



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 43 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN MUTHU MWANGI alias KEVO.....1ST ACCUSED

JEFFERSON GIMODE alias SINDE.....2ND ACCUSED

JOSEPH NJENGA THUO.....3RD ACCUSED

ANTHONY MBURU KIARIE.....4TH ACCUSED

JUDGEMENT

1. The accused persons **KELVIN MUTHU MWANGI alias KEVO**, **JEFFERSON GIMODE alias SINDE**, **JOSEPH NJENGA THUO** and **ANTHONY MBURU KIARIE** were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 26th day of February, 2013 at Dandora Phase II in Njiru District within Nairobi County jointly with others not before the court murdered **PATRICK MUBIA NYAGA**.

2. They first appeared in court on 19/3/2013 before Muchemi J. when their plea was deferred to 2/4/2013 when a plea of not guilty was entered for the first set of accused persons. On 23/5/2013, this file was consolidated with Criminal Case No. 46/2013 before Korir J. and fresh pleas taken on 25/5/2013. In the meantime before the trial herein commenced one of the accused persons namely **STEPHEN WASHIORI MWANGI alias 'SHIORI'** died and charge against him withdrawn.

PROSECUTION CASE

3. On 21/3/2016 their trial commenced before me at which **PW1 SIMON NYAGA MUBIA**, the father of the deceased testified that on 26/2/2013 between 7.00 p.m. – 7.30 p.m. he received a call from his wife **PW2** who informed him that the deceased had been attacked by a group of youths and since she was near to the police station he advised her to report to the police. He then followed his wife to the police station and on the way met three (3) members of the youth group, the 1st accused whom he knew as **KEVO**, 3rd accused **'DB'** and the 2nd accused **'SINDE'** together with one **KIBE** who was not charged. It was his evidence that he did not see the 4th accused. When the accused persons passed him he heard the 3rd accused say "amededi" meaning he was dead.

4. It was his further evidence that he proceeded to the scene where he found the police at the scene and proceeded to the 3rd floor where he identified the body of the deceased who had stab wounds. On his way downstairs he met **GIBSON MUIRURI** who told him that he was with the deceased together with one **MARION** when he was attacked and gave the names of those who attacked them. It was his evidence that the accused persons were friends of the deceased and that three (3) days before the date of his death the deceased had told him that he had a grudge with the accused persons and members of his group over garbage collection and that Sinde, Kevo, DB, Kibe, Kiarie and one Kevin Wambua had threatened him with knives. It was his evidence that he was able to see the accused persons well. He confirmed not having witnessed the attack and that he did not name the accused persons to the police.

5. In cross-examination he confirmed having paid Marion for lunch but not to give false evidence and that he did not see Kiarie in the first group of youth that he met. **PW2 BETH WANJA NYAGA** stated that she received a call from one **MAMA NJERI** who inquired whether she had received a report on her son and then reported to the police station where she was given the information of the death of her son and on the way to the scene met with **'DB'** the 3rd accused and one Kibe walking towards town. After four (4) days one **GIBSON MUIRURI** told her that he together with the deceased had been chased by the accused persons and that the deceased had told her of a dispute over sharing of garbage collection proceeds and that on 25/2/2013 he had been chased with a knife and his clothes cut at the back.

6. In cross-examination she stated that **MUIRURI** told her that he was together with the deceased when they were chased and that he knew the accused persons and recognized them since they were all in PNU T-shirts and that the initial information was given to her by one **MAMA NJERI**.

7. **PW3 – SGT. JOSEPHAT KIAMA** confirmed having arrested Stephen Mwangi on the way and further having arrested Kevin Mwangi ‘Kevo’ who led them to the 3rd accused and that he did not know how the rest were arrested. **PW4 CLP. STEPHEN KOSKEY** visited the scene of murder on 26/2/2013 upon receipt of information that there was a gang of about fifteen (15) members pursuing a rival gang and upon reaching there, found the said gang running away. They searched the building and recovered the body of the deceased and recovered the murder weapons but did not make any arrest.

