



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
HCCR NO. 31 OF 2015
(FORMERLY MERU HCCR NO. 36 OF 2014)

REPUBLIC.....PROSECUTOR

VERSUS

ERNEST NJOKA MUGAO Alias GITONGA MUGAO.....1ST ACCUSED

PETER MURIUNGI NYAGA.....2ND ACCUSED

J U D G M E N T

1. On 13th June, 2010, Joseph Rugendo Mwenda ("the deceased") was frog matched from his home in Kiathatu village, ruthlessly beaten, murdered and his body burnt beyond recognition on a footpath next to his farm. On 26th May, 2014, the state lodged before this court information charging Ernest Njoka Mugao alias Gitonga Mugao and Peter Muriungi (hereinafter "the Accused") with murder contrary to section 203 as read with Section 204 of the Penal Code. It was alleged that on 13th June, 2010 at Mutino Location, Meru South District within Tharaka Nithi County, jointly with others not before court the accused murdered the deceased. The accused disputed the charges and the state paraded eight (8) witnesses to prove the information.

2. PW1 Stella Kariithi, the widow, testified that on the material day, she was at home with her family, consisting of her five (5) children and the deceased. At about 6 pm five people stormed the homestead, tied the deceased and frog marched him to the road. She identified the five (5) as being Daniel Nyaga, Gitonga Nyaga, Muriungi Nyaga (2nd Accused), Kinyua Nyaga and Gitonga Mugao (the 1st accused). The five (5) beat the deceased using pangas and sticks all the way to the road. She followed them from behind. At the road, she witnessed them beat the deceased to death then set his body on fire. That they threatened her not to scream lest they kill her. She testified that although she screamed, no one came to help the deceased. That there was no one else who was there except the five who killed the deceased and set his body on fire. Later at about 7 pm, the five (5) came back to her home and took from her, two (2) blankets, two (2) bedsheets, ten (10) sacks of maize and Kshs.18,000/- in cash. They also took a sale agreement for the land which she and the deceased had sold. She reported the matter the following day to Chuka Police Station and identified the 1st and 2nd accused as those who were among the five (5) people who had killed her husband on the fateful day.

3. In cross-examination, PW1 told the court that she did not seek help after the incident because it was late in the evening; that her two eldest children were in police custody at the material time; that she could not seek any help from her immediate neighbour one Julius Kanaake because he had a case with the deceased; that she never sought any help following the attack because she is surrounded by hostile

neighbours. She admitted that she and the deceased had a long protracted land dispute with the accused. That there were people who responded to her screams but they did not offer any help. She recalled that sometimes in 2009, she and the deceased had been bannished away from the village by members of the public on suspicion of being witches but were allowed back on the intervention of the area D.O She denied any knowledge of the deceased having assaulted a villager by the name Muthoni before he was killed. She insisted that the motive behind the killing of her husband was because of the land dispute which her family had with the accused's family and had nothing to do with the deceased's conduct.

4. PW2 Simon Muthongo Mucena told the court that on the material day, when on his way to church at about 8.00 am, he met one Daniel Nyaga Mukira who told him that the deceased should be arrested and be killed for having assaulted a certain village woman. That later on after leaving church at about 4 pm, he heard screams from the direction of the deceased's home. When he reached near, he saw a crowd of about 30 people. He was able to recognise three people amongst the crowd. He did not witness the deceased being burnt. Neither did he see the accused amongst the crowd. PW3 Elijah Mugendi Rugendo, a son of the deceased recalled how (2) people came to their home on 12th June, 2010, tied him and took him to the chief's office. He was later transferred to Chuka Police Station where he was held in custody until 14th June, 2010 when his mother PW1 came to report about the murder of his father. It was then that he was released from custody.

5. PW4 Peter Mugao Kaunga recalled how on the material day at about 9.00 am, while at the homestead of one Kiboro, Daniel Nyaga told the people present that the area chief had said that the deceased should be sought and be killed. Later at about 2 pm, when PW4 was coming from his farm, he met the said Daniel Nyaga with two (2) others armed with clubs, bows and arrows. They told him that the deceased had been found and they were going to where he was. PW4 followed them and witnessed Daniel Nyaga assault the deceased with a club. He tried to reach the local administration for assistance without success. He witnessed a big crowd at the scene he was unable to identify anyone except the three (3) whom he had met on the way from his farm.

