



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CR CASE NO. 76 OF 2014**

REPUBLIC.....PROSECUTOR

VS

PATRICK NJIRA MWENDWA .....1<sup>ST</sup> ACCUSED

PETER MUGENDI PATRICK ..... 2<sup>ND</sup> ACCUSED

LEWIS MURANGIRI MUGENDI ..... 3<sup>RD</sup> ACCUSED

**JUDGMENT**

**Patrick Njira Mwendwa, Peter Mugendi Patrick and Lewis Murangiri Mugendi** are jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**

The particulars of the charge are that on 19/9/2014 at Nkumbo Village, Muiru Location, Tharaka Nithi County, **murdered Alice Kaari Mbaka.** The prosecution was led by Learned Counsel for the State, Mr. Mulochi who called a total of 6 witnesses in support of their case. The accused were represented by Mr. Ndubi Advocate.

**PW1 Helain Wanja, PW2 Glory Nkatha Mbaka, PW3 Consoloata Makena and Samwel Ndwiga Mbaka** are all children of the deceased. PW1, 2 and 3 testified that on the fateful day, 19/9/2014 at about 8.00 p.m., they were in their kitchen with their mother, the deceased, where they were cooking food using firewood and that there was a tin lamp (*koroboi*). PW1 told the court that the three accused hit the door and entered. She identified accused 1 as her uncle, accused 2 her cousin and accused 3 the grandchild of accused 1; that accused 1 cut her mother on both legs, knees and ankles; that accused 2 cut her mother on both sides of the waist and hands while accused 3 cut the mother twice on the head; that accused 3 pushed her aside and cut her on the left hand. She showed the court a big scar on the hand; that accused 3 had worn a marvin on the face but he removed it and told her that at least her mother was alive. They screamed for help and it is then their brother PW4 came, hit accused 1 with a club, his *panga* fell, and the three ran off. PW3 reiterated what PW1 told the court that the three accused assaulted their mother while accused 3 in addition, cut PW1 on the hand. PW3's evidence differed slightly with that of PW1 and 2 in regard to what each accused did. She said that accused 1 cut her mother on legs and head; that accused 2 also cut deceased on the head but could not tell where accused 3 cut and that accused 3 cut PW1 and poured petrol on her.

**PW4 Samwel Ntwiga Mbaka**, testified that that he was in his house on the said night at around 8.00 p.m. when he heard footsteps outside his door. Soon thereafter, he heard his mother and sisters screaming from the kitchen where he had left them cooking. His house was about 20 metres from the kitchen. He found that his door had been locked from outside and he jumped out through his window, saw people in the kitchen as one's leg was outside. He took a piece of wood, hit the person's shoulder, his *panga* fell, and he noticed that the person was his uncle Patrick Njira. He said that with the help of the tin lamp that was in the kitchen, he managed to see the two other accused whom he knew well. He said that after he hit accused 1, he heard him say "**kill her**" and he ran to call his uncle Erick Njagi; they called police who took the mother and PW1 to Chuka District Hospital. The deceased was transferred to Kenyatta National Hospital where she died. PW1 to 4 all knew that the accused 1's family was on bad terms with their mother and they never related well.

After PW4 identified the body, the post mortem was carried out by **Dr. Andrew Kanyi Gachie (PW5)** of Kenyatta National Hospital. He found that deceased's head had several injuries to the right side, 7cm, the back 6 cm, frontal aspect 4 cm, left side 7 cm. Upon opening the head, he found several fractures to the skull; there were other multiple injuries to the body, the elbow joint was fractured; the chest, where 8<sup>th</sup> rib had penetrated the lungs with massive bleeding in the chest cavity. The doctor was of the opinion that the deceased's death was caused by multiple injuries to the head, chest and upper and lower extremities.

**PW6 PC Jacob Birgen, the Investigation Officer**, received a report of assault about 8.00 p.m. on 19/9/2014 and proceeded to the scene. He recovered a *panga* from the scene which was allegedly used by one of the attackers. He rushed the injured to Chuka District Hospital. At the scene, he was informed that the attackers were the three accused persons. PW6 said that he entered the kitchen and saw a fire and hurricane lamp which was hanged in a corner. He learned that the reason for the attack was that deceased was alleged to be practicing witchcraft because she used to pray for people and that she had built a tent in her compound; further that there was bad blood between accused 1 and his brother who was the deceased's husband; that on 22/9/2014 the Chief of the area held a public Baraza on security but accused 1 and 2 did not attend and villagers went to arrest both from their homes while accused 3 was arrested at school.