8. **PW5 PC DICKSON JUMA** confirmed having responded to the information of a gang terrorizing people at Kwanyayo building and upon reaching the scene the gang ran away dropping a panga and blood stained knives. They recovered the body of the deceased whom they took to the mortuary. He stated that he was unable to identify any of the gang members. **PW6 PC PHILIP TOO** the investigating officer recorded statements of the witnesses having received statements from **GIBSON MUIRURI** (deceased) and **MARION MUTHONI**, **PW7** and by use of an informer they arrested **KELVIN MUTHU MWANGI alias ‘KEVO’**, **JEFFERSON GIMODE alias ‘SINDE’** and **STEPHEN WASHIORI MWANGI alias ‘CHURI’** who was arrested along Molem Road. It was his evidence that the 1st accused led them to the home of the 2nd accused from where he was arrested.

It was his evidence that the deceased and the accused persons used to work together in garbage collection and upon a disagreement, the deceased broke away and formed his group which led to a grudge between them. In cross-examination he stated that the 1st accused when interrogated said that he knew the 2nd accused and that the accused persons were arrested on the information given by informant and the father and mother of the deceased.

9. **PW7 MARION MUTHONI MAINA** stated that she knew the deceased and one **GIBSON MUIRURI** also deceased but denied witnessing the attack of the deceased herein and was only informed by **GIBSON MUIRURI** and one Gikuyu of what to say having allegedly been threatened. **PW8 DR. JOHNSEN ODUOR** performed postmortem examination on the body of the deceased who had two (2) stabbed wounds on the right shoulder, multiple stabbed wounds on the chest and abdomen, multiple slash wounds on the head, skull fractures and bleeding to the brain and as a result of the said examination formed opinion that the cause of death was multiple injuries caused by penetrating trauma. **PW9 DR. JOSEPH MAUNDU** confirmed that all the accused persons were fit to stand trial, while **PW10 PC JAMES NDIRANGU** produced the murder weapons.

DEFENCE CASE

10. When put on their defence, the 1st accused testified on oath and stated that on 26/2/2013 he was at his place of work at Babadogo from 4.00p.m. to 8.00 a.m. same as 10/2/2013. He was arrested on 15/3/2013 while coming from work by police officers who gave him a list with about thirty (3) names from which he said he only knew the 2nd accused. He denied having been engaged in garbage collection.

11. The 2nd accused stated on oath that on 26th he went to class at Good Shepherd Computer upto 3.00p.m. and that on the night of 26th he was at his parents’ house and that he did not know the deceased and was not in a garbage collection group. He confirmed knowing the 1st accused only.

12. The 3rd accused denied the commission of the offence and stated further that he was not in the group that attacked the deceased. He testified that on 26th, he was at a get together in Nyeri upto 5.00 p.m. In cross-examination he stated that he was in Nyeri upto 10.55 p.m.

13. The 4th accused stated that on 26th he woke up in the morning and went to school in town upto 3.00p.m. to 4.00 p.m. and went back home where he was staying with his mother and sister and that his sister later on told him that she had met the mother of the deceased at the police station between 8.00 – 8.30 but did not know why she was there. Later on his mother came back home and informed him that the deceased had died. He stated that he had never been a garbage collector.

SUBMISSIONS

14. At the close of the defence case, the prosecution opted not to make any submissions but referred the court to the earlier submissions filed at the no case to answer stage. On behalf of the 2nd accused it was submitted that there was no evidence tendered to show that the accused was connected to any gang and that there was any disagreement between the 2nd accused and the deceased over garbage collection fee. It was submitted that crucial witnesses who would have shed light on the prosecution case were never called for which reference was made on the case of **BUKENYA v UGANDA [1972] EA 549** and that the prosecution case was full of contradictions.

15. On behalf of the 4th accused it was submitted that there was no direct evidence to show that the 4th accused was seen killing the deceased but based on purely circumstantial evidence which did not show that the 4th accused is the murderer of the deceased. In support of the submissions herein, the following cases were submitted:-

- **REPUBLIC v JOSEPH NDUNGU KIMATHI – HCR. CASE NO. 31 OF 2008.**
- **REPUBLIC v JOSEPHAT KIPRUTO BETT, HIGH KENYA AT ELDORET – CR.CASE NO. 42 OF 2011.**

16. At the time of writing this Judgment I did not have the submissions by the 1st and 3rd accused persons but I have analyzed the evidence and the submissions filed herein.

