



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 45 OF 2011**

**LESIIT, J**

**REPUBLIC.....RESPONDENT**

**V E R S U S**

**LAWRENCE MUKARIA.....1<sup>ST</sup> ACCUSED**

**JACOB GIKUNDI.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. The two accused persons hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively Lawrence Mukaria and Jacob Gikundi, are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 22<sup>nd</sup> July 2010 at Amwathi Sub location, Kabachi Location Mutuati Division, Igembe North District within Eastern Province they jointly murdered Haron Mururu.
2. The prosecution called 5 witnesses. The facts of the prosecution case were that the deceased was guarding a miraa shamba belonging to the father of PW1. On the 22<sup>nd</sup> July just after 5 pm PW1 visited the shamba. While at a distance of between 15 and 20 meters PW1 saw four men, two of whom he recognized one as Lawrence the 1<sup>st</sup> Accused and the other one as Jacob the 2<sup>nd</sup> accused. PW1 testified that the two were his neighbours for a period of 10 years. They were with two others he did not recognize. He saw the 1<sup>st</sup> accused cutting the deceased on the right hand with a slasher while the 2<sup>nd</sup> accused cut the deceased on the head also with a slasher. The deceased was pleading with the four men not to kill him.
3. PW1 stated that he shouted at the four people asking them what they were doing and on saying so they stopped what they were doing and started walking towards him. PW1 decided to ran to the nearest canteen to secure himself where he got 5 people who took him back to the scene. PW1 testified that he found his worker the deceased lying on the ground with a club next to him and with bleeding from the head.
4. PW2 was going to the area looking for miraa when he heard screams. He testified that he walked towards the screams and that when he was about 20 meters from the scene of where the screams were coming from, he saw Gikundi who is the 2<sup>nd</sup> accused hitting the old man with a club on the head while Lawrence the 1<sup>st</sup> accused was cutting him with a slasher. PW2 stated that the two

- accused persons were in company with two others whom he did not recognize. He said that on witnessing the incident he rushed back and met with a motor cyclist which he rode to Mutuati Butchery where he reported the matter to the owner of the shamba. PW2 testified that the deceased was a guard of the shamba where he was murdered. PW2 also said that he knew the 2<sup>nd</sup> accused because he bought his land from the father of the 2<sup>nd</sup> accused. He said that that land was next to the land of PW1's father where the incident occurred.
5. The accused persons were put on their defence. The 1<sup>st</sup> accused gave a sworn statement. He said that he knew the deceased because both the deceased and him had been employed by one Nathan to guard his shamba. He said that on the morning of 22<sup>nd</sup> July, was the material day the deceased plunked miraa from Nathan's land. The 1<sup>st</sup> accused stated that he reported to Nathan what the deceased had done. He said that at about 6 pm the deceased went to the shamba and asked him whether he had reported to Nathan that he had plunked his miraa. The 1<sup>st</sup> accused stated that when he answered in the positive the deceased told him that he shall never tell Nathan again. The 1<sup>st</sup> accused stated that the deceased attacked him with a panga. The 1<sup>st</sup> accused showed the injuries he suffered to court. His right hand had the small finger missing and he said that it was the deceased who cut off the finger. He also showed his head which had two cuts 1 ½ inches and 3 long inches respectively. He also showed his forehead and left cheek which had 2 inch wounds. He also showed the left shoulder which had a 2 inch by 2 inches large healed scar. He also showed the court the left chest above the breast which 3 inch healed wound. He also showed a cut on the left knee which was a 3 inch wide and round scar. The 1<sup>st</sup> accused stated that after the deceased cut him on those parts of the body he fell down near where a cow was tied. He said that he saw a big stick which he picked and then used it to hit the deceased on the face. After hitting the deceased he ran a distance of about 20 metres where he fell down he was latter assisted by one Joshua Kaboo who is his brother who took him to Laare hospital where he was admitted for 2 days. After discharge he was arrested by the police.
  6. The 2<sup>nd</sup> accused put an alibi as his defence. He said that on the material day at about 1 pm he was at Muruate Village where he was guarding miraa belonging to a teacher called Kaumbuki. He said that he was arrested on the 25<sup>th</sup> July 2010. He said that the case was fabricated against him by PW2 who bought a piece of land from his father, one Nathan and one Mwenda. The 2<sup>nd</sup> accused said that he did not know the deceased.
  7. The case against both accused persons is that of murder. The prosecution must adduce evidence to establish that both accused persons acting with one common intention by either act or omission caused injury to the deceased person as a result of which he died. The post mortem report shows that the deceased died as a result of head injury following trauma. The prosecution must adduce evidence to show that the two accused persons hit the deceased on the head and therefore caused him the injury which led to his death. The prosecution must prove that at the time the accused persons caused the injury in question, they had formed the necessary malice aforethought to either cause death or grievous harm to the deceased.
  8. The prosecution has called 5 witnesses. There were 2 eye witnesses of the incident. The learned counsel for the accused person urged the court to consider the evidence by each of the two eye witnesses in regard to what each of the accused persons did and also to consider how each of the accused was dressed according to these eye witnesses. Ms Nelima urged the court to find that the alibi defence by the 2<sup>nd</sup> accused was not rebutted. Counsel also urged the court to find that the 1<sup>st</sup> accused was entitled to the defence of self defence for the attack that led to the deceased death.
  9. Mr. Mungai for the state urged the court to find that both accused persons were placed at the scene of murder and that they were positively identified through recognition by PW1 and 2 in favourable circumstances. He also urged that the two eye witnesses were credible and consistent in the evidence. Regarding self defence Mr. Mungai urged the court to consider that the deceased was unarmed, that there was no provocation and that the injuries inflicted on the deceased were so severe that self defence is not available as a defence to the charge.
  10. The 1<sup>st</sup> accused has not denied being at the scene at the time in question. He has put forward a defence of self defence and has given the circumstances which gave rise to this incident. He stated that him and the deceased were employees of PW1 and that both were employed to guard his miraa. The 1<sup>st</sup> accused explained that the deceased attacked him with a panga cutting him on

