



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 19 OF 1999**

REPUBLIC ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

PAUL KYUSA KISWII ::::::::::::::::::::::::::::::::::::::: ACCUSED

J U D G E M E N T

The accused was charged under S. 203 as read with S.204 Penal code in that on 11.7.97 at Kyeyanda village Kikumbulyu Makueni he murdered Zacharia Ngigi Kariuki. His trial commenced on 8.5.2000 and until its close with the accused’s own testimony plus that of his witness, Makuthu Kiswii (D.W.2), nine (9) prosecution witnesses had been heard.

From all accounts from the prosecution side, on the material day Tana and Athi Rivers Development Authority (TARDA) owned land where the offence allegedly took place. It was occupied by squatters who had to be evicted (see Paul Ngang’a P.W.1). So Tana and Athi Rivers Development Authority got security from the local provincial administration and gave out a lorry to carry these personnel and Tana and Athi Rivers Development Authority’s own staff to proceed to evict the squatters. Evidence showed that the accused was one of such people although according to him he lived on and tilled his own land. That the evicting team started off at 8 A.M. entering squatter’s houses, taking out their property therein and setting the houses ablaze. After one or two evictions, the team split into two to hasten the exercise. But then P.W.1 heard screams from where the other team had gone to evict a squatter, he saw motor vehicles from that way rushing away with full headlights. Danger was sensed. Everybody ran off even the security personnel. It transpired that the deceased – had been assaulted; he died of the injuries. But people came back, reinforced, on the material day and completed the eviction exercise. That some squatters who occupied the land before Tana and Athi Rivers Development Authority bought it got compensation and moved away. Others remained demanding to have the land. These were to be evicted.

A Tana and Athi Rivers Development Authority staff member on the ground Kisuli Kavisu (P.W.2) took part in the eviction. He apparently knew the accused. P.W.2 was not in the group that was to evict the accused. The accused who was not armed, passed P.W.2 and got into his compound. P.W.2 did not see what followed but those who had gone to pull down the accused’s house began to run away from there. P.W.2 simply joined them. Later he learnt that one man had been cut but P.W.2 did not see him. P.W.2 said that the squatters including the accused lived on Tana and Athi Rivers Development Authority farm which was fenced. That the security personnel – regular police and Administration police were armed while the evicting squad was not. P.W.2 did not know if notices had been sent to the squatters that eviction would take place or something. According to Kyalo Ndambuki (P.W.3) another Tana and Athi Rivers Development Authority employee in this eviction exercise, the same was not peaceful because the squatters were not aware of it. After two or so houses, the evicting team got to the accused’s house; he

was not there. His wife was. But as P.W.3 and others were removing property from the accused's house, he arrived armed with a panga. He was violent the squad closed itself in the accused's house. There was commotion and screams outside. People ran off. By the time P.W.3 came out all had died down. He learnt that someone had been cut. P.W.3 had seen the deceased that day but he did not know how he died. That P.W.3 did not know if the accused who lived on Tana and Athi Rivers Development Authority land 10 as a squatter was served with a quit notice. That P.W.3's division of the demolishing squad carried iron bars for the job while they had two policemen to provide security. That the accused whom P.W.3 knew could not be amused to be evicted.

Moses Mativo (P.W.4) gave more or less similar evidence since he was present. That while they were about to demolish the accused's house he came from nowhere, picked up a panga and chased the deceased Zakaria. The deceased tripped and fell. The accused cut him twice. P.W.4 fled. As he ran he heard police providing security, firing. P.W.4 had not been aware of the eviction exercise before he was told that morning to join it. Not even of any eviction notices. To P.W.4 the accused asked what was going on at his house. Suddenly he picked up a panga that was next to his door; he had not come with it. Probably it belonged to the evicting team. That the accused must have been surprised at people removing property from his house. On picking up the panga, people fled, then later P.W.4 noticed one unarmed policeman with a cut on his head. P.W.4 did not know who inflicted it.

When John Muthui (P.W.5) another Tana and Athi Rivers Development Authority staff (driver) who was in the team to evict squatters, heard other drivers blowing their horns, he joined in, and made to drive off. Then he met the deceased with head and neck cuts. P.W.5 did not know who inflicted them. He too did not know if the squatters had notice of this eviction or if they knew where their properties placed in the lorries were being taken to.

P.C. John Kimanga (P.W.6) had not been instructed to join the Tana and Athi Rivers Development Authority eviction team to provide security. But that the team that went to do so was in the process when the accused suddenly cut one man with panga and everybody ran away. The accused was arrested later – on 24.4.98 – over 8 months since the incident of 11.7.2001. Besides saying that he did not know if squatters were notified of the eviction, P.W.6 apparently remained at Kibwezi Police Station all the time until later when the accused was brought to him to rearrest and charge.

