



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 25 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

CHARLES MWAURA.....1ST ACCUSED

CEASAR KINYUA MWAI.....2ND ACCUSED

J U D G M E N T

1. The Accused herein were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. In that on the 12th day of April, 2015 at Ndunyu-Njeru trading centre in North Kinangop within Nyandarua County, jointly with others not before the court murdered **JOSEPH WANJOHI MUHURIA**. The accused persons denied the charges and were represented during the trial by Mr. Gichuki.

2. The prosecution called nine witnesses. The prosecution case was as follows. The deceased, **Joseph Wanjohi Muhuria** was a lumber jack and tractor driver. In the material period he worked for the 1st accused at the timber yard the 1st accused operated at Ndunyu. Other employees at the yard were a lorry driver by the name **Njuguna**, the 2nd accused and a night watchman, **Evanson Muringa Ngonda (PW2)**. On the morning of 12/4/15, a Sunday, word went out that the deceased had been caught at the yard stealing timber there from. It is not clear who first caught the alleged thief but according to a mechanic close by the yard who also occasionally did some casual jobs at the yard, **David Githiga Wambui (PW1)**, it is the driver of the 1st accused who informed **PW1** that a thief had been caught at the yard of the 1st accused.

3. **PW1** and the said driver proceeded to the scene at about 10.15 a.m. At the yard they found deceased seated under the apparent guard of **PW2** and the 2nd accused, with some pieces of timber beside him. It is hard to tell when members of the public also entered the yard but according to **PW1** and **PW2** the 1st accused was called to the yard. He took a ride on the motorcycle operated by **Moses Nganga Kimemia (PW6)** arriving at the yard at about noon.

4. Upon arrival, the 1st accused seemed to take over, demanding that the deceased directs him to the person or place where the stolen timber, evidenced by the gaps in timber stacks at the yard, had been taken. He assaulted the deceased, with his fists and also using a piece of timber with which he bludgeoned the deceased. At one point he had the deceased, whose hands were trussed with wire lie face down in a water trough at the scene, which had water.

5. After this session of assaults the deceased lay on the ground apparently badly injured. The 1st accused,

his driver **Njuguna**, the 2nd accused and **PW1** drove the deceased in the vehicle of the 1st accused to the local Administration Police Camp to report the alleged theft. Police however directed them to Engineer Police St, who in turn ordered the men to take the deceased to the local hospital. He was pronounced dead on arrival. A post mortem examination performed by **Dr. Titus Ngulungu (PW9)** on 20/4/15 certified that the death was caused by severe head injury attended by subdural haematoma and raised intracranial pressure. The accused were arrested and charged.

6. When the accused persons were placed on their defence, the 1st accused made a sworn statement to the effect that he was a timber merchant in Ndunyu (Njeru) centre. That on 12/4/15 he was summoned by an anonymous person to his timber yard because someone had been caught stealing timber there. He took a motor cycle arriving at 11.30 a.m. at the centre. At the yard he met a large crowd of people, among them **PW1** who identified the alleged thief. The latter appeared to have been assaulted.

7. He called the 2nd accused also present at the scene, to assist in escorting the deceased to the AP Post. Using his lorry, he escorted the deceased to the AP Post but he and the group of escorts were directed to Engineer Police Station. The group consisted of the 2nd accused, **PW1** and a man known as **Njuguna**, the latter who drove the lorry. Police at Engineer ordered the men to escort the deceased to the hospital where he was admitted. He was notified on the next day that the deceased had died, and was required to record a statement. But he only went there on 15/4/15 and was locked up in the cells. He denied having assaulted the deceased. He claimed that prosecution witnesses were his business rivals and therefore framed him up. He said that he did not see **PW2** on the material date.

8. The 2nd accused elected to make an unsworn statement. He stated that he was working and residing at Ndunyu Njeru at the material time. On the material date, he was pursuing one **James Mwangi**, who owed him some money. Not finding him, he decided to while away time and perform some errands at the centre. He heard about the incident at the yard owned by the 1st accused and proceeded there, via **PW1's** garage. There was a large crowd at the yard and he and **PW1** were asked by the 1st accused to help escort the theft suspect to the AP's camp, later the police station and eventually to hospital.

9. I have considered the submissions filed by the defence and evidence tendered at the trial. Certain key issues are not in dispute. The presence of the two accused persons at the timber yard where the offence was committed is not in dispute even though their role with regard to the admitted assault of the deceased is disputed. Equally, that the two accused with the help of **PW1** and one **Njuguna** took the injured deceased person to the police station and later to the hospital is not in dispute. That the deceased succumbed to his injuries before arrival at the hospital is also not in dispute.

