



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 14 OF 2014**

**JOSPHAT KIMAMO NGUNJIRI.....1<sup>ST</sup> ACCUSED**

**RICHARD NGUNJIRI KIMAMO.....2<sup>ND</sup> ACCUSED**

**VERSUS**

**REPUBLIC.....PROSECUTION**

**JUDGMENT**

The case for the prosecution herein is that the deceased Douglas Kamunya Ngunjiri and Josphat Kimamo Ngunjiri are brothers. Their shambas at Karaihu village, Karaihu Sub location in Tetu District share a boundary. For some time the two held a boundary disputes as confirmed by their assistant chief Jennifer Wanjiku Nduati. PW8, and their neighbour Isaac Ndung'u Kamunya, whose home was across the road from Accused 1.

The evidence was that Douglas, the deceased would sometimes uproot the fence between his shamba and that of 1<sup>st</sup> accused, other times he would lease out part of Accused 1's land without his consent and several arbitration meetings had been held prior to this date by PW7 and PW8 A and her predecessors.

On 24<sup>th</sup> April 2014, Agatha Muthuai Ndung'u a neighbour to the parties herein was coming from visiting a neighbour whose mother had died. She passed by the home of Douglas and the path went past Kimamo's place from where it dips down into a valley to her home. Just before she got home she heard noise and on looking back she saw Douglas chasing Kimamo running after Kimamo. She raised alarm for people to go and separate them- she saw people headed there and went to her house then left for the scene where she found Douglas lying down bleeding from his head and a huge crowd. They all waited for the police to come.

PW7 Isaac Ndung'u Kamunya heard the screams while at his home. When he got out he met the wife to Douglas at his gate and she told him that her husband had been cut.

PW5 Mary Wangari Wambugu was the deceased's daughter in law. On the morning on 24<sup>th</sup> April 2014 at 9:00am, she heard noise coming from his home. She rushed there and found her father in law, her 4 years old son, her daughter Lydia Wanjiku mention the 2 accused were cutting him with pangas- he was actually running and they were behind him, chasing him with pangas. Lydia was shouting to them to stop. They said that deceased had gone to provoke them but she saw Accused 2 hit the accused with a panga on the back and he lay down and never got up. He was bleeding from the head. They traced 1<sup>st</sup> accused in vain.

Rahab Wangui Waithaka was going to pick tea when she heard the screams with people rushing to Douglas's place – she had rushed there and met Douglas coming from the shamba of Josphat. He was walking with his eyes closed. He was in a blood soaked sweater. He had injury on thumb (left). He had a panga and tarimbo and when he reached where she was he fell down- Richard son of Kimaru came there- very angry and holding a panga. Josephat his father was approximately 5m, also armed with a panga behind him. When she asked them how they could do that to deceased, Josphat responded

*“can you be beaten in your own home. He too has cut me”.*

The 2 took themselves to the police station. By the time police came Douglas had died.

PW1 No.63860 PC Paul Chelego accompanied IP Mutua to the scene after a phone call from the Githakwa area chief – they went and removed the body from the scene to mortuary. He also attended the postmortem together with PW2 Gladshine Ngunjiri Kahihia and Patrick Ngunjiri Gatutu who were nephews of the deceased and who identified the body. Postmortem was conducted on 30<sup>th</sup> April 2014 by

Dr.Okoth Obiero who produced the post mortem Report.

Meanwhile PW9 No.204712 CPL Alex Wachira and his colleague from Githakwa AP Post had also been rang by the Assistant chief. They found the deceased already dead. They learnt that the 2 suspects had fled towards Githakwa AP Post. He left his colleague at the scene and followed the suspects whom he found at the AP Post. He arrested them. He placed them in cells, rang the OCS Ndugamano police station who came and collected the suspects. He identified the pangas that were recovered as MFI 1 (a) and 1 (b). He said he recovered the 2 pangas from the homes of the accused persons. He said at that time they had blood stains which as at 25<sup>th</sup> January 2018 was found to be rust by the prosecutor.

The 2 suspects were later presented to the psychiatrist for examination. They were examined by Dr.Ruchu Mwenda and found fit to stand trial. Their reports were produced as PExhibit 2. They were charged with murder c/s to section 203 as read with section 204 of the Penal Code.

At the close of the case for the prosecution the 2 accused persons were placed on their defence.

Their defence was that on the material date about 7:30am Accused 2 Richard Kimamo left home with a sack and a rope to collect napier grass he had cut the previous day for feeding the cattle. On reaching the lowest part of the shamba, he found cows and goats belonging to his 'baba mkubwa' Douglas Thuita Ngunjiri grazing inside their shamba- already 10m inside the shamba from the boundary fence.

He went to chase them out and that is when Douglas appeared – he told him to leave the livestock alone as he had no authority to remove them from there. An argument arose and it is then that Douglas threw his panga at Accused 2 who ducked and took off as Douglas gave chase. He disappeared from Douglas sight.

In the meantime Accused 1 had gone to the shamba to check how his maize crop was doing. He saw cows and goats grazing on the same and it is then that the deceased went to where he was and told him that there was nothing he could do about his grazing the cattle there. In addition, that seen, he would take over his (Accused 1's) shamba and join it to his own- the way he had taken his (Accused 1) sister's land. He threatened to kill him. According to Accused 1 this was in addition to the insults deceased would hurl at him every day whether he was sober/drunk. So on this day he threatened to kill him. Accused 1 thought it was a joke but deceased who was armed with a panga attacked him cutting him on both hands and on the back of his head.

