



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO 88 OF 2014**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**JANE NYAMBURA NGUGI.....1<sup>ST</sup> ACCUSED**

**KENNEDY GICHUI NJENGA.....2<sup>ND</sup> ACCUSED**

**TWN.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

1. When the history of this case is written, it will be remembered as that of the family in conflict with itself, as the 1<sup>st</sup> accused is the wife of the deceased while the second and third accused are son and daughter respectively.

2. The 19<sup>th</sup> of September, 2014 started as any other day at Rio Nderi village in kikuyu sub county of Kiambu county though for this family they had not known peace for some time. The 1<sup>st</sup> accused and the deceased as at the time of the alleged commission of the offence had been married for 34 years. The deceased was a logger, so for the purposes of his trade used to carry pangas. He used to smoke cigarette and bangi which at times made him very unfriendly but nonetheless he was a loving father. The 3<sup>rd</sup> accused was then a 14 (fourteen) year old girl but at the time of this Judgement she had become a mother of the child who she carried to court most of the period of the trial, which commenced on 29/9/2014 as the judgment thereon delivered on 16/9/2021 confirming how slow our justice system can sometimes be.

3. As will be seen from the evidence tendered before the court it seemed that the deceased had a long standing land dispute with his brothers and uncles and he believed honestly that his wife was siding with the enemy, as his father before his death had entrusted her with the title deed to his "Mugunda" as he did not trust any of his children to protect the family inheritance.

4. On the material day having come from his logging duties, he warned the 1<sup>st</sup> accused that she would "be crying" as she had never done before and shortly left the compound towards the gate. She thought in her imagination, that he was going to fight with his step brother over the family inheritance, but lo and behold he met with the 2<sup>nd</sup> accused at the gate, whom he proceeded to cut with the panga and this is what eventually led to the accused persons being charged with causing his death.

5. The prosecution case was stated by the witnesses as follows:- **PW1 JAMES KAMAU** stated that he got to the village from kikuyu town where he was working at about 8 pm and heard cry from the home of the deceased. When he responded to the cry he found the deceased lying on his stomach holding two pangas on both hands, with a rope on his neck which the 2<sup>nd</sup> accused was pulling, while the 3<sup>rd</sup> accused was sitting down with a cut on her hand and the 1<sup>st</sup> accused crying saying that the deceased wanted to kill them. It was his evidence that the 3<sup>rd</sup> accused had a knife which she was stabbing the deceased with.

6. He took the pangas from the deceased which he had used to cut the 2<sup>nd</sup> accused on the neck, removed the rope from his neck and left him at the compound while taking all the accused to the hospital. It was his evidence that when he left the deceased at the house, he was only bleeding from the face.

7. At the hospital the accused were told to report to the police first, before they could be attended to and while on the way to the hospital, the first accused called her mother, who came in a motor vehicle and took them to St. Teresa hospital in kikuyu town, where they were treated and they returned back to their home at 11.00 p.m, where he left them and went to his home. It was his evidence that they did not find the deceased at home.

