



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISHI

HIGH COURT CRIMINAL CASE NO.36 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

JONES WAMBURA KIRATU alias MWITA.....1ST ACCUSED

TAGANE MWITA SANDWE alias MTANZANIA.....2ND ACCUSED

STEPHEN MAHIGARA KIRATU alias MAHINGA WAMBURA KIRATU.....3RD ACCUSED

JUDGMENT

1. Jones Wambura Kiratu alias Mwita, Tagane Mwita Sandwe alias Mtanzania and Stephen Mahigara Kiratu alias Mahinga Wambura Kiratu (the '1st, 2nd and 3rd accused persons') by an information dated the 30th October 2018 are charged with two counts of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. In count no. I, it is alleged that on the 1st April 2018 at Kenyamangari village, Mashangwa location in Transmara sub-county within Narok County jointly murdered **Samuel Magige Kirato ('Magige')**. In Count No.2 it is alleged that the 1st, 2nd and 3rd accused persons on the 1st April 2018 at Kenyamangari village, Masahangwa location in Transmara Sub County within Narok County jointly with others not before the court murdered **Samuel Nyamuroni Marwa ('Nyamuroni')**.

2. It was the prosecution case that there had been a dispute between Nyamuroni and the accused persons pertaining to ownership of land. On 1st April 2018 there was an altercation between Nyamuroni and the accused persons which resulted to the death of Nyamuroni and Magige. To prove their case the prosecution called 6 witnesses Paul Mwita Nyamuhanga (Pw1), Samuel Wambura Manga (Pw2), Robert Osman (Pw3), Daniel Mwitani Ndeti (Pw4), Solomon Samu (Pw5) and Dr Morebu Peter Momanyi (Pw6).

3. Pw1 recalled that on 31st March 2018 he took Nyamuroni to his demolished house at Nyankongo. On their way to the house, they were stopped by the accused persons together with Obogo Wambura Mwera and Musebi Wambura Omwera. They jumped off the motor bike and ran away. The 1st accused tried to chase him but he ran fast ahead of him. When he went back to collect the motorbike, they deflated all the tubes and chased him away. At that point Pw1 realized that they were armed with pangas, a sword and sticks. On the following day, Nyamuroni asked him to accompany him so that they could collect the motor bike and called Magige to carry them with his motor bike. That upon arrival they met Obogo Wambura and Mosaibi Wambura at Obogo's gate where they had left the motor bike. The 1st accused appeared angry and tried to fight Nyamuroni by kicking his head and leg but Obogo separated them. The 1st accused had a panga and the same sword he had the previous day. The 2nd and 3rd accused also came. Shortly thereafter a fight ensued and Magige tried to run away but the 1st accused chased him and brought him back. The 1st accused reassured Magige that they had nothing against him and only had an issue with Pw1 and Nyamuroni. The 1st accused again started fighting Nyamuroni, prompting Nyamuroni to question what the matter was. The 1st accused asked Nyamuroni why he bought the land and when Nyamuroni attempted to respond the 1st accused beat him with a sword at the shoulder but he did not cut him. The fight intensified and Magige tried to jump off the fence. Pw1 testified that this time the 1st accused threw a panga at Magige and he was cut on the leg. Magige fell down on his stomach and the 2nd accused cut him on the face with a panga. Pw1 testified that when he realized Magige had been killed he tried to get away. He ran towards Obogo's home. A sword was thrown at him cutting his leg but he managed to enter Obogo's house. The accused persons then broke both the sitting room and bedroom door but when they saw him with a panga they retreated and threatened to burn the house. Around 5 police officers had come to try and stop the fight. Obogo came with 2 officers who arrested him. He then heard gunshots and Nyamuroni was asked by Pw3 to stand up and leave. Immediately the 3rd accused cut Nyamuroni with a panga on the right leg causing Nyamuroni to fall down. The police officers then put him into a lorry that had come from the headquarters of Nguku.

4. Pw2 testimony was that he arrived at the scene and found Magige already dead. He testified that he saw Nyamuroni sitting down while

two police officers tried to interrogate him. He saw Okondi cut Nyamuroni on the leg, the 3rd accused cut his head with a sword and the 2nd accused stabbed Nyamuroni with an arrow at the back of his head. Soon thereafter some police officers arrived from Angata. He testified that he attended Nyamuroni's postmortem on 4th April, 2018.

