



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 27 OF 2013

REPUBLIC.....PROSECUTOR

- VERSUS -

STANLEY MURURU IKAIRIA.....1ST ACCUSED

EDWARD MWITI IKAIRIA.....2ND ACCUSED

JUDGMENT

Stanley Mururu Ikairia and Edward Mwiti Ikairia, Accused 1 and accused 2, herein referred to as Stanley and Mwiti were jointly charged with four counts of **Murder Contrary to Section 203 as read with 204 of the Penal Code**.

The particulars of the charges are that on the night of 10th March 2013, at Kongoamotune village, Lanyiruu Sub –location, in Tigania East District, Meru County, jointly murdered **Peter Litati Ampuria, Susan Kathure Ampuria, Jamleck Mutethia Ampuria and Francis Mutabari Ampuria**.

The prosecution led by Prosecution Counsel **Mr. Mulochi** called a total of 5 witnesses. The defence was led by learned counsel **Mr. Kiogora**. In their defences, the accused persons testified on oath and did not call any other witness.

The accused, Stanley and Mwiti are brothers. Their father, Libono is brother to Peter Litati Ampuria, the deceased in count I. The accused are therefore nephews to Peter Litati and his wife Susan Kathure, deceased in 1st and 2nd charge. The deceased in Count III and IV are sons of the deceased Peter and Susan and therefore cousins to the two accused.

Doreen Kinya (PW1), a daughter to Peter and Susan was at home with both parents on 10/3/2013 at about 7.30 pm, in their sitting room; that Stanley entered the compound and while outside their sitting room, started shouting abusing her father, Peter calling him a dog and that he should take his children so that he, Stanley, could kill them. PW1 went outside with her Techno phone and used the torch to see his face, and that he was armed him with a knife; that her father Peter Litati left their house saying he was going to ask Stanley's father, Libono, why Stanley was abusing him; that after the father left, PW1 and her mother Susan decided to follow him to persuade him to go to Libono's house on the next morning ;that Stanley's father home was about 50 metres away and by the time they caught up with Litati they found Stanley was holding Litati; that Susan went and stood between Stanley and Litati and told Litati to go back home; that at that time, Mwiti, (Accused 2) came and hit Susan on the head with an axe and she fell down bleeding and died. PW1 said that Stanley had a knife and a torch which he was flashing around and she was able to see Mwiti from that light; that Stanley then chased Litati round Libono's home; that her brother Elias came to the scene, observed and saw the mother was dead and ran off; that Stanley continued to look for Litati using his torch as there is a farm around his house; that Stanley found Litati in the farm which is outside Stanley's house but she remained where the mother's body was; that Stanley kept threatening to kill Litati when he found him, and indeed when he did, he held Litati with one hand while the other stabbed Litati and he fell; that her brother Muteithia came to find out what was happening, passed by her and went where Litati had fallen; that on approaching the place, Stanley stabbed Muteithia on the left side of the ribs and he fell; that Stanley went back where Litati had fallen and continued to stab him; PW1 stood up and ran to the road as she screamed. She went towards her younger uncle's home where she met her other brother, Francis Mutabari on the road and they went back where the mother's body lay. On reaching there, Stanley emerged from the fence of the house, flashed the torch at Mutabari and chased him and caught hold on him from the back. PW1 ran after them as she screamed; that Stanley's parents were in their home, they came out of their house at one time but went back inside. PW1 went to her uncle, Joseph Abungi's house till the next day. PW1 learnt next day that police had come to take the bodies, she went to the scene, saw Muteithia's body about a step from the father's but Mutabari died in Hospital.

