



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO.60 OF 2011**

**ISAACK NKUNJA ALIAS PROFESSOR.....1<sup>ST</sup> ACCUSED**

**SABINA MUTHONI.....2<sup>ND</sup> ACCUSED**

**-VS-**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

The accused persons, Isaac Nkunja and Sabina Muthoni are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars of the offence are that on 25<sup>th</sup> May 2011, at Thaene village, Kithetu Location in Igembe South District within Meru County, jointly with another not before the court, murdered Paul Mwenda Mugambi alias Chomelea.

The prosecution called five witnesses. PW1 Doctor Kome Guantai produced a post mortem report filled by Doctor Macharia in relation to the body of the deceased, done at Meru Hospital on 4<sup>th</sup> August 2011. The doctor testified that externally, the body had a cut on the scalp, multiple bruises on anterior chest wall and the respiratory system had fractures on the first rib on both sides with haemothorax. In addition, there was a rupture of the small gut and the doctor formed the opinion that the cause of death was blunt chest injury. The post mortem report was produced as Pex No. 1 by consent.

PW 2 Grace Mbirigi testified that on the 25.11.2011, she was at the home of Samuel Thiambu at about 8PM with one Karambu (PW3) and one Rebecca to take alcohol. They were later joined by the deceased who bought Changaa worth 30 shillings and took it. The deceased then produced a Kshs 1,000 note to pay for the Changaa he had taken. Samuel Thiambu who was selling the changaa picked up a panga and cut the deceased on the head and he fell down. The deceased then started screaming for help and 1<sup>st</sup> accused and the 2<sup>nd</sup> accused (wife of Thiambu) came with metal bars each and started beating the deceased all over his body. Thiambu also beat the deceased with the flat side of the panga and the deceased continued screaming. As the three continued beating the deceased, PW2, Rebecca and Karambu (PW 3) left the compound and neighbours came to the deceased's aid. The deceased was later carried to the police station and PW2 was among those people who carried the deceased. The deceased had been seriously beaten and he could neither walk nor stand and on the way to the police station, he told them that the attackers had forced a tool he used to weld tanks and basins with into his anus. The deceased reported the same at the police station. PW 2 further testified that she had no quarrel with the accused persons and that the house where the alcohol was being sold belonged to Samuel Thiambu and the 2<sup>nd</sup> accused and that Samuel ran away after the incident and that two months later she learnt that the deceased had succumbed to the

injuries.

PW 3 Eunice Karambu testified that on the material day, they were at Samuel Thiambu's house with PW 2, one Rebecca, 1<sup>st</sup> accused and 2<sup>nd</sup> accused taking Changaa. They took changaa worth 30 shillings and paid. Soon thereafter the deceased came and ordered changaa worth 40 shillings and gave out Kshs 1,000 note. The deceased then asked for change and he was cut on the forehead by Samuel Thiambu and fell down. The said Samuel together with the 1<sup>st</sup> and 2<sup>nd</sup> accused then started beating the deceased with iron bars whereupon PW 3 and the others ran away to the road and continued listening to what was going on. They then went back accompanied by other villagers and took the deceased to the police station and left him there. The said Samuel, 1<sup>st</sup> and 2<sup>nd</sup> accused then ran away after beating the deceased. At the police station, the deceased reported the case himself since he was able to talk and PW 3 further testified that there was an object that had been forced into his anus and that the deceased told them that he felt he would not survive and that further should he die, those who caused his death were Samuel Thiambu, 1<sup>st</sup> accused and the 2<sup>nd</sup> accused. The following day, as PW 3 went to draw water near Maua General Hospital, she heard people saying that there was a man in a police vehicle called Mwenda 'Chomelea' and that was when she realized that the deceased had died. She later wrote a statement with the police.

PW 4 Selestino Mugambi who was the father to the deceased testified that on 4<sup>th</sup> August 2011 he went to Meru Level 5 hospital and identified the body of the deceased to Doctor Macharia for purposes of conducting a post mortem. It was his testimony that the body had cuts on the head, the legs and that the right leg had a more serious cut at the middle of the shin which was almost amputated and the body had injuries all over. The external part was swollen and the chest was bruised all over.