5. Pw3 No.8340033 testified that on 31st March 2018 he got a report from Chief of Mashangwa location that there were armed persons at the boundary of Kuoo and Mashangwa locations. They began their investigations and about 3 kilometers from the station they heard some people making noise. Upon making inquiries they were informed that the armed persons looked like robbers. The said persons had ran away leaving behind a motor cycle Reg. No.619V when an alarm was raised. Pw3 told court that on the 1st April 2018 whilst within the station they heard screams from the same place. They proceeded to the place and found that 2 people had died; the one on the south side was cut on the head while the other was cut on the leg. They were informed that one person was hiding in one of the homes. He testified that they went to the said home and found a man with injuries on the legs and rescued him.

6. Pw4 was a police corporal No.98176. He testified that on the 1st April 2018 he was called by Pw3 and informed that there were people who had been spotted along Mashangwa Kuoo border who were believed to be the same people who had fled the previous night. They proceeded to the scene and found Magige and Nyamuroni had been cut to death. Magige was lying 20 meter from the border line and had a cut on his right leg. Nyamuroni was 50 meters from the border line and he had a deep cut on the head and legs. Pw1 had sneaked into the nearby compound where he locked himself. They rescued him and called for help from the Camp. He testified that the lorry from the camp arrived and they helped Pw1 into the lorry as he had a deep cut on the right leg below the knee. The OCS commanding Angate Barikoi police Station came to the scene and the bodies of the deceased were loaded to the land cruiser and later taken to Migori Mortuary.

7. Pw5 was the investigating officer. He testified that on 31st March 2018 he received a call from Pw3 informing him that there was a dispute involving some parcel of land. The deceased had been chased away and he left behind motor cycle registration No. KMDN 619 V. The incident was reported at the camp and noted in their O.B. At 11.20 p.m. the motor cycle was released to the deceased. The following day at about 9.30a.m. Pw5 received a call from Inspector Korir the in-charge of the camp informing him that Magige had been attacked and killed by the accused persons. He testified that he drove to the scene and found Magige and Nyamuroni had died. The bodies had deep cuts on the head, hands and legs and other multiple cuts. Pw1 was rescued by the officers and was inside their vehicle. Pw5 told court that he photographed the scene and took the bodies to Migori Sub-district hospital and Pw1 was taken to Kehancha where he was treated and discharged. He testified that on the 9/4/2018 he filled the post mortem forms and sent P.C. Samuel Nguchana to go and witness the postmortem. He was however transferred before the accused persons were arrested.

8. Pw6 testified that the postmortem reports were done by Dr Victor Awinda who is currently working at Kehancha Hospital. He testified that the postmortem report of Magige was done on the 9/4/2018 at Migori Referral Hospital. On the external appearance, Dr Awinda noted that the body was covered with blood clots and had multiple stab wounds, 5 of which were on the buttocks. He also noted that the right femoral vein and artery were cut. There was also a deep cut wound on the right side of the neck cutting the muscles in the neck as well as the blood vessels, that is, the carotid artery and the right jugular vein. The head had comminuted fracture of cranium. Dr Awinda concluded that Magige died due to severe open head injuries with distorted brain tissue as a result of an assault.

9. Pw6 further gave testimony that the postmortem report of Nyamuroni reveals that there were 3 deep cut wounds on the head. There were other deep cut wounds on the right arm and abdomen. He also had 5 punctured wounds on the face. He also testified that there were cut wounds on the nose with blood clots noted on the nose. He testified that Nyamuroni had deep cut wounds on the head and brain tissue was distorted. He told court that Dr Awinda concluded that Nyamuroni succumbed due to severe open head injury to brain with distorted brain tissue as a result of an assault.

10. When placed on their defence the 1st, 2nd and 3rd accused persons all gave unsworn testimony and testified as Dw1, Dw2 and Dw3 respectively. Dw1 testified that he did not know anything about the incident that occurred on 1st April 2018. Dw2 testified that he did not know the 3rd accused and that he was never with him. He also testified that Nyamuroni was not known to him. Dw3 testified that he did not know the other 2 accused persons in court and denied committing the offence.