ANALYSIS AND SUBMISSIONS

17. To sustain a conviction on a charge of murder, the prosecution is required to prove beyond any reasonable doubt the following ingredients of the offence:-

- *The fact and cause of death of the deceased.*
- *The fact that the said death was caused by unlawful act of omission or commission on the part of the accused persons or that the said unlawful act was caused by malice aforethought.*

18. The fact and the cause of death of the deceased is not in dispute. The fact of death was proved by the evidence of his father **PW1, PW2** his mother, **PW4 STEPHEN KOSGEY** who discovered the body of the deceased at “Kwanyayo” area in the company of **PC DICKSON JUMA - PW5** and as I have said before unless the deceased was Jesus Christ, Lazarus or Jairus daughter, the same was dead and subsequently was buried. The cause of death of the accused was equally proved beyond reasonable doubt by the evidence of **PW8 - DR. JOHANSEN ODUOR** who conducted post mortem examination on the body of the deceased and produced the report thereon in which he confirmed that the deceased had sustained the following injuries:-

- Multiple stab wounds on chest and abdomen.
- Stab wounds on the head.
- Flash wound on the head
- Evisceration of intestines.
- Bilateral lung collapse.
- Stab wounds on intestine, liver.
- Skull fracture.
- Acute subdural hematoma.

19. On whether the said death was caused by unlawful act of omission or commission on the part of the accused person; from the evidence tendered before the court, it is clear that there is no direct evidence by any witness who was present at the scene. The only evidence available is that of **PW1** the father of the deceased who testified that when he was called by his wife **PW2** to the scene and on his way he met six (6) youths of which he knew the 1st accused as ‘**KEVO**’, 2nd accused as ‘**SINDE**’ and 3rd accused as ‘**DB**’. It was his evidence that they were friends of the deceased and that he met them at Ebenezer Building moving towards Dandora. It was his further evidence that he met one **GIBSON MUIRURI** deceased who told him that he was with the deceased when they were attacked. The deceased gave him the names of about ten (10) youths including the accused persons. It was his evidence that three (3) days before the death of the deceased he had quarreled with **DB, Kiarie, Kibe** and others over the issue of garbage collection in which they threatened him with knives. It was his further evidence that when he met the accused persons they were all wearing red PNU T-shirts. He further stated that **MUIRURI GIBSON** was with **MARION - PW7**. This evidence was however not corroborated by that of the police officers who were the first to get to the scene including **PW4** and **PW5** who never gave the description of the clothings of the youth he had met on the way to the scene.

20. **PW7 MARION MUTHONI MAINA** in her evidence confirmed that she knew the deceased and **GIBSON MUIRURI** but denied ever knowing or seeing any of the accused persons. She recanted her statement to police and stated further that she was called by **GIBSON MUIRURI** and on Gikuyu to go to the police and record what they had told her under threat. The witness was stood over by the prosecution and was never recalled at the close of the prosecution case to be cross-examined by the defence. It is further noted that the statement recorded by one **GIBSON MUIRURI** - deceased was never produced by the prosecution to corroborate the evidence of **PW1**.

21. The testimony of **PW1** is contrasted by that of **PW2 BETH WANJA NYAGAH** whose testimony was that she only met **KIBE** who was not charged and **DB** the 3rd accused who she stated had gone to Dandora Primary School with the deceased. She further stated that one **Muiruri, deceased** had told her that four (4) days before the death together with the deceased they had been chased by four (4) boys whose names she gave as Kevin – 1st accused, Dibby - , Kiarie – 4th accused and Maina. Both **PW1** and **PW2** were not clear on the nature and intensity of the lighting at the road which would have enabled them to identify the accused persons.

22. **PW3 SGT JOSEPHAT KIAMA** stated that the accused persons were arrested through the use of an informer and that at their arrest all of them denied having committed the offence. Under cross-examination it was his evidence that three (3) of the accused persons had been mentioned by witnesses who had recorded their statements and that they were looking for them through the use of an informer. **PW4** who was the first police at the scene stated that they met a gang of about fifteen (15) men who were armed with pangas and other crude weapons at Kwanyayo building but did not make any arrest. He further did not describe how they were dressed as to corroborate the evidence of **PW1, PW5 PC DICKSON JUMA** also confirmed that they met a gang of fifteen (15) people at Kwanyayo building terrorizing people but were unable to arrest any. He stated that he did not recognize any of them but picked a panga while **PC KOSEY** picked knives at the scene.

