



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 63 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS KIMATHI CHARLES.....1ST ACCUSED

JEREMIAH MUTHEE THUIMUTA.....2ND ACCUSED

SAMUEL KIOGORA KIAMA.....3RD ACCUSED

JUDGEMENT

1. The Accused persons 1. Julius Kimathi Charles 2. Jeremiah Muthee Thuimuta and 3. Samuel Kiogora Kiama were jointly charged with the offence of Murder Contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya.

2. Particulars of the offence are that on the 8th May 2013 at Mumui location, Tigania West District in Meru County Jointly with others not before this Court murdered Douglas Muthaura Maithima.

3. The Evidence of Dominic Mwingirwa was that he was at the quarry near Isiolo town on 8th May 2013 at around 08.00 hrs when about 5 people in Motor vehicle registration KAS 171 A Toyota G. Touring came and got hold of the deceased alleging he had cut one Douglas. That they beat him with kicks and later tied him on both hands and legs, put him in the boot and drove off. Pw1 says he was with his wife and the deceased at the quarry when he was held and taken away. That after the 5 people had left in the car with the deceased he called the sister to the deceased and informed her what had happened. PW1 said it was Muringi, Muthee- A2, Kimathi, Japther and Sammy the driver who went to the quarry and beat up deceased and put him in the boot of a vehicle and drove off. PW1 said the 5 people said they were taking the deceased to police station. He said when the 5 people arrived they started beating the deceased without asking for anything. He said Muringi hit the deceased on the head whereas Kiamthi kicked him on the back

4. That when he asked what the problem was they told him the deceased had killed somebody. PW1 said he had not seen Muringi since the day of the incident. He said he had also not seen Japther. He said after about 20 minutes after the suspects had left with the deceased in the car he learnt that he had died, while undergoing treatment at the hospital

5. PW2 reiterated what PW1 had said that while at the quarry in Isiolo PW1 saw his cousin Douglas Muthaura passing by the road and called him. That she served him with tea and food and while he was eating a group of 5 men came in a care and parked where they were and alighted. That the 5 approached them, seized the deceased and started kicking him before tying up his hands and legs with a rope. That when people at the quarry inquired why they were doing that the 5 said Douglas had killed someone and that they were taking him to police station. She said they put the deceased in the boot of the car and drove away. Like PW1, PW2 gave the registration number of the vehicle that took the deceased away as KAS 171 A. She said she learnt later that Douglas had been found in Mumui having been beaten badly and he died at night while undergoing treatment at Miathene hospital. PW2 said she knew that the three accused person together with Japther and Muriungi are the ones who took Douglas away. She said all of them came from Mumui location. PW2 said the first accused picked a stone and used it to injure the deceased on the head whereas accused no. 2 tied the deceased person and he was carried in the car that accused no. 3 was driving. PW2 said Muriungi and Japther were not in court.

6. PW3 Dr Maria Muthoni produced post mortem Report prepared by Dr Koome Guantai. Dr Guantai observed that the deceased had testicular lacerations and both testicles were missing. That the deceased had 3 fractures on the left hand side of chest and that there was haemothorax- accumulation of blood in the chest cavity. That there was extracranial haemorrhage- blood clot on the external cranium, located on right parietal region. There was also skull fracture measuring approximately 6 cm. Dr. Guantai concluded that cause of death was severe head injury secondary to multiple trauma.

7. PW4, Assistant chief of Mumui sublocation Geoffrey Itabari testified on 27th July 2018. He said he received a phone call at 10.00 pm on 6th May 2013 from Julius Kimathi who informed him that his brother Silas Muthaura had been assaulted by a known person and had

sustained multiple panga cuts and was at Meru General Hospital. That he advised him to report assault to the police. PW4 said Kimathi informed him it was Douglas who had injured his brother.

8. That on 7th May 2013 at about 5.00 am he called A1 to find out the condition of his step brother Silas and he was told his condition had not improved. That on 8th May 2013 while he was at home at 9.30 am he received a phone call from Francis Muthee who told him the person who had beaten Silas had been beaten by unknown people and he had been left by the road. He said that Francis Muthee is neighbour to A1. That PW4 reported the matter to Chief Silas Kinyua and he learnt chief had also reported a similar report from Muthee and he had reported to OCS who was on the way to the scene.

9. He said Douglas Mutuma also went and reported that his brother had been beaten and was lying on the road and he wanted to be assisted to take him to hospital.

10. That he accompanied Douglas Mutuma to where his cousin Douglas Muthaura was on the road and they found a crowd of people had surrounded the person who had been beaten. That the person could not sit up. That he knelt besides him to talk to him and he said he had been taken from Isiolo with a car. He said he was beaten in Isiolo and then taken in a car up to the scene where he was lying.