PW2 Geoffrey Mutembei is the son of Joseph Abungi, a brother of the deceased Peter Litati. PW2 was at his home with his mother about 7.30 pm when they heard screams emanating from Litati's home. His home was about 80 metres away. He decided to go and see what was happening but before reaching, saw his cousin Francis Mutabari at his gate. Mutarabi fell at his feet saying he was dying and that Stanley had stabbed him. He used the torch on his mobile phone to observe Mutabari and found him bleeding from the left side of the ribs and only a

little blood was coming out. PW2 called for a motor cycle rider to help take Mutabari to hospital which he did. PW2 proceeded to Litati's home but found nobody there. He then went to Libono's home- his older uncle and near the gate, he found Litati had been stabbed all over the body and was dead. Near Litati's body lay Shadrack Muteithia who was also dead. As he observed the body he heard Stanley saying that he did not want to see anybody there. As PW2 followed the direction that Stanley had gone, he found Susan Kathure had fallen near Stanley's house and was also dead and there was an injury to the head. PW2 found that it is Doreen, PW1 who was crying and was near where he found Mutabari. He was disturbed from what he saw and went away. He went to record his statement on 13/3/2013.

PW3, Pastor Stanley Marara was at his home about 7.30 pm on 10/3/2013 when he heard a girl screaming and the screams were emanating from Litati's (Kathure's) home. He went with his wife to Litati's gate but found that the screams were in Libono's home. They found Doreen (PW1) at the gate screaming and on enquiring from her, she said her father and mother had died; PW3 told her to go to PW2's gate where her brother Mutabari had fallen. PW3 found PW2 attending to Mutabari at the gate and using his torch, he noted that Mutabari was bleeding from the ribs but was still alive; that neighbours came and together they entered Libono's home and near the main gate, found Litati's body with multiple stab wounds on the face and the neck was slashed open; that next to his body was Muteithia who was also dead. About 30 metres away, at Stanley's house, they found the body of Kathure with a cut on the head. PW3 said that he fainted and came to later. He called the chief who is related to Libono, who visited the scene where PW3 stayed till next day; that he saw Libono seated at the door of his house but said nothing. Police came for the bodies and he escorted them to the police station. At the police station, the police asked if there was anybody that could identify somebody in the cells and he found Stanley in the police cells. He later recorded his statement on 13/3/2013.

PW4 PC James Aswani then of DCIO's office Tigania, was the investigating officer in this case. On 11/3/2013 **PC Francis Wanyoike** informed him that one Samuel Ikiaria had called to report that he had a murder report from Kongoamutune. We proceeded to the scene with the DCIO and at the home of Stanley, they found the body of Peter Litati which was near the gate and next to it was a small axe that has blood stained (P. Exhibit no 1); that the body had deep cuts on the forehead and neck. About 3 metres from Stanley's door was the body of Kathure; that the place seemed disturbed with signs that there had been a commotion as there had been some rain; that there was mud leading to Staley's house which they entered but found nobody. They found a sheath of a knife which they suspected could have been used in the crime. They took it as exhibit (P. Exhibit no 2). He also found the 3rd body of Mutethia in the maize farm. The fourth victim had been injured and taken to hospital. On proceeding to Tigania Hospital, he found that the 4th victim had also died. PW4 said he interrogated witnesses including PW1 who told him how the confrontation started when Litati left his house to go and ask his brother Libono, why Stanley was abusing him and a confrontation occurred on the path that separates the two homes. According to PW4, he learnt that there had been a land dispute between accused persons and Litati; that on the same night of 10th and 11th March 2013, Stanley went to report a case of assault and on the morning of 11th March 2013, he presented himself to the police station and was arrested while Mwitii was later arrested by members of public at Lanyiruu on same date. PW4 said he saw a small cut on Stanley's forehead for which he was treated while Mwitii had minor bruises on the thigh.

Postmortem on the bodies of the deceased was done on 15/2/2013 by Dr. Njuguna. The post mortem reports were produced by Dr. Mohamed.