10. The court must determine whether the two accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. Admittedly, the incident in which the deceased sustained the fatal injuries occurred in the yard owned by the 1st accused, and close to the yard/garage of **PW1**. Also the two accused persons were well known to **PW1**. The 1st accused said that when he arrived at the yard the 2nd accused and **PW1** were already at the scene.

11. The key eye witnesses to the alleged assault by the accused persons are **PW1** and **PW2**. Both of them agree that the 1st accused arrived at the yard about noon. Evidently, as often happens when a theft suspect is caught, some members of the public had gathered at the yard as news of the incident spread in the trading centre. It is therefore reasonable to accept the evidence by **PW1** that when he first arrived at the yard at 10.30. a.m., the deceased appeared **“to have been assaulted and being guarded while two pieces of timber lay by him”**. The **“guards”** were identified by **PW1** as the 2nd accused and **PW2**. The latter confirmed his presence at the scene while the 2nd accused admitted being present. **PW1** however stated in his evidence that despite their presence he did not witness the 2nd accused assault the deceased.

12. However, with regard to the 1st accused both **PW1** and **PW2** described in detail how, upon arrival the 1st accused took to ‘interrogating’ the deceased and striking him with a piece of wood until he lay on the ground, clearly in pain. It is likely that the deceased had been attacked before the 1st accused arrived, but

on the available evidence there is no telling who the culprits was. Seizing upon this possibility the defence projected **PW1** as a suspect to the offence and urged that his evidence be taken with caution. Was **PW1** a suspect and therefore his evidence accomplice evidence? In other words, who is an accomplice for purposes of this case?

13. The Court of Appeal in the case of **Antony Kinyanjui Kimani -vs- Republic (2011) KLR (Criminal Appeal 15/2007)** grappled with this question, stated *inter alia*:

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’

14. In this case, **PW1** was a beneficiary of the 1st accused’s occasional odd jobs, the latest one being on the eve of 12th April, 2015 when he was hired to stack the newly supplied timber at the yard. Indeed **PW1** told the court that upon learning of the theft, the 1st accused asked him why he “allowed” the theft to happen. Without hesitation he had rushed to the yard when he learned from **Njuguna** that a thief had been caught stealing timber at the yard. In his own words, **PW1** took it upon himself to question the deceased on arrival at the yard, seeking to know why he came back to steal the timber he brought, to the yard, probably earlier.

15. His claim that he only stayed at the yard for a few minutes before going for lunch sounded like an attempt to minimize his involvement at the scene. His evidence that he went away initially only returning after the 1st accused had returned may be true but that does not mean that he had no opportunity to participate in attempts to forcefully subdue the deceased while the 1st accused person’s arrival was awaited.

16. The foregoing, and **PW1**’s subsequent participation in taking the deceased to the police suggests to the court that, the witness, like many ordinary people in this country could have participated, in the very least in the initial subjugation of the suspect; and that he did not, as he claims, merely question the deceased before going away. His subsequent night report to the deceased’s sister **PW3**, must have arisen from a guilty conscience, or self serving on **PW1**’s part, but I do not think that much can be made out of his alleged failure to report to police on 12/4/15 that the deceased had died or that the 1st accused was responsible for his death.

17. It appears that upon his arrival the 1st accused person took over the matter of the alleged suspect and he got the witness (**PW1**) and others to assist him make a report. Hence, on the material before me I am convinced that **PW1** was an accomplice of sorts to the offence. Notwithstanding the fact that under section 141 of the Evidence Act an accomplice is a competent witness whose evidence can form the basis

of a conviction, it is good practice to seek for corroboration of accomplice evidence.

18. In one of the earliest cases on the subject, the Court of Appeal for East Africa in the case of **Republic -vs- Ndara s/o Kariuki & 6 others (1945) 12 EACA 84, at Page 86** prescribed the correct approach in dealing with accomplice evidence as follows:

“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.”

19. In reiterating the foregoing the court stated in **Kinyua -vs- Republic (2002) 1 KLR 256** that:

Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

20. I have reviewed the evidence of **PW1** in the context of the evidence in the trial, including that by the accused. I have also noted that during the rather lengthy cross-examination **PW1** acquitted himself well on the key issues. He was clearly an odd jobs man and cannot be said to have any business rivalry with the 1st accused; and no such suggestion was put to him.