11. That when he tried to ask who had beaten the deceased the crowd became irate and made noise saying

“ Huyu mjinga anauliza maswa gani amalizwe”

12. PW4 said he stopped asking questions as the crowd threatened to kill him together with the injured person.

13. That he urged the crowd to calm down as OCS was on the way to scene. That Douglas Mutuma with help of Makena, a sister in law to the deceased carried the deceased on a motor bike and took him to hospital.

14. PW4 Assistant chief said the OCS told him to accompany the injured person to the hospital. He said before he left the scene A1 arrived and he asked him for OB number issued to him when he reported assault on his cousin but he didn't have it. That he went and booked report and police vehicle took the deceased to hospital where was admitted.

15. That the next day Douglas Mutuma called PW4 and informed him that Douglas Muthaura had died. PW4 said that from Isiolo where deceased said he had been taken from to where he had been dumped was like 10 KM. He said the deceased wrists looked like they been tied because they had bruises. He said the deceased could not sit or stand and he was helped onto the motor bike that took him to police station. He said A1 came to scene in his car.

16. He said he didn't see A2 & A3 at the scene. PW4 said that Muthee reported to him that the person who was beaten had been brought to scene by a car. He said the deceased was a neighbour to A1 about 500 m apart and 1 Kilometre from second accused person home.

17. PW4 said A1 operates a matatu and was also a member of community policing. He said A1 reported Silas had been beaten and took him to hospital. He said that he had known deceased herein for just one week prior the incident. He said that when he went to scene the deceased was still alive and had injuries on the wrists. He said Muthee called him at around 9.00 am. He said there were over 200 people at the scene by the time he left. He said he found A2 at the scene whereas Kimathi found him at the scene. He said PW1 was known to him. He said PW1 had been found with bhang and arrested by A2 who was Area Manager. He said A1 and A2 were members of Community Policing and A2 became Area Manager.

18. PW5 P.C. Dennis Mweu testified as current Investigating officer P.C. Odhiambo who investigated the offence initially having gone on transfer. He produced statement recorded by P.C. Ojiambo as initial Investigating Officer –Exp 2(a) and (b).

19. In cross examination he said that initial report was that Douglas Mutharura was assaulted by a mob for allegedly assaulting Silas Muthaura.

20. When accused were place on defence, A1 gave sworn statement said that on 8.5.2013 at 8.00 am he was at home with a mason who was constructing his kitchen and that at 10.00 am he left and proceeded to Ruiri in his car. That on the way after Marere he came across a group of people along the road and vehicles were slowed down.

21. That PW4, the Assistant Chief stopped him and asked if he had reported when he took Silas to hospital. That he told him he had reported and he was issued with OB No. 86/06/5/2013.

22. That he didn't have the OB in the car and that PW4 told him that once at home he should read it over to him. That he proceeded home and read over the OB no. to Assistant chief through phone. He said PW4 told him that someone who was suspected to have cut Silas while attempting to steal motor bike had been arrested. He said that it was at the station he learnt of suspects name when his cousin booked him as suspect in Silas death.

23. He said the deceased had been in the village for first a few days before committing offence. He said it was Geoffrey Kaunyangi who was constructing for him a kitchen on the material day. He said he was paying fundi 1000/= per day for the work on 7.5.2013 and 8.5.2013.

24. He said he was the one assisting the fundi to construct the timber kitchen. He said the roof of the kitchen was covered with 5 iron sheets. He said he was a lone at home with his wife and the fundi. He said his children had gone to school. He said his mother's home is 500m from his home. He said that his mother had come to his home early in the morning and found him with the fundi around 8.00 am. He said

PW1 and PW2's evidence was not true.

25. He said that he was elected Community Policing member on 26th January 2010 and that he arrested PW1 and his cousin Kithinji who were in possession of bhang which they were selling to young boys. That PW1 pleaded guilty and was sentenced to 7 months jail.

26. He said PW2 is wife to PW1 and that PW1 wanted to revenge. He said he had never spoken to PW1 since he was arrested and charged. He said that he didn't know the deceased until when his cousin was assaulted. He said A2 is his neighbour. He said he also knew A3 and both A2 and A3 have been friends.

27. He said that when his cousin Silas was attacked, it is Joseph Kimathi the cousin of the deceased who woke him up.

28. DW5 Geoffrey Kaunyangi witness to A1 said he and accused persons come from the same location but different villages. He said that on 8th May 2013 at about 7.00 am he was at A1's home where he had been constructing a kitchen. That he found A1 at home and A1 assisted him to pass ironsheets and when he finished with the roof A1 left in his vehicle.

29. That after about 20 minutes A1 returned home and then left again without a word. He said that Kimathi was at home with his children and wife Catherine. He said that Kimathi was paying him Ksh 1000/= to construct the entire kitchen. He said he didn't know A1's mother. He said he knows A1 father because he sees him herding. He said he didn't know the woman who came to see Kimathi's wife. He said he could not tell when the woman came but it was around 8.00 am and 1.00 pm. He said the 1st woman who came to A1's home was agemate of his wife.