On Peter Litati, Dr Njuguna found that he sustained deep cuts to the neck bilaterally on both sides, multiple cuts on the posterior trunk. Internally, the carotid artery at the neck and jugular veins were cut. The doctor opined the cause of death was severe hemorrhage due to the cut carotid arteries. As for Susan Kathure, the doctor found deep anterior neck cuts and multiple cuts on the thighs; internally there was a severed trachea, cut of the jugular and carotid arteries. The doctor found the cause of death to be severe haemorrhage due to cut carotid artery. For Francis Mutabari, externally, the doctor found a stab wound on the left thoracic region on the 5th intercostal space and internally, there was massive haemorrhage and a punctured left lung and injury to the left pulmonary vessels. The doctor found the cause of death to be massive haemorrhage secondary to penetrating chest injury.

In respect of Jamlick Muteithia, externally he was found to have sustained penetrating abdominal injury at epigastric region, multiple stab wounds on both thighs. Internally, there was a laceration to the liver, a perforated stomach with massive haemoperitenium. The doctor formed the opinion that the cause of death was massive haemoperitenium due to hepatic injury (liver injury) following penetrating abdominal injury.

The accused persons were called upon to defend themselves and each gave a sworn statement. Stanley admitted to having killed 4 people on the night of 10/3/2013; that about 9.00 pm when asleep, he heard loud noises and screams outside; that people were knocking on his door and window; that he was asleep in one room while his wife and children had slept in another; that he opened the bedroom door and before he reached the outer door, the door was pushed open and people entered and attacked him; he was hit on the head, left eye and left hand which he used to defend himself. He fell and they continued to beat him on the back and shoulders as one said that traitors should be killed together with their families; he identified the voice of Peter Litati ;that about 6 people entered while others remained outside at the widow; that he identified them from their voices as PW2 his cousin, PW1 and her brother Mutwiri. He fell and managed to get up with a chisel and decided to defend himself and started to stab them in the darkness as there was no light in his house; that they all started to struggle to get out. Thereafter, he got an opportunity to go and report at the police station where he found a report had already been made and was placed in cells to await more details of the incident. Next day, police came with a doctor (PW3) informed him that people had died at his home and that he is the one who killed them. He was taken to hospital and later charged. He denied ever having had a dispute with all the deceased.

Mwitii stated on oath, that on 10/3/2013, he was woken up by Tony son of Litati and Muthee, who told him to go and wake his father. He heard Doreen crying and they asked why she was crying and she said her father, mother and brother had died; that Tony and Muthee left to go and witness what was happening. Since his leg was fractured, he did not leave home; that next day, two men went to his home and carried him to the police station; that Tony cut him on his leg and private parts. Later he was asked to go to write a statement so that his hospital bill could be paid but he declined and was discharged on 22/3/2013. When he went to record a statement next day, he was arrested.

The two accused face charges of **Murder under Section 203 as read with Section 204 of the Penal Code**. It is the duty of the prosecution to prove beyond any doubt, the following ingredients;

1) **The death and cause of death of the deceased;**

2) **That the accused caused the death through an unlawful act or omission;**

3) **That the accused possessed malice aforethought as defined under Section 206 of the Penal Code.**

The death of the four deceased is not in dispute Stanley admitted having killed all the four on the night of 10/3/2013. The post mortem reports confirmed the death and the very serious injuries that each of the deceased sustained that led to the death. The only issues to be resolved are:-

1. **Whether Mwiti took part in assaulting the deceased;**

2. **Whether the two had malice aforethought.**

The deaths of the deceased occurred in the night. There was only one witness to the incident, PW1. PW1's testimony as to how the whole incident occurred is at total cross roads with what Stanley and Mwiti told the court.

Stanley invoked the defence of self defence. Self defence as a defence is available to an accused person **under Section 17 of the Penal Code** which provides as follows:-

“Section 17 subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for use of force in the defence of a person or property shall be determined according to the principles of English Common Law”.

The Common Law principles relating to self defence were espoused in the leading case of *PALMER VS R (1971) AC 814* which was later approved in *R VS MCNNES, 551* where Lord Morris said as follows:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be a way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter.....”

