. 1st accused said that on 15th May, 1999 he was in his rural home in Maragua in the morning. He left for Nairobi at 8.30 am, arriving at the City Centre around 10.00 am. By that time the deceased had been killed.

The prosecution led evidence from IP Richard Kabuga (PW 13), Ag IP Mark Bundi (PW 20) and IP Andrew Ochieng (PW 21) of identification parades. It was the evidence of IP Kabuga (PW 13) that on 25.5.1999 he carried out an identification parade in respect of a suspect called Mathew Ochieng (second accused). The identifying witnesses were Evans Kimani and David Mathai, whom the prosecution did not call as witnesses.

Evidence of that identification parade was therefore rendered useless by that omission to call those two identifying witnesses. IP Bundi (PW 20) conducted an identification parade on 24.5.1999 in respect of the first accused. One of the identifying witnesses was Evans Kimani who was not called as a witness. The other identifying witness was James Mwaura Kinyanjui (PW 1) who gave evidence and said that he had known the first accused before the 15th May, 1999, that he did not identify any of the members of *Kamjeshi* at the scene of the attack but that he only identified the 1st accused because he was a member of *Kamjeshi*. IP Ochieng (PW 21) conducted the final identification parade on the 3rd June, 1999 in respect of the 5th accused. Two identifying witnesses, Evans Kimani and David Mathai, were not called to give evidence while the third identifying witness James Mwaura Kinyanjui had known the 5th accused before the 15th May, 1999 for more than three years. Most important, PW 1 did not identify the deceased's attackers at the scene.

The 1st, 2nd and 3rd accused were arrested by police constable Albanus Muli (PW 18) while the 4th and

5th accused were arrested by police constable Norman Marco (PW 11).

From that evidence it is clear that the only evidence against the accused, tending to connect them with the commission of this offence, is the evidence of James Mwaura Kinyanjui (PW 1) who identified all the five accused persons at the various identification parades held at Buru Buru police station. This is evidence of a single identifying witness. Evidence of Timothy Mwangi Njiinu (PW 5), Alice Muthoni Mwangi (PW 6) and of John Macharia Maina (PW 7) strongly implicated Thomas Kagiri with the commission of this offence. Thomas Kagiri is not an accused person in this case. He was discharged during the committal proceedings by the Chief Magistrate Nairobi for lack of evidence.

Each of the accused has given unsworn statement and raised a defence of alibi. First accused said that on 15.5.1999 he was in his rural home in Maragua attending to a land case. He left for Nairobi at 8.30 am, arriving at the City Centre at 10.00 am. He then boarded another *matatu* for Dandora. It was while he was in the *matatu* that he learnt of the deceased's death.

The first accused raised this same defence on the 27th May, 1999 at 4 pm when his charge and cautionary statement was recorded inside the CID offices, Buru Buru Police Station. His defence was not investigated by the Police. Not a single investigating officer visited the first accused's home to verify the correctness or otherwise of this defence.

The second accused, in his unsworn statement, told the Court that he is a hawker/tailor doing business at Shauri Moyo. He went to his place of work early in the morning of 15.5.1999, worked up to 1 pm and then went to watch football at Kasarani. He went home at 6 pm where he learnt of the deceased's death in the 7 pm radio news broadcast. He did not kill the deceased. In fact, in that statement, the second accused is implying that he is not a *matatu* tout at all.

On the 15th November, 1999 when he was committed to this Court for trial, and after the alibi warning had been issued by the Chief Magistrate, the 2nd accused informed the Court that he stays in Dandora phase I and works at Shauri Moyo, *Jua Kali*. Unfortunately again, the alibi raised by this second accused was not investigated.

The third accused said in his unsworn statement that he left his residence at Dandora at 7 am on 15.5.1999 and travelled to Karen to see his sister.

He slept in Karen and returned to Dandora on 16.5.1999. Then he went to his place of work at Emco Steel Works, Dandora from where he was arrested.

In the Chief Magistrate's Court after he had been committed to this Court for trial, the third accused said that on 15.5.1999 he went to his sisters place at Ngong. Before then he had gone to see his brother at Ziwani.

The police did not investigate that alibi.

The fourth accused told the Court that he was very sick on the 15th May, 1999. He had an attack of Tuberculosis. He was so sick that he was unable to walk. He was visited by his sister at his residence in Korogocho and that she is the one who went and bought him drugs, which he used upto the 29th May, 1999 when they got finished. As he was then able to walk he decided to go and see his sister, so that she could buy him more drugs. While he was on his way, he was arrested in a police ambush.

The fifth accused told the Court that he works at Kariobangi as a loader. He loads sand onto lorries. On 15.5.1999 he worked throughout the day, and continued to work daily up to the 29th May, 1999 when he was arrested on his way to Athi River when escorting a friend to see his aunt there. Quite clearly therefore all the accused persons have raised the defence of alibi. The law as regards this defence is now settled and was restated in *Leonard Aniseth v R* 1963 EA 206 at page 208 letters F, G, thus:-

"Since the well-known decision of *Woolmington v Director of Public Prosecutions* (1935) AC 462, it is

well settled that, subject to the defence of insanity and to certain statutory exceptions which are not relevant to the present case, no burden rests upon an accused person to establish any defence. In the recent case of *R v Johnson* 46 CR APP R 55 the Court of Criminal Appeal dealt specifically with the burden of proof when a defence of an alibi is raised. The headnote of that case reads:-

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case”.

In *Sekitoleko v Uganda* (1967) EA 531 where the facts were that the appellant was charged with robbery. His defence was an alibi. The then Chief Justice of Uganda Sir Udo Udoma held that, as a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts, whether the defence set up is an alibi or something else. That burden always rests on the prosecution.

The same principle of law was again restated by Sir Udo Udoma in *Ssentale v Uganda* (1968) EA 365 where he held that an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer.

In this case, therefore, the accused persons have raised the defence of alibi. This defence is to be given the same consideration as all other defences raised by an accused in a criminal trial. That consideration is on a balance of probabilities. The prosecution still remains with the duty to prove the guilt of the accused beyond reasonable doubt. That burden of proof never shifts to the accused, who assumes no burden to prove his innocence. So that, the prosecution in this case must adduce admissible and credible evidence to displace these defences of alibi. I have already pointed out that the only evidence adduced by the prosecution, tending to link the accused persons with the commission of this offence, is that of James Mwaura Kinyanjui (PW 1) the deceased's

driver. This is therefore evidence of a single identifying witness.

In *Abdalla Bin Wendo and Another* (1953) 20 EACA 166 the Court of Appeal had this to say:

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

The evidence of James Mwaura Kinyanjui (PW 1) is particularly unreliable because (a) though he conceded to have known the accused persons before the date of the incident as members of *Kamjeshi* (b) he was completely unable to identify them at the scene during the attack of the deceased and

(c) only identified them at the identification parades because the accused were members of *Kamjeshi*.

In the circumstances of this case, I must look for other evidence, whether circumstantial or direct, pointing to the guilt of these accused persons. I have looked for this evidence without success. I come to the inescapable conclusion that the evidence given by James Mwaura Kinyanjui (PW 1) has not displaced the defences of alibi raised by the accused. In agreement with the unanimous opinion of my three assessors Mr Francis Maina, Miss Hannah Wanjiru Ndegwa and Mr Moses Mwangi, I find that the five accused persons did not cause the death of the deceased. I find them not guilty of murder and I hereby do acquit them.

It is so ordered.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of May, 2001

**A.G.A ETYANG**

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**JUDGE**