When called upon to defend himself, accused 1 gave an unsworn statement, that indeed the deceased was his sister-in-law. He recalled the 19/9/2014, he prepared supper, ate and went to sleep in accused 2's house till 6.00 a.m. He denied having heard anything in the night and that his home is about 200 metres from that of the deceased. Next day he went to tend to his cattle and heard of the attack at noon. He admitted that he had a bad relationship with the deceased and they never used to visit each other.

Accused 2 in his unsworn defence said that on 19/9/2014 at about 8.00 p.m., he went to Kanguto prayer house where he used to teach music. He finished about 5.00 p.m. and left for his uncle's house, Justine Gitonga. He slept at 9.00 p.m. Next day he left for his home. He said he had been framed because they never used to talk with the deceased or visit each other.

Accused 3 also gave an unsworn statement in which he stated that he used to sleep in accused 1's house. He said that he was in school on 19/9/2014 and went home at 6.00 p.m. He did homework till 9.00 p.m. and slept. He denied seeing accused 2 but did see accused 1. He denied committing the offence.

After the close of the defence case, Mr. Ndubi submitted that the prosecution did not prove its case because PW1 to 4 being deceased's children, there should have been other independent evidence to corroborate their evidence; that there being a grudge between the family of deceased and accused, a frame up cannot be ruled out; that the incident having occurred at night, the court should find that the source of light could not have enabled the witnesses to see the attackers and Counsel relied on **Section 63 (1) of the Evidence Act** that the evidence of PW6 was not of any use to the court as he only recorded statements and lastly, that the accused persons' alibis should be considered.

In reply, Mr. Mulochi urged that there were two sources of light in the kitchen and the evidence of PW1 to 4 was consistent; that PW1 to 4 knew all the accused as relatives. Counsel urged that the prosecution

proved its case to the required standard beyond any reasonable doubt.

To prove an offence of murder, the prosecution has to establish that the following ingredients exist:

1. **Proof of the fact and cause of death of the deceased;**
2. **Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence and**
3. **Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence.**

In the instant case, the cause of death was established by PW5 to be a result of multiple injuries inflicted to the head, chest and both upper and lower limbs and severe haemorrhage. The said findings corroborate the evidence of the witnesses PW1-4 that the deceased was cut by the assailants in various parts of her body.

The next issue is whether it is the accused persons who caused the death of the deceased by an unlawful act or omission.

The offence herein occurred at night about 8.00 p.m.. PW1-3 who were present in the kitchen with the deceased told the court that with the use of a tin lamp (*koroboi*) and a fire using firewood, they were able to see the people who suddenly entered their kitchen. According to PW1, the kitchen was small, about 4 square metres. All of them claimed to have seen the three accused. PW1 however, said that accused 3 wore a marvin covering his face but PW2 and 3 did not make any mention of accused 3 wearing a marvin or mask.

Being night and the manner in which the attack took place i.e. suddenly, no doubt the circumstances were not favourable for identification and the principle on the standard of evidence required in the case of identification were set out in the case of *Cleophas Otieno Wamunga v Rep 1989 KLR 424* where the Court of Appeal stated thus:

***“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:***

***“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

In the case of *Kamau v Rep 1975 EA 139 EACA*, the Court said”