30. A2 on the other hand testified that on 8.5.2013 at about 11.00 am he was at home which is next to the Isiolo-Ruiru road when he heard screams and he saw a crowd of people pushing and beating someone. That he approached the crowd which had swollen to between 100 to 150 people. That when he asked what the problem was the crowd shouted " Mwizi! Mwizi! Ua!ua!"

31. That the crowd said they were going to kill and burn the person. That he made a phone call to Assistant chief – Mwenda that there was a man who was being beaten by members of the public. That when Assistant chief delayed to come he decided to call chief Silas who assured him Assistant chief was on the way.

32. That he saw Mutuma who came on a motor bike carrying Jackline Makena, wife to deceased persons brother. That he stopped Mutuma and told him it was his relative who was being beaten by the crowd. That he told him to go and get Assistant chief.

33. That he remained with Makena and approached the crowd. That when they reached the crowd, the Assistant Chief had also arrived and he started talking to the deceased who had been beaten and was unable to walk. That Mutuma's Motorbike was used to carry the deceased to police station. He said he and Makena assisted the deceased onto the motorbike and Assistant chief escorted him to police station. He said he called assistant chief because he was a member of the community policing.

34. A2 said he had known the deceased earlier as they were in class 3 together at Mumui primary school. He said his home to deceased persons home is a distance of 300 M. He said from his home to scene is 500M. He said he heard screams while he was at home. He said screams were about 15 M from his home. He said the people who were beating the deceased were not known to him as they came from Isiolo direction going towards Ruiru. He said it was not true that they took the deceased from the quarry in Isiolo as alleged by PW1 and PW2. He said PW1 and his cousin were arrested when he reported to Assistant chief – PW4 and Administration police that he had bhang. He said that since 2010 pW1 had developed enmity towards him and doesn't even greet him. He said he relied on evidence of PW4.

35. A3 also gave sworn statement and said that on 8.5.2013 he left his home at 6.00 am proceeded to Ruiru and said he didn't commit offence.

36. He said that on 8.5.2013 he left home at 6.00am and proceeded to Ruiru where he picked passengers and went to Isiolo and got there at 8.30am. he said among his passengers were students who were going to Kianjai Secondary school and one lady. That at Airport traffic police officers who stopped him and inspected his vehicle. That there was also a road block at Nanyuki junction where he stopped and his vehicle was checked and he proceeded with the journey.

37. He said he got a crowd at Maji ya chumvi and when he inquired a woman told him that a person who had broken and stolen from a shop was being beaten. That because the students were in a hurry he just passed. He said it is at the police station he learnt that he was alleged to have carried someone in the boot of his car. He said the allegation was not true. He admitted that his car is registration KAS 171 A Toyota G-Touring white in colour. He admitted knowing A1 & A2. He said he went with them to Mumui primary school. He said they came from the same village. He said that traffic police were standing at the place PW1 & PW2 claimed he put the deceased in the boot. He said the woman passenger he picked was going to be his witness

38. DW4 Wilson Kinyoru Mutai testified and said that on 8.5.2013 he send A3 to buy for him chicken feed from Kianjai. He said that he went to the quarry at 7.00 am and remained there upto midday and that PW1 and PW2 were not known to him. He said he knew the people who were at the quarry. He said the deceased was not known to him but he heard same one had been arrested on suspicion of theft at Maji ya Chumvi. He said he met A3 along the road between 8.30 am to 9.00 am. He said A3 was driving Toyota G-touring Registration No KAS 171 A. He said he is one of the elders who assist chief and if something happened he would have known.

39. At close of defence case accused persons filed written submissions seeking that accused persons be acquitted. From the evidence on record the issue for determination is:-

a) Whether prosecution has proved its case beyond reasonable doubt that a death occurred.

- b) That the death occurred as result of unlawful act or omission
- c) That the unlawful act and/or omission was actuated by malice aforethought
- d) That the unlawful act and/or omission actuated by malice aforethought was perpetrated by accused persons.

40. The fact of death has been confirmed by the post-mortem Report –Exp1 – produced by Dr Maua Muthoni and prepared by Dr Koome. Dr Koome established cause of death as severe head injury secondary to multiple trauma. PW1 &PW2 also said that after the deceased had allegedly been forcefully taken from the quarry and carried in the boot of motor vehicle Registration KAS 171 A, they learnt later he had died.

41. PW4 the Assistant chief as well as the accused persons also confirmed the fact of death. Whether the death occurred accidentally or by unlawful act or omission the doctors report shows there was deliberate effort made to take away his life.