- 8. PW6 ALLAN NJENGA GACHUI** testified that he met the 2<sup>nd</sup> Accused at 8.00 pm running towards the road saying that he had been cut by his father, the deceased, when he got to their home, he found the deceased lying down with the first accused and the second accused on his chest, with a rope on his neck. The deceased was holding two pangas on his hands.
- 9.** He separated them and saw that he had injuries on his head. He escorted the two accused persons to the road so as to take a motor cycle to go to the hospital. It was his evidence that he did not see the 2<sup>nd</sup> accused at the scene and that the deceased proceeded to the house.
- 10.** It was his evidence in cross examination that he did not know how the deceased was injured but stated that the fight between the deceased and the accused persons was outside the gate of their home.
- 11. PW2 INSPECTOR JOSEPH MWAURA** received the accused persons at the police station at 8.30 p.m. with a report that they had been beaten by the deceased, which he booked, before referring them to the hospital. The following day he received a report from the village Elder, that the deceased had been found dead at thogoto forest. He proceeded to the scene and later on received information that the accused persons had been arrested.
- 12.** He confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons had injuries when they reported to the police station and that from the home of the deceased to where his body was found was about 500 meters.
- 13. PW3 DR. DOROTHY NJERU** conducted post mortem examination on the body of the deceased which had a chopped wound on the right side of the head with a fracture beneath the skull and as a result formed an opinion that the cause of death was head injuries due to sharp force trauma.
- 14. PW4 DOROTHY MWANGI** a clinical officer produced the P3 forms on the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons who had a history of having been assaulted by a person known to them. The 2<sup>nd</sup> accused had a cut wound on the head caused by a sharp object while the 3<sup>rd</sup> accused had tenderness on the stomach and a small cut on the right fingers caused by a sharp object
- 15. PW5 PAULINE MUNYOLI** conducted mental assessment on the accused persons who were all found fit to stand trial.
- 16. PW7 PC SILAS KIPTOO** visited the home stead of the deceased and found bloodstains, which he followed to where the body was, about 800 meters away, with a deep cut on the head. There were three pangas and a rope in the compound, they removed the body to the mortuary and recorded statements from the witnesses. He stated further that the accused persons had earlier reported to the station that they had been assaulted by the deceased.
- 17. PW8 CORP. TERESIA THRIKWA** processed the scene and took photographs including of the clothes recovered from the house of the deceased and followed the blood stains to the forest where the body was found.
- 18. PW9 ELIZABETH WAITHIRA ONYIEGO** a Government analyst received the items collected from the scene which included three pangas, blood sample of the deceased, sisal rope, the 3<sup>rd</sup> accused shirt petty coat and jumper belonging to the 1<sup>st</sup> Accused and a lessso belonging to the 3<sup>rd</sup> accused. She further received blood samples belonging to all the accused persons and upon her analysis concluded that the DNA generated from the rope and on two pangas matched the profile of the deceased.
- 19.** It was her further evidence that the DNA on the shirt of the 2<sup>nd</sup> accused matched his profile and the DNA generated from the T-shirt, petty coat, jumper and lessso matched those of the 3<sup>rd</sup> accused while one panga did not generate DNA profile.
- 20.** When put on their defence, the accused persons gave sworn evidence. **DW1 JANE NYAMBURA NGUGI** stated that the deceased came back home at 8.00 p.m. and as was his norm asked for a cigarette, he then warned her that she was going to cry and left the home through the gate, she then heard the 2<sup>nd</sup> accused crying and she raised an alarm for assistance.
- 21.** At that time the deceased turned to her with the panga, in attempt to protect themselves she went for the deceased and they both fell down before Kamau PW1 came to their rescue who suggested that they go to the hospital on their way to the police station where her mother came for them.
- 22.** It was her evidence that when they came back to the house they did not find the deceased and her mother suggested that they go to her home with them, which they did, having closed the door and left key to the house at the special place where the deceased would get it and they then proceeded with her mother to her home, where they stayed until the following day when they returned to the police station and were arrested and later on taken to their home.
- 23.** It was her evidence that at home, they found many people including police officers, one of them called mwaura assaulted her demanding for the key to the house, which had been left with Kamau who later on brought it and when the door was opened they found blood stains on the floor. It was her evidence that they did not kill the deceased whom they had left alive when they went to her mother's place. She stated further that there was no dispute between her and the deceased whom she had been married to for 34 years.
- 24.** In cross examination, she confirmed that the deceased had a dispute with his step brother over the family land and that the 2<sup>nd</sup> accused had on the material day left for his place of work at 7.00 a.m. and that it was when he was returning home that he met the deceased who proceeded to cut him and when they responded to his alarm, the deceased proceeded to cut her and the 3<sup>rd</sup> accused. It was her further evidence that the deceased thought that she had sided with his step brother with whom they had a land dispute, which land their father had left her in charge of.

25. **DW2 KENNETH GICHUI NJENGA** testified that on the material day he had left home for his place of work up to 8.10 a.m. when he was dropped back home in a motor cycle and at the gate he was hit with a panga at the back of his head causing him to lose consciousness. At that time, he did not know that it was his father who had attacked him. It was his evidence that the deceased did not talk with him at the point of attack and that the relationship between him and the deceased was very cordial.

26. It was his evidence that after they reported to the police, they returned home with their grandmother who decided not to leave the at their home and went with them to her home from where they were arrested. It was his evidence that they were framed by their uncles who had land dispute with the deceased and he denied beating the deceased as he lost consciousness immediately he was attacked.

27. In cross examination he stated that he did not know why the deceased attacked him as he was not expecting at the scene at the time. He stated that there had never been a fight between his father and mother and that at no time did he side with his mother in any family dispute.

28. **DW3 TERESIA WANJIRU NJENGA** corroborated her mother's evidence and stated that she got home from the polytechnic where she was studying at 8.00 p.m. and started to prepare supper when the deceased came in and warned PW1 that she was going to cry as she had never done before, he then sat at the door step and light his cigarettes before leaving towards the gate where he met the 2<sup>nd</sup> accused whom he cut with the panga and when they responded to his alarm, the accused told her mother that she was next to be attacked, she then moved in between her father and mother and the deceased proceeded to kick her to give way.

