



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 77 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWANGI MUNGAI.....1ST ACCUSED

BEATRICE NYAGAKI MUNGAI.....2ND ACCUSED

JUDGMENT

Introduction

David Mwangi Mungai (herein ‘the 1st accused’) and Beatrice Nyagaki Mungai (herein ‘the 2nd accused’) are jointly charged with the murder of Patrick Muiga Gathimba contrary to section 203 as read with section 204 of the Penal Code. It is stated in the particulars of the offence that the offence was committed on 20th day of June 2013 at 1400hrs at Ndenderu Village within Kiambu County. The 1st and 2nd accused persons denied committing this offence.

The 1st accused is represented by Mr. Wamwayi, advocate while the 2nd accused is represented by Mr. Jumba, advocate. The prosecution case was handled by various prosecution counsels but at the conclusion of the proceedings, Ms Macharia appeared for the Office of the Director of Public Prosecutions.

Background

The accused persons were arraigned in court on 9th July 2013 but the plea was taken on 17th July 2013. The trial commenced on 17th March 2014 before Honourable Lady Justice Florence Muchemi. She took evidence of five prosecution witnesses. She did not complete the trial. She was transferred to another Court Station. I took over the proceedings in this case on 2nd November 2015 after the file had been handled in various courts. This court gave directions to proceed from where Justice Muchemi had reached in compliance with section 200 (3) of the Criminal Procedure Code after all the parties opted to do so. I took evidence from three prosecution witnesses and from two defence witnesses.

Prosecution case

The evidence in support of the prosecution case shows that the deceased Patrick Muiga Gathimba died on 26th June 2013. According to the evidence of Dr. Daniel Zuriel, PW8, the deceased had an abrasion on the right side of the head measuring 3cm by 3cm; abrasion on the right pelvic region extending deep into

the body; haematoma on the right parietal region; the left side of the brain had degenerated. The cause of death was severe head injury due to blunt force trauma.

Lucy Wahu, PW5, testified that on 20th June 2013 at around 2.00pm she was at her home in Ndenderu when she heard screaming from the neighbouring home of Mungai. Someone was shouting “what have you come to steal from my compound”. Wahu went outside her house and looked towards Mungai’s home which was 20-30 metres from her home. She saw the 1st accused and his mother the 2nd accused beating the deceased. The 1st accused was holding a piece of stick which Wahu identified as a piece of firewood. At the time the 2nd accused was holding the deceased while the 1st accused was beating him using the piece of firewood.

On the same date, the deceased’s sister Grace Wairimu Gathimba, PW2, had received information that the deceased had been spotted walking naked around Ndenderu. PW2 started looking for her brother. She found him at the home of Isaac Kinuthia Murira, PW3. Isaac had received information around 4.00pm that the deceased who was known to him had been spotted walking around while naked and had asked that the deceased be restrained and taken to his home. Three people had managed to restrain the deceased and take him to PW3’s home where PW3 dressed him using his clothes. The deceased was kept at PW3’s home until PW2 went for him and took him to hospital. Both PW2 and PW3 described the deceased as having a blunt injury on the head. They also stated that the deceased was not talking. The deceased died in hospital while undergoing treatment six days after he had sustained the injuries. After investigations the two accused persons, who are mother and son, were arrested and charged with this offence.

Defence case

In his defence given under oath, the 1st accused told the court that on 20th June 2013 he was inside his house preparing food to take to his child in school when he heard their two dogs barking and his mother the 2nd accused asking the deceased why he went to the compound without announcing himself; that he went outside his house and saw the dogs about to attack the deceased and the 2nd accused trying to restrain them; that he took a piece of firewood and chased the dogs back to their kennel. He said that he held the deceased who was sick and took him outside the gate and that the deceased left. The 1st accused said that he knew that the deceased was sick and that two days before 20th June 2013 he had found two neighbours holding the deceased trying to dress him up.

The 1st accused further stated that the deceased was not talking when he saw him on 20th June 2013 and was using his hands to communicate with signals. He denied hitting the deceased using the firewood. The 1st accused said that the deceased seemed drunk.