the head, the shoulder, the hands and the legs just because he the 1<sup>st</sup> accused had reported theft of miraa by the deceased to the owner PW1. The 1<sup>st</sup> accused showed the court a missing finger on the right hand which he said the deceased chopped off. According to the 1<sup>st</sup> accused, he had been cut multiple times on the parts of the body which he revealed to the court to examine. He said that he picked a stick on which a cow had been tied and he used it to hit the deceased once on the head before running for his life.

11. The 2<sup>nd</sup> accused on his part put forward an alibi as his defence.
12. I have considered the evidence of the two eye witnesses. From their evidence they claim that the deceased was attacked by four men each of who was armed with a slasher, and that they cut the deceased multiple times on the head. Each of the two witnesses were categorical that the attackers used slashers to cause injury on the deceased.
13. I consider the post mortem findings of the considered examination of the body of the deceased. The findings were that the deceased had a stab wound on the left shoulder and fractures on both jaws with a depressed fracture on the front of the head and multiple bruises and cuts on the scalp. The cause of death was a head injury following trauma. Considering these injuries I find that the description given by PW1 and 2 of how the injuries were inflicted on the deceased, and the weapons they used do not tally. The doctor noted one stab wound on the left shoulder and he noted multiple bruises and cuts on the scalp. However, the cause of death was not the cuts or the stab wound but the head injury caused by trauma.
14. According to Concise Oxford Dictionary Revised Tenth Edition the medical meaning of trauma is physical injury. The doctor did not testify in this case because the post mortem report was produced by the Investigating Officer. The court did not have the advantage of a description of how the injuries on the deceased could have been caused. However even without that evidence the fractures found on the deceased were on the frontal part of the head involving the temporal front region which is the forehead and the jaws. Considering the prosecution evidence there is no way that the injury of fractures on the frontal part of the head could have been caused by slashers as described by the prosecution witnesses. The injury on the body of the deceased was consistent with a single blow by a heavy stick on the face of the deceased as described by the 1<sup>st</sup> accused in his statement in defence.
15. I find that PW1 and 2 were not telling the truth when they said that they saw both accused and two others cutting the deceased several times on the head and the body. There was no evidence of multiple cuts that could have been caused by slasher on the body of the deceased. The major injury which was the cause of death was a fracture on the head and that fracture was caused by a trauma and not by cuts according to the Doctors conclusion. I agree with Ms Nelima that PW1 and 2 who claim to have been eye witnesses of the incident are not credible witnesses as their evidence is inconsistent with the post mortem finding on the body of the deceased.
16. The 1<sup>st</sup> accused admitted hitting the deceased once on the face as he fled for his life. The issue is whether self defence is available to the 1<sup>st</sup> accused. In **MORRIS MUNGATHIA VS REPUBLIC CRIMINAL APPEAL NO. 212 OF 2006 COURT OF APPEAL AT NYERI**, the court held:

**“The law on self-defence was succinctly stated in the Privy Council case of CHAN KAU V. R (2) (1955) W.L.R.192 as follows:**

**In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence apart from that of insanity. It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self defence is to lay before the court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat (see Manzi Mengi v. R [1964] EA.289”**

17. The 1<sup>st</sup> accused has in his defence statement laid down the facts upon which his defence is based. He has shown that he came under attack by the deceased because of reporting the deceased to their employer PW1. The 1<sup>st</sup> accused also showed the court the injuries he claims the deceased inflicted on him. These were multiple cuts including the loss of a finger.
18. I noted that PW2 denied that the 1<sup>st</sup> accused was his employee. He said that only the deceased was his employee. I also noted that when the 1<sup>st</sup> accused was taken to the doctor for examination, the police specifically requested for a mental assessment and a report of the 1<sup>st</sup> accused was fit to stand trial. They did not seek a general examination of the 1<sup>st</sup> accused regarding injuries he may have. There is therefore no comment in regard to any injuries the 1<sup>st</sup> accused had at the time of the mental assessment on the 2<sup>nd</sup> August, 2010.
19. I have considered the 1<sup>st</sup> accused defence and the facts adduced by him and given the analysis of the case and the evaluation which I have done of the entire evidence. I am satisfied that the 1<sup>st</sup> accused was acting in self defence when he hit the deceased with a stick on the head. It was a single blow to the head according to the 1<sup>st</sup> accused. There is no evidence adduced by the prosecution to negate the 1<sup>st</sup> accused defence.
20. Regarding malice aforethought the court must also consider whether in the case of injury caused whether the accused inflicted a single or multiple blows. I am guided by the case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, where BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

21. Unlike in the reported case herein above there is no evidence before the court to show that the deceased was hit several times. The evidence of the post mortem findings suggests that there was a single blow to the head of the deceased. That further goes to negate malice aforethought.
22. I have come to the conclusion that the 1<sup>st</sup> accused acted in self defence when he hit the deceased and caused him injuries that led to his death.
23. Regarding the 2<sup>nd</sup> accused he has put forward an alibi as his defence. Having come to the conclusion that there was no evidence that the deceased was cut with slashers multiple times as the two eye witnesses suggested, and having concluded that the injury on the deceased was consistent with a single blow to the head, I am persuaded that the 2<sup>nd</sup> accused may not have been at the scene nor a perpetrator of the incident. The 2<sup>nd</sup> accused has adduced evidence which shows a motive to implicate the case against him on the part of PW2. PW2 testified that he bought the whole of the family land from the father of the 2<sup>nd</sup> accused and that as a result he offered a small piece of land to the mother of the 2<sup>nd</sup> accused for her to live in. The 2<sup>nd</sup> accused testified that the case was a fabrication against him by PW2 and others in order to get him out of the way as he was resisting the sale of the land by his father. That is a reasonable explanation why PW2 would fabricate the case against him.
24. I considered the evidence of the Investigating Officer. He said that his findings were that the attack was in order for the accused persons to secure an employment in the farm where the deceased worked in his place. When cross examined by Ms Nelima for the accused about where he got that information, the Investigating Officer stated that he was given that information by the son of the owner of the farm where the deceased worked. He however admitted that the allegation was not reduced into writing.
25. The findings by the investigating officer as to the motive of the attack is both illogical and not plausible. I cannot understand how one would kill another in broad day light in order to secure their job from the employer of the deceased. There is no way an employer can hire a person who

killed his employee. In any event no evidence was led to that effect by any of the prosecution witnesses.

26. In conclusion I find that the prosecution did not prove its case against the 2<sup>nd</sup> accused. Accordingly I give the 2<sup>nd</sup> accused the benefit of doubt and acquit him for this offence.
27. In regard to the 1<sup>st</sup> accused I do find that he acted in self defence and that therefore he did not form the necessary malice aforethought to commit the offence charged. I therefore substitute the charge against him from murder contrary to section 203 of the Penal Code with that of manslaughter contrary to section 202 of the Penal Code. I find the 1<sup>st</sup> accused guilty of the substituted charge of manslaughter and convict him accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF FEBRUARY 2014.**

**J. LESIIT**

**JUDGE**