29. It was ever evidence that the deceased then proceeded to cut her with the panga before he was taken away by Kamau PW1 who later on assisted them to go to the hospital from where they met their grandmother who went with them to her home. It was her evidence that at that time she was 14 years old and that the relationship between her and her father was very cordial. In cross examination she denied beating her father.

### SUBMISSIONS

30. At the close of the defence case it was submitted by the accused persons that the evidence before the court is that the deceased caused injuries to the 2<sup>nd</sup> and 3<sup>rd</sup> Accused Persons for which they sought treatment, while the deceased was left at home. It was submitted that nobody saw any of the accused persons inflict the injuries which caused the death on the deceased.

31. It was submitted that the police did not investigate the possibility of the injuries inflicted upon the deceased was as a result of the outstanding land dispute with his step brothers and therefore the case was not proved beyond reasonable doubt for which the case of **PIUS ARAP MAINA v REPUBLIC [2013] eKLR** was submitted to support the submission that there were too many glaring contradictions on the prosecution case.

32. It was submitted that the prosecution case was based on circumstantial evidence but did not meet the standard set by the Court of Appeal in the case of **JOANA CHEBICHII SAWE v REPUBLIC [2003] eKLR** and that the court should examine the prosecution evidence against the defence evidence so as to see whether the case was proved beyond reasonable doubt, as was stated in the case of **ABDUL NGOBI v UGANDA SC. CR. APPEAL NO. 10 of 1991** where the court stated that if the defence succeeds in raising reasonable doubt on the prosecution case, then they must be acquitted.

33. It was finally submitted that the prosecution failed to prove malice aforethought on the part of the accused persons as the conduct of the accused persons before the act does not in any way implicates them to the planning to execute the offence as there was no evidence tendered to prove mens rea.

34. The prosecution opted not to make final submissions and relied upon their submissions at no case to answer stage and the evidence on record.

### DETERMINATION

35. To succeed in a charge of murder, the prosecution is under both legal and evidential burden to prove the following elements of the offence:

- a) the fact and the cause of death.
- b) That the said death was caused by an unlawful act of omission and or commission on the part of the accused person.
- c) That the said unlawful act was caused with malice aforethought on the part of the accused persons.

36. The fact and the cause of death in this cause is not in dispute, all the prosecution witnesses and the accused persons confirmed that the same died on the material day and the cause of the said death was proved beyond any reasonable doubt through the evidence of **PW3 DR. DOROTHY NJERU**, whose evidence was that the deceased sustained chop cut wound on the right temporal region, with underlying skull fracture, multiple abrasions on the face and laceration left frontal region and that the cause of death was head injury due to sharp force trauma. In the absence of any evidence to the contrary I find and hold that the fact and cause of death were proved.

37. The only issue in dispute is whether the said death was caused by the unlawful act on the part of the accused persons. As submitted by the accused persons, there was no direct material witness who saw the accused persons kill the deceased. The prosecution case is therefore solely based on circumstantial evidence.