21. I had also opportunity to watch him testify. I believe that **PW1** was a credible witness in so far as the assault by the 1st accused on the deceased is concerned. **PW2**'s evidence by and large corroborated the evidence of **PW1**. **PW2** himself appeared an old frail man when he presented as a witness. Though engaged as a night watchman by the 1st accused, it did not seem to me that beyond lending a bodily presence at the yard, he had the capacity to tackle a young intruder or to subdue anyone. Possibly his value lay in the ability to raise an alarm in the event of an incident, more than offering resistance to any would-be-thief.

22. The fact that the 1st accused did not see him on arrival at the yard does not mean **PW2** was not there because already a crowd was surrounding the yard. **PW2** had been recently engaged and barely knew the workers of the yard, but, he knew the 1st accused his employer. There is no evidence that he had any axe to grind with the 1st accused and no reason was suggested by the defence as possible motivation in **PW2** giving false testimony against the 1st accused. I consider **PW2** an independent witness whose evidence was consistent with an corroborated the evidence of **PW1**.

23. Other independent corroboration is found in the demonstrated existence of the water trough in photographs exhibited by the scene visiting office **PC Njue (PW7)**. The scene in the said photographs (**Exhibit 2**) is consistent with the description thereof by **PW1** and **PW2**. In addition, at the post mortem examination the doctor found evidence of multiple bruises of different shapes, :irregular, linear and circular, over the head, upper limbs, torso, all which he attributed to blunt force trauma. He considered the injuries consistent with homicide.

24. The 1st accused himself admits that he went to the yard on receiving reports that a man had been caught stealing his timber. Although he claims the man was unknown to him, both **PW1 & PW2** clearly identified the deceased as the 1st accused's employee. This evidence is supported by **PW3** who knew the 1st accused as her brother's employer. Although her stated reason for the deceased's presence at the yard on the material dates may be more out of filial loyalty than a desire for truth, she confirmed that **PW1** sought her out on the evening of 12/4/15 and reported that the deceased had been assaulted by his employer and was in hospital. This latter additional information was on all accounts intended by the reportees to protect **PW3** from the grave truth that the brother had already died, as she was later to discover. That is not uncommon.

25. The description of the assault by the 1st accused by both **PW1** And **PW2** is more or less consistent in detail. It was a brutal thrashing, initially armed at making the deceased reveal the whereabouts of the stolen timber. Hence the immersion of the suspect into a water trough. When witnesses and members of the public intervened, he retorted that he was not done and intended to kill the deceased.

26. Indeed by the time the assault stopped the deceased lay in a heap on the ground, immobile and had to be carried away on the orders of the 1st accused. The APs at the Chief's camp and the police at Engineer police station refused to take him in ordering, no doubt on account of his state, that his escorts take him to hospital. If the 1st accused's defence is to be believed, he travelled over 1 hour to the yard on a Sunday, viewed the scene and took the trouble, despite confirming the loss of his timber, to take the injured suspect to hospital.

27. He was hard pressed during cross-examination to explain why **PW1** whom he ordinarily gave odd jobs would falsely implicate him as he suggested. His claim that **PW1** was possibly instigated by business rivals was not put to **PW1** when he testified, nor does it explain **PW2's** evidence. Despite the state of the deceased, and alleged benevolence of the 1st accused he did not directly drive the deceased to hospital for treatment but rather to the AP Camp and police station. His defence is not convincing.

28. **PW1** told the court that while he and 2nd accused entered the hospital with the deceased, the 1st accused and **Njuguna** drove away from the hospital so that **PW1** and the 2nd accused had to meet them elsewhere. That upon learning that the deceased was declared dead on arrival the 1st accused warned the men not to reveal what they knew, paying them Ksh.1,000/= . This evidently guilty conduct, and the 1st accused's reluctance to go to the police station to record a statement undermine his assertions of innocence. So too his obviously untrue statement that he did not know the deceased, his proven employee.

29. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the 1st accused. I am satisfied that he inflicted the injuries that led to the death of the deceased. And that, from the severity of the attack, and threats uttered during the attack, it was the intention of the 1st accused to cause grievous harm if not death to the deceased.

30. As indicated, it may well be that by the time the 1st accused got to the yard, some person or persons had also struck or assaulted the deceased. It matters not that the deceased may have sustained some sort of injury from the said initial assault. And possibly, **PW1** and the escorts were themselves accessories to the offence, under Section 21 of the Penal Code. The assault on the deceased, whether or not he had stolen goods from the timber yard was unlawful act.

31. The Court of Appeal held in the case of **Njoroge -vs- Republic (1983) 197** that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”