The court then heard Dr. Kirasi Olumbe the chief government pathologist (P.W.7). He performed a post mortem on the deceased herein on whose head and back of the same he noted two long wounds. There was another on the left side of the head. The skull was fractured and blood had accumulated on the brain. The deceased also bore defensive injuries on his fore arms. P.W.7 was left with the view that death was caused by the head injuries inflicted using a sharp object (Exh.P1). The deceased's body had been identified to P.W.7 by Paul Macharia (P.W.8)

APC Julius Kyalo (P.W.9) with others had gone with the team to evict squatters from Tana and Athi River Development Authority farm on the material day, to provide security. To him the accused's house was the fifth. The squad placed their pangas near the accused's door; they were removing property from the house. Then the accused arrived. He was not armed but he looked furious. The team in his house saw him and closed themselves in. That the accused picked up one panga from near the door and confronted the deceased. He cut the deceased on the head, the back of the head and on the left arm. P.W.9 who was 8 – 10 M. away was not armed. The accused then faced him; P.W.9 ran off with others. They hopped into a lorry and went to the farm office. Later the deceased's body was collected from the scene. P.W.9 told the court that his mate an askari was assaulted – not in the accused's compound. He did not say by who or where.

To P.W.9 the operation started as early as 6 a.m. That when the accused ran into his compound all the mayhem broke loose. P.W.9 had not known that he, the accused intended this. They could have caught/arrested him. That Tana and Athi River Development Authority staff carried pangas and axes – the lot from which the murder weapon came.

The accused (D.W.1) testified on oath. He lived on his shamba at Kyeyanda, Kikumbulyu of Makueni.

That he was born there. That at no time was the accused ever told that he lived on Tana and Athi River Development Authority land or given notice to quit it. So on this day he was tending crops on his shamba when he heard screams from the direction of his home. He proceeded there. In the compound he saw a lorry with people who were demolishing houses and setting them ablaze. That the accused approached them and asked who they were and what they were doing; they did not answer him. He moved closer but somebody hit him across the mouth and he lost a tooth. He fell down. On waking up a man armed with a panga confronted him (the accused). He threw that panga and struck the accused on the right shoulder. That the two men closed in combat. That he wrested the panga from that man but during the struggle it cut its handler on the head. Those demolishing the houses along with his assailant ran away. He was not cut on any other part.

That the accused later located his family who had scattered away from home. That he hit his assailant because the raiders, according to him, were removing food from his house. He did not know them or even his victim. That the accused did not chase about cutting his victim. That later the raiders, as he called them, returned with policemen and finished the demolition job. He had no notice of the eviction and that the accused cut his assailant in self defence.

Then the court heard the accused in cross examination that adjudication was yet to come to their area and so he had no title to his land. That he lived there with his brothers and their families. That the Tana and Athi River Development Authority farm was separate from theirs even if he did not know where it was. That the accused came upon about eight people with a lorry demolishing and burning houses. He did not know if they belonged to Tana and Athi River Development Authority. That he did not see policemen at the scene. That all in his compound were strangers; he snatched a panga from one and threw it at him without intending to kill him. That already nine houses had been demolished by the time the accused showed up at his compound and they had no notice of that. And that when Tana and Athi River Development Authority came to this place it bought land from some people who moved elsewhere. That the accused was not one such seller.

Then the accused called his brother Mathuku Kiswii (D.W.2) who simply said that they lived on that land for many years and they were not notified of the eviction in issue. He was not even present during the exercise.

Both counsel were heard in final submissions and the court gave a summary of whole case to the assessors together with the points it thought required their focus before rendering their oral opinions. Two assessors were of the view that the accused was not guilty while one said that he was guilty of manslaughter. The court then rose to consider and deliver the following decision.

In this court's view the accused is not guilty at all. He was elsewhere on his land on the material day when he heard screams and the rest from his compound. Evidence has it that his house was about to be demolished by Tana and Athi River Development Authority staff in an eviction exercise he was not notified of. To him he held the view that he lived on his land and so anything affecting his home by strangers was an attack on his property. That he came to the scene unarmed. He picked up a panga the evicting staff had placed near his door. Nobody seems to have told the accused what was in the offing; his account was that when he inquired he was assaulted. That he fought back in self defence and defence of his property. This could as well be. He told the court that he did not know these raiders who were destroying his home. There was no evidence to the contrary. But it was not in doubt that he did not come to the scene armed and ready to attack those demolishing his home and throwing about his property. In this case, this court is inclined to find the accused not guilty, regrettable and unfortunate as the death of Zakaria Ngigi was. The circumstances are such that the accused neither formed malice aforethought nor was in the process of executing a criminal act and as a result Ngigi was killed.

In sum the prosecution has not proved its case beyond a reasonable doubt and the accused is acquitted.

Judgement accordingly.

Delivered on 31st July 2001.

J. W. MWERA

JUDGE