From my understanding of the above decision, whether or not the force used in self defence is reasonable, depends on the special circumstances of each case, meaning that the test to be applied is a subjective one. That position was affirmed in **Republic Vrs Deana 2 Cr Appeal R 75 CCA** where the court held that

“There is no rule of law that a man must wait until he is struck before striking in self defence”.

The above principles have been applied by Kenyan Courts. In the recent case of **Mohammed Omar and others Vrs Republic CRA 414/2012**, the court considered the current position of self defence in English Common Law where it considered the case of **DPP Vrs Morgan (1975) 2ALL Er 347** where the court held:

“....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

Even where a person raises the defence of self defence, the onus is never placed on the accused to establish the defence. The onus still rests on the prosecution to prove that the accused was not acting in self-defence.

The Kenyan Courts have applied the above principles a host of cases **i.e. Morris Mungethia Vs Republic CRA 212 of 2006; Mungai Vrs Republic (1984) KLR 85.**

In the instant case, PW1 narrated how Stanley went outside their house, made noise, abusing Litati and Litati decided to go and ask Stanley's father, Libono why Stanley was abusing him and that they followed behind to try and stop Litati and ask him to go and ask Libono next day only to find that Stanley had already caught up with him and a scuffle ensued. According to PW1, the scuffle was in Libono's compound where Stanley's home is. Stanley talked of having been found asleep in his house and was attacked therein and that he injured the people while inside the house. I must point out that Stanley raised this defence for the first time during his defence. Despite the fact that PW1 and PW2, whom Stanley claims were part of the group that attacked him testifying in court, no question was put to them regarding the alleged attack or the words the two allegedly uttered threatening Stanley. Further to that, PW4, the investigating officer who

visited the scene said that he found that outside Stanley's house was disturbed as if there had been a commotion. It is near where Kathure's body was found. PW4's evidence clearly corroborates PW1's evidence that there was a struggle between Litati and Stanley before Kathure went between them and she was assaulted.

PW4 also entered Stanley's house and only found a sheath. Had the house been the place where the scuffle occurred and where all the deceased had been injured, then there would have been a lot of blood in Stanley's house resulting from the serious injuries the deceased received. Each deceased was found in a different area of the home, which was consistent with PW1's narration of the events. There was no blood in Stanley's house. PW1's testimony, that the first to be injured was her mother Kathure, then Stanley went in search of the father Litati whom he found in the garden near the house and attacked him; that when Muteithia came later to find out what was happening and went where Litati had fallen, Stanley stabbed him on the left side of the neck and he fell near Litati. Indeed PW2 and PW3 who came to the scene thereafter found Muteithia's body very near Litati's.

PW4 also confirmed having found Muteithia's body in the nearby farm. It means that each of the deceased was assaulted at a different place of the home, where their bodies were later found. As for Mutabari, PW1 explained that she met Mutabari coming where the others had been injured as she was going away; they went back where the mother's body was and Stanley emerged again chasing Mutabari, caught him from the back and stabbed him. I believe PW1's narration of the events of the said night as opposed to Stanley's narration which to me is a total afterthought and viewed against PW1's evidence, unbelievable.

To discount Stanley's testimony further, the injuries found on the deceased persons were carefully inflicted on the heads and necks and the very vital and delicate parts of the victims bodies. The injuries would have been more random if indeed Stanley inflicted the injuries in the dark as he alleges. It is even unlikely that the victims would have walked away from Stanley's house with very serious injuries to the neck that were sustained. Most likely, they would have fallen at the scene. As regards the allegation that Stanley was attacked first and assaulted, PW4 only saw a small cut on Stanley's forehead. Had he been attacked as he alleges, even the court would have seen the injuries. If he did receive any injuries, they were minor. Stanley was not acting in self defence. I find that he is the one who attacked the deceased persons and went on a murderous frenzy inflicting very serious injuries on each. Stanley must have been settling an old score due to the existing land disputes.