6. PW5 Jackline Ncioki, a sister to the deceased recalled how she identified the body of the deceased on 29th June, 2010 at Chuka General Hospital Mortuary for postmortem. PW6, Dr. Nicholas Nkonge appeared and produced the postmortem report as P Exhibit 1. The report showed that the deceased died of burns. PW7 Corporal George Oswen testified that on the 14th June, 2010 while at Chuka Police Station, he received a report from PW1 that a group of five (5) people had stormed her home, frog marched her husband out of his homestead, murdered him and set his body on fire on a foot path next to his home. That the five returned and robbed her PW1 of various items. That on receipt of the said report, PW7 accompanied the O.C.S Chuka Police Station, the D.C.I.O and other officers to the scene. They found that the body of the deceased had been burnt beyond recognition on a path leading to a bushy hill. He did not know how the accused were arrested as he was shortly thereafter transferred to Kapsabet. In cross-examination, he confirmed that he established that before he was killed, the deceased had assaulted a lady by the name Muthoni and that that is why he was murdered.

7. PW8 Corporal Elijah Wachira Ndirangu investigated the case. He recalled how a report was made by PW1 of the murder of deceased. He visited the scene in the company of his superiors on the same day whereafter he commenced his investigations. In his investigations, PW8 established that between the 10th and 12th June, 2010, the chief of Mutino location one Gerald Marigi had held a meeting with the villagers of Twamikua village and had ordered that the deceased, if found, be killed because he had allegedly assaulted a wife of his brother, one Muthoni. He also established the existence of a long protracted land dispute between the deceased and one of his brothers. He also established that on the 12th June, 2010, two villagers had stormed the deceased's homestead and arrested his son PW3, who was placed in custody until PW1 made a report of the murder of the deceased on 14th June, 2010. PW8 attended the postmortem of the deceased on 29th June, 2010 as well as his burial. He told the court that the suspects remained at large until the accused were arrested in May, 2014 while their accomplices remained at large. He had not arrested the area chief who had incited the villagers against the deceased because the Director of Public Prosecutions had not advised as such.

8. In cross-examination, he admitted the existence of a land dispute between the families of the deceased

and the accused; he denied that he arrested the accused at the instance of PW1. He also admitted that the crime was committed by a large group of people but that it is the five (5) identified by PW1 who had first attacked the deceased.

9. In their defence, the accused gave sworn testimonies. The 1st accused told the court that on 13th June, 2010, he was away visiting his grandmother in Nkondi which is 40 Km away from the scene of crime. That he left his home on the 12th June, 2010 and returned on 14th June, 2010 when he learnt about the demise of the deceased. He denied being at the scene of the incident on 13th June, 2010 as alleged by PW1. In cross-examination, he insisted that he had a good relationship with the deceased and that he was away when the deceased met his death. The 2nd Accused told the court that he is a church preacher and a Nyumba Kumi leader in his village. That on 13th June, 2010, he left his home at 6 am and went to Kithino market which is several kilometres away. That he stayed there and returned home at around 10 pm. It is on 14th June, 2010 that he heard about the murder and consequent burning of the deceased. DW3 John Nyaga told the court that he is an uncle of the 1st accused. He recalled that the 1st accused visited their home in Nkondi at the invitation of DW3's mother who happened to be the grandmother of the 1st accused. That the 1st accused slept there on both the 12th and 13th June, 2010. On his part DW4 Samuel Muthengi Njagi told the court that on the 13th June, 2010, he was with the 2nd accused at Kithino market from noon until 7.30 pm.

10. In his submissions Mr. Kijaru, learned counsel for the accused submitted that the testimony of only eye witness PW1 cannot be relied as she was not truthful; that apart from PW1, none of the other prosecution witnesses placed the accused at the scene of crime. Counsel further submitted that the alibi set up by the accused was never displaced by the prosecution. He urged that the accused be acquitted. Mr Ongige learned prosecutor submitted that the evidence of PW1 was consistent and firm. That PW4 saw the accused among the people who frog marched the deceased from his home and later murdered him. In his view, the accused's alibi was not authentic.

11. I have reviewed that evidence and the submissions of counsel. The accused face a murder charge. It is for the prosecution to prove beyond any reasonable doubt that the accused attacked the deceased and inflicted injuries on him from which he succumbed. The prosecution also must prove that at the time of attacking the deceased as aforesaid, the accused must have had mens rea, that is, they must have intended the death of or intended to cause grievous harm upon the deceased.