The 2nd accused also testified under oath. She told the court that she could not have killed the deceased who was known to him; that she used to give him casual jobs to repair her “jiko”; that the deceased used to be drunk most of the time. She testified that on 20th June 2013 she was in her house cleaning utensils when she heard her dogs barking and went out. She saw the deceased and asked him why he had come without calling to alert them and that one could have thought it was a thief but the deceased did not answer. She tried to restrain the dogs but was not managing; that the 1st accused came out of his house and picked a piece of firewood and hit the dogs; that the dogs returned into their kennel; that the 1st accused held the deceased and asked him what he wanted but the deceased did not answer; that the deceased was using his hands to communicate; that the 1st accused took the deceased to the gate and the deceased left. She stated that she only held the deceased by the shoulder to talk to him and that the deceased had no physical injuries.

Analysis and determination

Murder is committed when a person with malice aforethought kills another person by an unlawful act or omission. The prosecution must prove that the accused person(s) before the court with intention to kill did an unlawful act or omission that resulted in the death of the victim. The standard of proof required is

proof beyond reasonable doubt.

At the close of the defence case Mr. Wamwayi submitted that the prosecution did not challenge the evidence of the 1st accused who maintained his innocence throughout his evidence; that the prosecution was relying on the evidence of Wahu, PW5, who said she witnessed the assault by the 1st accused while being held by the 2nd accused but this witness contradicted her evidence in cross examination when she told the court that she did not see the 2nd accused holding the deceased; that due to these contradictions the court ought to treat the evidence of PW5 with caution; that the deceased could have sustained the injuries elsewhere since his sister PW2 said that the deceased was of unstable mind. Counsel further submitted that there is no clear evidence connecting the accused persons with the death of the deceased and the prosecution did not prove this case beyond reasonable doubt. Mr. Wamwayi asked the court to acquit the 1st accused.

On his part Mr. Jumba on behalf of the 2nd accused submitted that PW5 failed to meet the consistency and credibility test in her testimony. Counsel submitted that PW5 contradicted herself when she testified that she saw the 2nd accused holding the deceased while the 1st accused hit the deceased with a piece of wood and on cross examination she denied witnessing the 2nd accused holding the deceased; that the evidence of the prosecution does not meet the threshold of proof beyond reasonable doubt. Counsel further submitted that the 2nd accused testified that there were trees blocking the view to her compound from PW5's homestead and therefore it is not possible for PW5 to have seen what was going on in the home of the accused persons; that the defence evidence was not challenged and that the existing doubts must benefit the accused persons. Counsel submitted that from the date of the alleged assault to the time of death anything could have happened to the deceased to necessitate his death. Counsel urged the court to acquit the 2nd accused person.

I have carefully read all the evidence adduced against the accused persons and their defence. I have also considered the submissions. Of the eight prosecution witnesses it is only PW5 who says she witnessed the assault on the deceased. PW1 Patrick Njoroge told the court that he had seen the deceased twice on 20th June 2013. The first time was around 10.00am. The deceased was not talking but was using his hands to gesture that he wanted some money from PW1. The second time is around 1.00pm. Again the deceased was not talking but was using hand signs to communicate. At this time the deceased dismissed him using the hands. PW1 did not mention seeing any injuries on the deceased.

Grace Wairimu, PW2, the deceased's sister was informed about the deceased stripping naked. By the time she found him in the home of PW3 Isaac Kinuthia the deceased was already injured. She told the court that the deceased was not talking but was using his hands to communicate and that later while in hospital he could only mumble inaudibly the name of "Mwangi" in answer to every question.

Isaac Kinuthia, PW3, also found deceased naked at his home. He had asked some people to restrain the deceased at his (PW3's) home. PW3 dressed the deceased and waited for PW2 to come and pick him. PW3 saw a blunt injury on the deceased.

The other witnesses who include the police officers and the doctors obviously did not witness what happened. The roles they played came after the fact.

From the outset the death of the deceased has been confirmed by the evidence of Dr. Daniel Zuriel, PW8, who supervised the post mortem in company of two other doctors. His opinion on the cause of death is that the deceased died as a result of a severe head injury due to blunt force trauma. I have no doubt that the death of the deceased that occurred six days after he was injured has been proved beyond reasonable doubt. The injuries described by the witnesses were head injuries and these are the same injuries confirmed by the doctor upon examining the body of the deceased.