Although PW1 and Stanley deny that there was a problem between their families, I believe there was. During his investigations PW4 established that there existed a land dispute between accused persons and Litati. PW2 said that on hearing the screams the mother alluded to whether Stanley had started drinking again. It just suggests that all had not been well before and it seems to have been instigated by Stanley. The action of Stanley's parents not coming to intervene when Litati was attacked, or saying anything to the neighbours who came to the scene after this incident bears witness to the fact that all was not well between the two brother's houses.

As to whether Mwiti took part in the murder of the deceased:

According to PW1, when PW1 and Kathure followed Litati to Libono's home, they found Stanley had already got hold of Litati while armed with a knife and that Kathure went in between Stanley and Litati telling him to go back home. PW1 said that it is then Mwiti came and hit Kathure with an axe in the middle of the head and she fell. According to PW1, Stanley had a torch which he was flashing around and that is why she was able to see Mwiti. She never saw Mwiti again. The other witnesses did not see Mwiti on the said night. The evidence against Mwiti is of a single identifying witness under unfavourable conditions and this court must warn itself of the dangers of relying on it. The court is guided by the principles laid down in **R Vrs Turnbull 19 2ALL ER** on what the court should take into account when relying on such evidence. For example, how powerful was the light from Stanley's torch, how long was the torch shown on Mwiti's face. In the case of **Roria Vr Republic (1967) EA 583** the court held:

“A conviction resting entirely on identity invariably causes a degree of uneasiness,”

That danger is, of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of the court to satisfy itself that in all circumstances, it is safe to act on such identification. In Abdallah Bin Wendo and others Vs republic (20 EA CA Pg 168) this court reversed the finding of the trial judge on a question of identification and said this:-

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

As noted earlier, PW1 is the only identifying witness. This incident happened where there was a scuffle between Stanley and Litati when Kathure went between them. Apart from PW1 saying she saw Mwiti, from the light of Stanley's torch, she did not say whether Mwiti said anything to enable her recognize his voice or for how long the light fell on his face that she was able to see him. The prosecution did not lead any evidence to establish that only Stanley and Mwiti were in that compound on that night. Even though PW1 is a cousin of Mwiti and may have easily identified him, this court would expect there to have been some other independent evidence either direct or circumstantial to corroborate PW1's testimony. Considering the circumstances under which the incident occurred, even if it is a person PW1 knew well, the possibility of error cannot be completely ruled out. The identification of Mwiti was not water tight.

Mwiti told the court how he was woken up from his house by one Tony and Muthee. Although he claimed that the two beat him, he had earlier said he could not leave the house because he had a fracture. When PW1 testified, Mwiti never put any question to him regarding her having gone to his house to call Tony and Muthee. Mwiti's defence is an afterthought and not believable. However, that does not lessen the

onus placed on the prosecution to prove that indeed Mwititi was with Stanley when assaulting the deceased. The identification of Mwititi was not full proof and this court cannot rely on the testimony of PW1 alone to connect Mwititi to the offence.

In the end, I find the evidence against Mwititi to be too weak to connect him to the offence. However, as regards Stanley, I am satisfied beyond any doubt that he harboured malice against the deceased and that is why he attacked and injured the deceased for whatever reason he knows best. What Stanley did can only be done by a person who had an intention to kill and he did not murder one but virtually wiped out a family by killing four of them. Malice aforethought flows from the numbers of victims brutally murdered and the kind of injuries inflicted on each of them. Stanley went on a murderous frenzy and this court finds him guilty of the four counts of Murder as charged and convicts him of the **four counts of murder under Section 322 of the Criminal Procedure Code.**

As for Mwititi, the charges of Murder were not proved to the required standard and he is hereby acquitted. He is set at liberty forth with unless otherwise lawful held.

Dated and Signed at Nyahururu this 2nd day of July, 2018.

.....

R.V.P Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 4th day of July, 2018.