42. The deceased persons testicles were missing. They were 3 fractures noted on left hand side of chest and accumulation of blood in the chest cavity.

43. There was extracranial haematoma – Blood clot on the external cranium located on right parietal region. There was also skull fracture measuring approximately 6 cm. these are kind of injuries that could not have been self inflicted. They are life threatening injuries and indeed the deceased succumbed to them.

44. According to accused persons the injuries were inflicted on the deceased by a mob. However, the Assistant chief – PW4 says when he got to the scene he found the deceased lying down and could not sit up. That he knelt besides him and talked to him and the deceased told him he had been taken from Isiolo town in a car. That the deceased was beaten in Isiolo town and then taken in a car upto the scene where Assistant chief found him lying down. Assistant chief said when he tried to ask who had beaten him the crowd started making noise and he stopped asking the deceased questions as the crowd threatened to kill him.

45. PW4, Assistant chief didn't say he found a mob beating the deceased. The deceased said he had been beaten in Isiolo and then brought to the scene where PW4 found him. T

46. This declarations by the deceased to Assistant chief is corroborated by the evidence of PW1 and PW2 that the deceased was taken from Isiolo by 5 people including the accused persons herein who came in motor vehicle KAS 171 A G-Touring.

47. PW1 and PW2 said the 5 got hold of the deceased and tied him on both hands and legs and put him in the boot of the car.

48. A1 & A2 are claiming that PW1 had a grudge with them because they had arrested him in 2010 in possession of bang and was convicted and imprisoned.

49. The issue of grudge between A1 and A2 with PW1 was however not raised with PW1 when he testified and if A1 and A2 were fabricated, then there is no reason given why A3 and the other 2 suspects at large were mentioned.

50. A1's cousin had been fatally injured and accused persons went in pursuit of the assailant whom they were told was the deceased but being members of community Policing and Sub Area Manager respectively the standard of responsibility upon them was higher that that of an ordinary citizen who would think it is normal and a shortcut to take the law into their own hands.

51. Accused persons after taking the deceased from Isiolo inflicted fatal injuries and then place him at a place where one would suspect he was subjected to mob injustice.

52. A2 pretended he was reporting an incident of mob injustice when PW1 and PW2 saw him early in the morning at 8.00 am holding the deceased and bundling him into A3's car.

53. A2 has raised the issue of his witness constructing for him a kitchen but the contradiction in his witness evidence compared to his evidence couled with the fact that he didn't raise this defence early enough makes this court find that his defence cannot stand.

54. A3 had said he was going to bring a woman passenger he had carried on the material morning to confirm he didn't commit the offence. That woman didn't come and instead, DW4 came claiming he send A3 to buy for him chicken feeds between 8.30 and 9.00 am.

55. This witness is an afterthought. PW1 and PW2 said the accuse persons went to get the deceased from the quarry at 8.00 am. PW4 said from the quarry to scene where the deceased was dumped is 10 minutes drive. So it is possible that accused persons herein committed the offence and then went on with their normal routines.

56. Dw4 claimed that he owns the quarry which PW1 and PW2 were working in and that pW1 and PW2 were not at the quarry on the amterial day. DW4 didn't produce any document to show he owned the quarry. He didn't give a single name of the alleged employees at the quarry to prove he knew everyone working there. Evidence of DW4 was not supported by A3 or any other evidence.

57. Accused persons and the deceased as well as PW1 and PW2 come from Mumoi and there no evidence tending to show that there was any mistaken identity of the people who fatally beat the deceased. Offence was committed in the morning during daytime. Although PW4 and accused A1 would like the court to believe that the deceased was new in the area that he had been there for just one week, A2 said they were

schoolmates at Mumui primary school and A3 says he and A1 and A2 were also in the same school I,e Mumui Primary school. It is confirmed in the evidence that the deceased persons home and the homes of the accused persons are in close proximity to each other. The narrative that he was a stranger in the village was only being peddled to advance the accused persons ill motive and malice in subjecting the deceased to extrajudicial harm in revenge of A1's cousin's death.

58. I do find that the prosecution has proved all the 3 ingredients of the offence of murder have been proved beyond reasonable doubt against the accused persons. I do find accused persons guilty as charged and they are convicted under S.215 C.P.C.

HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 14TH DAY OF FEBRUARY 2019

In the presence of:

CA: Kinoti

Republic:-

A1:-Present in person

A2:-Present in person

A3:-Present in person

Mrs Wambulwa advocate holding brief for Mr Omari advocate for accused persons.

HON. A.ONG'INJO

JUDGE

Ms Mwathe for state

Accused persons may be treated as 1st offenders.

Ms wambulwa in Mitigation for accused persons.

I pray for a date for mitigation.

Order

Mention 1.3.2019 for victim impact statement, mitigation and sentence. Accused remanded in custody.

HON. A.ONG'INJO

JUDGE