***“The most honest of witnesses can be mistaken when it comes to identification.”***

During cross examination of PW6, he was referred to the Investigation Diary and the first report recorded in the OB No. 53 of 19/9/2014 at 11.00 p.m., the same night of the attack. He read to the court the original report which indicates that the attackers were **“three masked men”**. PW6 tried to explain that it is at the time of recording statements that the witnesses told him that only one person wore a mervin, that is, the accused 3. It is noteworthy that PW1 who told the court the accused 3 wore a Mervin was seriously injured and did not give PW6 any information when he visited the scene. The question then is

who gave PW6 the information that the attackers were 3 masked men? The 1<sup>st</sup> report recorded in the OB is quite contrary to PW6's evidence that when he visited the scene on the same evening soon after the attack, he was told that the attackers were known and they were relatives – accused 1 to 3. The record of the 1<sup>st</sup> report and PW6's evidence are contradictory. A 1<sup>st</sup> report of an incident is very crucial to a case because it is deemed to have been made when the incident was fresh in the minds of the witnesses and not interfered with and usually represents the true facts. The importance of a first report to the authorities or other people present was considered in the case of *Kioko Kilonzo & Others v Rep CRA 82-85/2011* where the Court of Appeal considered an earlier decision of *Terekali v Rep 1952 EACA*. In that case the East African Court of Appeal said as follows:

***“... Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been time for consultation with others ...”.***

Since PW6 was the first at the scene and was told who the assailants were, that is the report he must have booked in the OB. He cannot purport to explain the variance in the first report and the evidence adduced in this court pointing at accused persons as the assailants.

The disparity between the first report contained in the OB 53 OF 19/9/2014 and the evidence of witnesses raises doubts in the court's mind as to whether the assailants were identified on the night of the attack.

To buttress my doubts on the identity of the assailants, if indeed PW6 was told who the assailants were on the 19/9/2014, he did not explain why he did not arrest them or even question them between that day and 22/9/2014 when the three were arrested. In fact, it is not the police who caused the arrest of the accused persons. PW6 said that the Chief of the area held a public Baraza, on 22/9/2014 the accused persons did not attend and it is then that members of public went to arrest them. Does it mean that the police were not intending to take any action against the accused persons if indeed they were known? There is no evidence that the accused had left their homes between 19<sup>th</sup> and 22/9/2014 and indeed accused 1 and 2 were found at their homes while accused 3 was in school. It seems the arrest of the accused was an afterthought and may have been based on the long standing bad blood between the two families and the fact that they did not attend the Chief's Baraza. PW6 further told the court that he only went to search accused 1's home on 22/9/2014 but did not make any recovery. If indeed he had been informed on 19/9/2014 that the accused were the perpetrators, it did not make sense for him to wait for 3 days in order to go to search their houses. If indeed they were the culprits, they had more than ample time to get rid of the weapons. The fact that PW6 and other officers never took any steps in arresting the accused as from 19<sup>th</sup> seems to support the first report in OB 53 of 19/9/2014, that the three men who attacked the deceased were masked and the witnesses may not have known the attackers. Although PW1-3's evidence seems to be consistent as to what they saw, I find that the evidence and conduct of the PW6 and the Police does cast doubt on the prosecution evidence as to whether the assailants were identified by PW1 and 3 on the same night.

All the accused persons raised alibis in their defences. Even when the defence raises an alibi, that he was elsewhere when the offence was committed, the onus still rests on the prosecution to prove its case beyond any reasonable doubt. The duty of the court is to consider the alibi and weigh it against the prosecution evidence to establish whether it casts any doubt in the prosecution case. The alibis were raised as afterthoughts and were just bare denials. The defences would not have made much difference as a defence. In *Kiarie v Rep (1984) KLR 739*, the Court of Appeal observed:

***“Where the evidence relied upon to implicate the accused person is entirely of identification, that evidence should be watertight to justify a conviction.”***

In light of the doubt raised by the 1<sup>st</sup> report as compared with evidence of PW1-3, I find that the evidence

of identification cannot be said to be watertight.

Having carefully considered all the evidence on record, I find that the prosecution has not established beyond any doubt that it is the accused persons who committed the unlawful act that caused the death of the deceased. A doubt was raised in the court's mind by the first report booked in the OB and the conduct of the Police in not taking action against the accused soon after the attack. Considering the relationship between accused 1 and 2 on one hand and the deceased, the accused are all prime suspects but suspicion alone cannot be a basis for a conviction and this court has no option but to acquit the accused of the offence of murder under **Section 322 CPC** and are set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**10/2/2016**

**PRESENT**

Mr. Kariuki for State

Mr. Nyanyire Holding Brief for Mr. Ndubi for Accused

Peninah, Court Assistant

All the three Accused, Present