The next issue is the identity of the person or persons who caused that death and whether they possessed malice aforethought. As stated in this judgement there is only one witness who testified to seeing the

deceased being assaulted, PW5. Her evidence was challenged by the defence as untruthful, inconsistent and contradictory. PW5 was attracted by some shouts to the effect that “What have you come to steal from my compound?” These shouts were coming from the home of the accused persons and were uttered by the 2nd accused person. PW5 went out to find out what was happening. Her home is 20-30 metres from that of the accused persons. Her testimony on the issue is as follows:

“I went outside the house and looked towards Mungai’s compound. I saw the wife of Mungai and her son Mwangi beating one Muiga. Muiga had rented a room in a neighbouring plot. He is deceased. Mwangi was holding something like a stick, like a piece of firewood which he was using to beat the deceased. I returned to my house to cook.”

PW5 went on further:

“When I saw Mwangi with a stick, he and the deceased were holding each other. The mother of Mwangi was also holding the deceased.”

PW5’s evidence on cross examination was challenged as contradictory to what she had told the court on her examination in chief. Both defence counsels submitted that PW5 told the court on cross examination that the 2nd accused was not holding the deceased. Both defence counsels submitted that if the 2nd accused did not hold the deceased then the 1st accused could not have hit the deceased.

I have examined the evidence of PW5 in cross examination and this is what she told the court:

“I did not see the 2nd accused holding any weapon or hitting the deceased.”

I understand her to be saying that the 2nd accused was not holding any weapon not that 2nd accused was not holding the deceased.

The defence also challenged the evidence of PW5 stating that PW5 could not have seen the assault since there were trees blocking her view from the compound of the accused persons. I have examined the evidence. I note that PW5 was not cross examined on this issue and therefore her evidence that she witnessed the two accused persons beating the deceased remains unchallenged. I have stated that I did not find any contradiction in her evidence regarding the 2nd accused holding the deceased while the 1st accused was hitting him.

This is evidence of a single witness. The law allows proof of facts by a single witness. In **Benjamin Mugo Mwangi & Another v Republic [1984] eKLR** the Court of Appeal stated that:

“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 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.” See also **Roria v. Republic [1967] EA583** and **Addalla Bin Wendo & Another v. Republic (1954) EACA 187.**

I have subjected the evidence of PW5 to careful scrutiny. I find it credible, reliable and free from doubt. I have cautioned myself on relying on the evidence of a single witness. I note that it was during the day and the two accused persons have been neighbours with PW5 who live 20 to 30 metres apart. I also note that the two accused persons do not deny that the deceased went to their compound on 20th June 2013 and that the 2nd accused asked him why he did not alert them that he was entering into their compound. The 1st accused too told the court that he held a piece of firewood although he denied using it on the deceased and stated that he used the wood to chase the dogs away.

I find I have no reason to doubt the evidence of PW5 and therefore it is my finding that the two accused assaulted the deceased. Although evidence shows that the 2nd accused did not hit the deceased she did not do anything to stop her son from assaulting the deceased and evidence shows that she held him as the 1st accused was assaulting him. The injuries the deceased sustained caused him to be admitted to hospital. He died six days after from the same injuries.

On the issue as to whether the two accused had formed the intention to kill the deceased it is my finding that this has not been proved by the prosecution. As a result it is my finding that the accused persons are not guilty of murder for lack of evidence to prove they had intended to cause the death of the deceased. I however find that the deceased died as a result of injuries he sustained after the assault by the two accused person. The offence I find proved beyond reasonable doubt is manslaughter under section 202 as read with section 205 of the Penal Code.

In conclusion I hereby acquit David Mwangi Mungai and Beatrice Nyagaki Mungai of murder as charged and instead convict each of them for the offence of manslaughter. Orders shall issue accordingly.

Dated, signed and delivered in open court this 9th day of March 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mr. Wamwayi for 1st accused

Mr. Jumba for 2nd accused

Mr. David Mwangi Mungai 1st accused

Ms Beatrice Nyagaki Mungai 2nd accused

Mr. Daniel Ngumbi, court clerk