ANALYSIS AND DETERMINATION

11. The accused persons have been charged with two counts of murder. For the prosecution to secure a conviction they must prove that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought (see *Anthony Ndegwa Ngari v Republic [2014] eKLR*).

12. The fact and cause of death the deceased persons is not in dispute. According to the postmortem reports and the evidence of Pw6 both Magige and Nyamuroni died due to severe open head injuries resulting from an assault. Pw1, Pw2, Pw3 and Pw4 were present on the material day and saw the lifeless bodies of Magige and Nyamuroni.

13. I now turn to whether the prosecution proved the second element, that the accused committed the unlawful act which caused the death of the deceased. The evidence linking the accused persons to the heinous crime was given by Pw1 and Pw2. They both testified that the accused persons were well known to them. Considering that the incident occurred in the morning in broad daylight, I have no doubt that the accused persons were positively identified. Pw1 gave clear testimony that the 1st accused threw a panga at Magige's leg as he tried to run away while the 2nd accused cut his face with a panga. Although Pw2 was not present when Magige was attacked, he gave a clear account of what transpired upon his arrival. He testified that he saw the 3rd accused cut Nyamuroni on the head using a sword.

14. From the evidence it is clear that the 1st and 2nd accused persons cut Magige using a panga while the 3rd accused was responsible for the fatal injuries inflicted on Nyamuroni. The 1st, 2nd and 3rd accused persons were thus responsible for the deaths of Magige and Nyamuroni. Did the accused persons have a common intention? **Section 21 of the Penal Code** provides *inter alia* :

“....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....”

15. The doctrine of common intention was discussed in **Dickson Mwangi Munene & another v Republic [2014] eKLR**. In that case the court of appeal held that;

“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged. [Emphasis added]

In **Njoroge-Vs-Republic, [1983] KLR 197 at p. 204**, the Court of Appeal stated that:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly.”

....

It is evident from the above definition and authorities that in order to secure a conviction on the basis of common intention, the prosecution must prove that the accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.”

16. In this case the conduct of the 1st, 2nd and 3rd accused persons before and after the commission of the offences leaves no doubt of common intention on their part. The 1st, 2nd and 3rd accused persons were armed with pangas when they attacked Pw1 and the two deceased persons. The 1st, 2nd and 3rd accused persons would not allow Magige and Nyamuroni to leave the scene and attempts by them to do so, led to the serious injuries sustained by Magige and Nyamuroni. It therefore mattered not who delivered the fatal blow as the 1st, 2nd and 3rd accused persons had common intention to kill the deceased persons.

17. I now turn to consider whether the prosecution established that the element of malice aforethought. **Section 206** of the **Penal Code** provides that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death or a grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

18. The Court of Appeal in **Paul Muigai Ndungi v Republic [2011] eKLR** held that malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person. Pw6 testified that Magige’s body had multiple stab wounds and that he had another wound on the back of his head and a skull fracture. Pw6 further testified that Nyamuroni had deep cut wound on the arm and abdomen. According to the post mortem report Nyamuroni also had a fracture of skull which was comminuted. The injuries inflicted by the 1st, 2nd and 3rd accused persons leaves no doubt in my mind that their intentions were to cause death or do grievous harm to Magige and Nyamuroni.

19. In conclusion I find that the prosecution has established their case to the required standard, beyond reasonable doubt. **Jones Wambura Kiratu alias Mwita, Tagane Mwita Sandwe alias MTANZANIA and Stephen Mahigara Kiratu alias Mahinga Wambura Kiratu** are thus found guilty of the murder of **Samuel Magige Kirato and Samuel Nyamuroni Marwa** and I convict them accordingly as charged.

Dated, signed and delivered at Kisii this 20th day of May 2020.

R.E. OUGO

JUDGE

In the presence;

1st Accused Person Present

2nd Accused Person Present

3rd Accused Person Present

Mr. Morara h/b for Mr. Nyangwencha For the accused persons

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael Court Clerk