23. **PC PHILIP TOO** the investigating officer confirmed that he arrested the accused persons based on the information from the witness statement. He stated that from his investigations he formed an opinion that the accused persons and the deceased who were working together in garbage collection differed over payment which led to the deceased forming his own group which the accused persons were not happy with and that the names of the accused persons were mentioned by the father of the deceased and one **Marion - PW7** and **GIBSON MUIRURI** deceased. He stated that the panga and the knives recovered at the scene were not dusted for finger prints. He stated that they had a list of the suspects and when they arrested the 1st accused he confirmed that he knew “**Sinde**”.

24. I have contrasted the prosecution evidence herein above against the defence of the accused persons all who denied having been engaged in the business of garbage collection. The prosecution did not tender in any evidence to dislodge the accused claim neither did it establish beyond any reasonable doubt that the accused persons were engaged in garbage collection with the deceased. The accused persons offered alibi defences which were never dislodged by the prosecution.

25. Whereas there is a strong suspicion of the accused persons' involvement in the murder of the deceased herein, suspicion however strong cannot be a basis of a conviction in a criminal trial. It is worth noting that there were only two (2) alleged eye witnesses:- **PW7** who recanted her statement to the police and one **GIBSON MUIRURI** who died before testifying and whose statement the prosecution opted not to produce. Further the mere fact that the father of the deceased **PW1** met two (2) of the accused persons as corroborated by **PW2** his wife, does not mean that they took part in the commission of the offence without any further evidence supporting that particular evidence. There was also contradiction between **PW1** and **PW2** as to whether the youth they met were going towards town or Dandora thereby raising doubt in the prosecution case the benefit of which the accused are entitled to.

26. Sad as it is that the deceased lost his life in a senseless manner, I have taken into account the evidence of the father of the deceased, the mother and the investigating officer against the evidence of **PW7** who was alleged to have been the only eye witness and note that her part evidence in court did not corroborate the evidence of **PW1** and **PW2**. I have noted that whereas there might be a possibility of her hiding something or afraid of consequence which the prosecution failed to present before court. This being a criminal trial where the burden of proof is required to be beyond reasonable doubt, her evidence raises a doubt in the prosecution case as it is clear that the accused persons were arrested based on the statement allegedly recorded from **PW7** who has refuted the said statement thereby raising a doubt as to whether the accused persons were at the scene and or participated in the commission of the offence and the court is left to speculate on the nature of her evidence.

27. Where the prosecution case rests entirely on circumstantial evidence as in the case herein, such case must satisfy the following test as was stated in the case of **OMAR MZUNGU CHIMERA v REPUBLIC** quoted with approval in **REPUBLIC v JOSEPH NDUNGU KIMATHI [2015] eKLR**, (i) the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and nobody else.

28. From the evidence tendered before the court it is clear that nobody saw the accused persons kill the deceased. The only evidence linking them to the murder was that the father of the deceased saw two of the accused persons while on his way to the scene, while the mother saw a different set of the accused persons. This coupled with the fact that the deceased had allegedly told his parents that the accused persons had threatened him for days before his death. This evidence is weak if compared with the evidence of **PW7** who was alleged to have been an eye witness and who only testified upon her arrest.

29. The motive for the alleged commission of the offence herein is an alleged dispute over garbage collection between the accused persons group and another group allegedly formed by the deceased and whereas it is not mandatory to prove motive, I take note that the prosecution failed to establish beyond any reasonable doubt the existence of these groups, the accused persons having denied being part of any garbage collection gang in their defence which was not dislodged by the prosecution.

30. The evidence adduced by the prosecution did not therefore exclude the possibility of the accused persons having been mistakenly identified and or connected to the commission of the offence based upon the past conduct between the accused persons and the deceased as per the evidence of his father and mother. I would therefore give the accused persons the benefit of doubt and find that the prosecution case was not proved beyond any reasonable doubt.

31. Having come to the conclusion herein, it therefore follows that all the accused persons are not guilty of the offence of murder as charged and hereby acquit the same. All the accused persons should be set free forth with unless otherwise lawfully held and it is so ordered.

32. The prosecution has the right of appeal.

DATED, DELIVERED and SIGNED at Nairobi this 10th day of April, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Muoki for the 1st accused

Mr. Muoki for Mburu for the 2nd accused

Mr. Muoki for Nyachoti for the 3rd accused

Mr. Muoki for Gulenywa for 4th accused

All accused persons present