38. The circumstantial evidence relied on by the prosecution is that the deceased had attacked the accused persons starting with the 2<sup>nd</sup> accused whom he attacked with a panga causing grievous injuries to the same and that when the 1<sup>st</sup> and 3<sup>rd</sup> accused persons responded to his alarm, the deceased turned against them, kicking the 1<sup>st</sup> accused and cutting the 2<sup>nd</sup> accused with a panga. This evidence was not disputed by the accused persons.
39. The fact that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were attacked by the deceased was confirmed through their evidence in chief, P3 forms on them and the evidence of PW1 who took them to the hospital and whose evidence was that the deceased also sustained injuries inflicted upon him by the 3<sup>rd</sup> accused, which evidence he did not confirm under cross examination.
40. The issue for determination in this matter is whether the deceased sustained injuries as at when the 1<sup>st</sup> and 3<sup>rd</sup> accused persons responded to his attack on the 2<sup>nd</sup> accused? It is of importance that when the accused persons were referred to the hospital, the deceased was not, thereby leading to an inference that the same did not sustain any life threatening injuries at that stage. Any injuries which he might have sustained at that stage as confirmed by PW1 were on the face while according to PW6 were on the head.
41. This then leads to the question as to what time did he sustain the injuries which led to his death? There is evidence which was not dislodged by the prosecution that when the accused persons were being taken to the hospital the deceased was left in the compound and that when the accused persons returned with the mother of the 1<sup>st</sup> accused and the grandmother of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to collect their cloths, the deceased was not found at the place where he had been left. The house was at the state in which it had been left while they went for treatment.
42. There was no evidence placed before the court to show that the accused persons returned back home thereafter so as to inflict the fatal injuries on the deceased and so as to join the chain of event linking them with the death of the deceased. Having raised an alibi defence, to the effect that they had left the home with the mother of 1<sup>st</sup> accused, it was for the prosecution to displace their alibi defence, which at the close of the case herein, they failed to do so. As was stated in the case of **ADEDEJI v THE STATE [1971] 1 ALL NLR 75**.
- “Failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.”***
43. In the case of **REPUBLIC v S.S.M. [2020] eKLR** the court had this to say on the issue of the defence: -
- “34. It therefore follows that the mere fact that the prosecution case is believable does not amount to a rejection of the alibi defence. The South African case of Ricky Ganda v The State [2012] ZAFSHC 59:-***
- “The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”***
44. In a case that is solely based on circumstantial evidence, the circumstances taken cumulatively should form a chain so complete that there is no escape from conclusion that within all human possibility it was committed by the accused and none else as was stated in the case of **ABANGA alias ONYANGO v REPUBLIC CR. APPEAL NO. 32 of 1990**.
45. At the close of this case there remained a doubt in the mind of the court as to what time the deceased met his death. How did he leave the house and where did the 3<sup>rd</sup> panga found at the scene came from. Further the injuries that caused the death of the deceased were inconsistent with those which the eye witnesses stated he had sustained during the fight with the accused persons, thereby leading to the conclusion that they must have been inflicted by a third party.
46. In this case the prosecution did not call very vital witnesses who should have dislodged the accused persons defence, including the mother of the 1<sup>st</sup> accused and the arresting officers, thereby leading me to draw an adverse inference that had the said witnesses been called their evidence would have been averse to the prosecution case.
47. Having taken into account the defence by the accused persons when weighed against the prosecution evidence on record, I have come to the irresistible conclusion that the prosecution failed to prove that the death of the deceased was caused by unlawful act on the part of the accused persons.
48. I have further taken into account that the prosecution failed to prove malice on the part of the accused persons and being a case that was solely based on circumstantial evidence the proof of malice is an essential element as was stated by this court in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** thus: -

***“29. In cases like this where the prosecution case is solely based on circumstantial evidence it is very important for the prosecution to establish motive as one of the chains linking the accused to the crime. Where the prosecution is not able to establish a motive behind the alleged crime it assumes importance as the proof of motive on the part of the accused person to commit the offence satisfies the judicial mind about the authorship of the crime. In the absence of motive, the court is then***

*required to have a deeper search into the circumstantial evidence tendered so as to link the accused to the crime.”*

49. In the absence of prove of motive and whereas there is suspicion that the death of the deceased might have been caused by the accused persons as a result of injuries inflicted during their fight, mere suspicion however strong cannot be a basis for a conviction in a criminal trial. See **PARVIN SINGH DHALAY v REPUBLIC [1997] eKLR**.

50. There is also the element of the deceased having been the aggressor, as it is on record that he attacked the accused persons without any provocation on their part and therefore even if I were to be wrong in holding that there was no direct evidence linking the accused persons to his death, it logically follows that based on the nature of the injuries inflicted upon him, if at all it is true during their fight which did not require any medical attention, the accused persons did not have any intention to cause his death and the force used in the defence of their persons was not excessive in the circumstances taking into account the fact that the deceased was at the material time armed with two pangas and had inflicted grievous injuries on the 2<sup>nd</sup> accused.

51. There is further contradiction between the evidence of **PW1 JAMES KAMAU** and **PW6 ALLAN NJENGA GACHOHI** the two alleged eye witness on the sequences of the event and to what happened between the deceased and the accused persons, there remains a doubt in the eyes of the court as to whether there was a fight between the accused persons before the deceased cut the 2<sup>nd</sup> accused with a panga or whether it was after the said attack. Further the nature of injuries which they stated the deceased had sustained at the said fight are inconsistent with what caused his death thereby raising suspension of the injuries which caused his death having been infected after the fight.

52. I further agree with the submissions by the accused persons that the prosecution did not investigate the possibility of the long standing dispute between the deceased and his step brothers bring the cause of his death with the accused person who are his family members being the fall guys.

53. Further the conduct of the accused persons immediately after the deceased attacked them and thereafter did not show any element of guilt on the part. The following day after they were attended by the Doctor as advised by the police, they went back to the police station, from where they were arrested before being taken to their house, where the body of the deceased had been found dead. They did not attempt to run away from the area.

54. I have therefore come to the irresistible conclusion that prosecution failed to prove all the elements of the offence against the accused persons beyond reasonable doubt and find the same not guilty and accordingly acquit the same. The accused persons are hereby discharged of the charges. The same to be released forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2021**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms Kinaru for Okeyo for the State*

*Mr. Kagiri for Gakeria for the accused persons*

*All 3 Accused persons – present*

*Court assistant Gitonga*