He began to scream for help. People heard including Accused 2 who was at the lower end of the shamba. Accused 2 heard his father screaming for help saying -nimeuawa! Nimeuawa! ( I have been killed! I have been killed!).

On reaching there he found Lydia Wanjiku, deceased's daughter and his father and uncle fighting. They separated them. Accused 2 testified that he took his father away so that they could obtain P3 and get treatment as his father had cuts on neck and both hands. That when they were leaving the deceased was ok- they left him with his daughter and one Wachira Wakairu his friend, and his daughter in law.

Both accused were of the view that it is these 3 people who knew who had injured the deceased. That when they got to the police post the said Wakairu Wachira arrived and said that they were suspected of having cut the deceased but were arrested and denied medical treatment.

In addition the 2 accused persons testified that they did not see any injuries on the deceased. That each of them was unarmed when Douglas confronted them, and neither of them caused him any injuries.

### **Submissions**

For the accused persons it was submitted that the state had not proved their case beyond a reasonable doubt.

- Ø Key witnesses including the Investigating officer did not testify and no sound reason was given for the same.
- Ø That prosecution evidence was related with contradictions and inconsistencies.
- Ø That murder reports were not produced.

Relying on **Simon Muli Katiwa Vs.Republic (2006)eKLR.**

*“It is the burden of the prosecution to avail all the material evidence to the court, he must summon all material witnesses and avail or present the court with all facts, where prosecution fails to call a witness and it transpires that the evidence in support of the charge against the accused is barely adequate, the court trying the case is entitled to draw an adverse inference that the omitted evidence is averse to the prosecution's case”*

The court was urged to find that the omitted evidence would have been adverse to the case for prosecution.

- Ø That the pangas were not linked to the offence by finger prints/ blood samples.
- Ø That prosecution had not proved beyond a reasonable doubt that accused persons murdered the deceased or caused a certain unlawful event/state of affairs attributed to them leading to death of deceased.

Ø That they had definite state of mind in relation to causing death of deceased.

Ø That accused's' statement of defence was credible and plausible.

Ø That the case was poorly investigated.

For the state it was argued that

Ø The witnesses were consistent

Ø Both accused had intention and motive of killing the deceased based on their numerous land disputes.

Ø That incident happened in broad daylight.

Ø That guilt was proved.

### **Analysis and Determination**

I have carefully considered the evidence before me the submissions by Gichuhi Mwangi & Associates and oral submissions by Magoma for the state.

Issues that arise:-

1. Whether the prosecution had proved its case beyond a reasonable doubt.
2. What is the effect of failure of investigating officer to appear to testify and produce the pangas?
3. Whether the defence is credible plausible.

I begin with issue No.2 on the effect of failure to call the Investigating Officer-

This issue was settled in the Court of Appeal case of **PM & 2 OTHERS Vs. Republic (2014) eKLR**

**31. A further contention by the appellants is that the investigating officer was not called to testify among other crucial witnesses. Section 143 of the Evidence Act Cap 80 Laws of Kenya provides:-**

**“No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact”**-----

-----**In the case of Kihara versus Republic (1986) KLR 473 the Court of Appeal held inter alia that,**

**“The prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in court”**

**32. Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our mind is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collect, collate and repeat what PW1, PW2, PW3, and PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigation officer and other witnesses was not fatal to the prosecution case. In all cases, the investigating officer is not an eye witness and in the instant case, the testimonies of the eye witnesses was sufficient to convict the appellants.**

The Court of Appeal was of the view that the absence of evidence of Investigating Officer was not fatal to the case because his role was to “collect, collate and repeat” what the other witnesses had already stated and that in any event the investigating officer was not an eye witness and a court could rely on the evidence of eye witnesses to convict.

That also goes to the evidence about the panga. It is the investigating officer who was to produce them but he was never called and they were not produced as evidence. However, he is not the one who recovered the panga but PW8.

On issue no. 1 and 2 it is evident that the deceased succumbed to injuries caused by sharp objects. There was eye evidence from the prosecution witnesses of the deceased chasing the 1<sup>st</sup> accused and later both accused chasing him. These are relatives who had a long running land dispute as evidenced by the 1<sup>st</sup> accused's statement of defence. He was provoked beyond measure by the deceased. He was attacked by the deceased it is not believable that he just lay there. He called out to his son, the 2<sup>nd</sup> accused who had also been extremely provoked by the deceased. These acts of provocation happened on their side of the shamba. I am persuaded by the evidence before me that the accused persons acted out of provocation

Section 208 of the Penal code defines: Provocation

*(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

*(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.*

Section 207. Killing on provocation

*When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.*

Having found so, I substitute the offence of murder with manslaughter c/s 202 as read with s. 205 of the Penal Code. I find each of the accused persons guilty of manslaughter and convict each accordingly.

**Dated, signed and Delivered in open court this 7<sup>th</sup> day of June 2019 at Nyeri.**

**Mumbua T.Matheka**

**Judge**

In the presence of:-

Court Assistant: Juliet

State counsel- Martha holding brief for Magoma for state

Gacheru for Gichuhi Mwangi for both accused.

**Judge**