12. It is clear from the testimonies of the prosecution witnesses that only PW1 identified the accused and placed them squarely at the scene of the murder. Her firm testimony was that she knows the accused as they are related to her. They are children of a brother to her husband with whom the latter had a protracted land dispute. That she saw the two in the company of three (3) others who, on the material day, stormed her homestead, seized the deceased, tied him up, frog marched him to the road, beat him to death and then burnt his body. She denied having any grudge against the accused.

13. Section 124 of the Evidence Act Cap 80 Laws of Kenya provides:-

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

....."

It is clear from the said provision that in criminal proceedings, in order to find a conviction, the evidence relied on must be corroborated. PW2 and PW4 who were at the scene at the time the incident took place told the court that they never saw the accused persons amongst the crowd that participated in the murder of the deceased.

14. In the case of **Mwendwa Mulinge .v. Republic [2014] eKLR** the Court of Appeal held:-

"More often than not, the conviction of an accused person solely on the evidence of a single identifying witness poses some uncertainty. In MAITANYI .v. REPUBLIC [1986] KLR 198, this court stated as follows:-

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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 condition favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

15. In the present case, PW1 told the court that the attack took place at about 6 pm. It was during day light. At first, she said that although she screamed, no one turned up to help the deceased because she was surrounded by hostile neighbours. She later changed and stated that some people responded to her screams but when they came they stood by and watched as the deceased was being put to death by the five. In cross-examination, she said that she failed to seek help because it was getting dark. Her testimony was contradicted by that of PW2 and PW4 who told the court that they witnessed the murder, albeit from a distance. The two put the attack as having taken place between 2 pm and 4pm in the afternoon as opposed to PW1's testimony that it was shortly before darkness. PW2 and PW4 stated that the crowd of people who participated in the killing of the deceased consisted of about 30 people whilst PW1 testified that only the five (5) people she named who took part. PW2 and PW4 also testified that they did not see the two accused amongst the crowd. The foregoing clearly casts doubt on the testimony of PW1. It should be remembered that PW1 must have been traumatised with the sudden invasion of her homestead, the frog marching and consequent killing of her beloved husband. Indeed that may explain why she took no action at all to seek help/assistance immediately after the incident.

16. Further, PW1 named three other women who she alleged responded to her screams. These were, Luciana Kirema, Damaris Gacoka Muthengi and Mary Gakembi. None of these wrote statements or was called to testify for the prosecution. Simply put, the evidence of PW1 remained uncorroborated.

17. The accused gave a defence of alibi. They gave sworn testimony and called two witnesses to corroborate their testimonies. In the case of **Richard Chacha Champion & Anor .v. Republic [2016] EA 2014, Majanja J** observed that:-

"In approaching the issue of the defence of alibi, it must always be recalled that the burden remains on the prosecution to prove the allegation made against the accused person beyond reasonable doubt. In Kiarie .v. Republic [1984] KLR 739, the Court of Appeal held that an Alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi. In the case of Wangome .v. Republic [1976-80] 1 KLR 1683, the Court of Appeal addressed the treatment of defence of alibi by way trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused. The trial court in taking the approach it did, failed to consider the

veracity of the defence and determine, in light of the entire evidence and whether the prosecution had met its obligation to the required standard. This is not a case where the appellants merely asserted an alibi, they gave sworn testimony, produced supporting evidence and called witnesses."

18. In the case of Uganda .v. Sebyala & Others [1969] EA 204, the court quoted a decision in Tanzania Criminal Appeal No. 12D 68 of 1968 wherein it was observed that:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

19. In the present case, the alibi set up by the accused were not dislodged by the prosecution. Neither did the prosecution take advantage of section 212 of the Criminal Procedure Code, Cap 75 Laws of Kenya to rebut the same. This case does not seem to have been properly investigated. To say the least, it is a sad case where a life was lost at the hands of members of the public allegedly at the instigation of a public officer. The chief of Mutino location who is said to have incited the public against the deceased, was neither questioned, arrested or charged with any offence. In the words of the investigations officer (PW8), neither his superiors nor the Director of Public Prosecutions advised him as such. Those who stormed the home of the accused the day before the heinous act and molested the deceased's minor son (PW3) were likewise neither questioned or any action taken against them. To this court's mind the prosecution failed to prove its case against the accused to the required standard.

20. In the circumstances, I find the accused not guilty and acquit them of the offence of murder under section 215 of the Criminal Procedure Code.

DATED and delivered at Chuka this 15th day of September, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

15/9/2016