PW 5 Tom Mburu who was the investigating officer in this case testified that on 25<sup>th</sup> May 2011, a report was made by the deceased that he was assaulted by people well known to him. He gave their names as Nkunja, Sabina (1<sup>st</sup> and 2<sup>nd</sup> accused respectively) and one Thiambu. He further testified that after the deceased reported the assault, he was taken to Nyambene District Hospital where he died and that the suspects had disappeared from the date of the assault. On 8<sup>th</sup> August he was called by the officer commanding the Police Station who requested him to go and witness the post mortem of the deceased at Meru General Hospital. It was his testimony that sometimes in November 2011, one of the suspects was sighted by members of the public who informed police officers after which PW 5 accompanied the reportee who identified to him the 1<sup>st</sup> accused at a place where they were having drinks whereupon he arrested the 1<sup>st</sup> accused. He later established that the deceased, accused and others were in a changaa den where they were taking changaa and that the den belonged to the 2<sup>nd</sup> accused and one Thiambu and that the cause of the fight was after the deceased gave 1,000 shillings to pay 30 shillings and demanded his change. This is said to have angered the accused persons who attacked the deceased with a panga. He further testified that before his transfer, he only arrested the 1<sup>st</sup> accused and that he attended the post mortem and that the body had multiple cuts on the legs, head and hands which were visible.

After the close of the prosecution's case the accused persons were placed on their defence on 25<sup>th</sup> day of September 2014, whereby they opted to give sworn statements but call no witnesses. Both accused persons gave an alibi as their defence. The 1<sup>st</sup> accused testified that he did not know the deceased and that he only heard his name in court; that he never met him on the material date when the incident allegedly occurred because he had been in Meru to sell miraa and returned home at 4.00 pm.

Accused 2 stated that she knew Samuel Thiambu who intended to marry her. His home was near hers. She denied having been with Samuel Thiambu on the said date but that she was at her home on the material day; that she was mentioned just because she used to live with Thiambu; that when the chief arrested her in November, he alleged that she was hiding Thiambu. She also told the court that she never went into hiding as alleged by the prosecution but used to wash clothes for people to earn a living. In cross examination, accused 2 stated that she knew PW2 and 3 and that they used to quarrel with her there before as they used to steal maize from the accused 2's family and if accused 2's family complained, PW2 and 3's children would attack her family with stones.

Before the plea was taken, the accused persons were examined by Dr. Mwenda a Psychiatrist Consultant who certified the accused persons mentally fit to stand trial.

Mr. Omari for the accused persons submitted that the prosecution had failed to prove the charge against the accused persons. He submitted that the accused persons had put forward the defence of alibi which was not challenged and that the accused persons were not anywhere near the scene and that further the accused persons were arrested 6 months after the incident and that to date the said Samuel Thiambu had never been arrested.

Mr. Mungai for the State submitted that the prosecution had proved its case against the two accused persons and that they had been placed at the scene of crime in that they were in a drinking den whereupon they inflicted severe injuries on the deceased and that the defence of alibi put forward by the accused persons was an afterthought and urged the court to find the accused persons guilty of the charge.

I have considered the evidence adduced by both the prosecution and the defence and submissions of counsel. To prove an offence of murder, the prosecution is required to establish the following ingredients:

1. Proof of the fact and cause of death of deceased;
2. Proof that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the accused. (actus reus);
3. Proof that the unlawful act or omission was committed with malice aforethought i.e. mens rea;

In the instant case, PW2 and 3 testified that they were in the house of one Thiambu who was with his wife, accused 2, when the deceased found them there. That the accused 1 was also present. They had gone to take changaa; that the deceased found PW2, 3 and one Rebecca there. He ordered for changaa for Ksh.30/- drunk and gave Thiambu a note of Kshs.1000/- and asked for change. That was the genesis of the assault against him. Both PW2 and 3 said that Thiambu cut the deceased with a panga on the forehead and that accused 1 and 2 then joined Thiambu in assaulting the deceased. The evidence of PW2 and 3 was consistent and unshaken as regards the occurrences at Thiambu's house.

In her sworn defence, accused 2 denied that she was Thiambu's wife but only a fiancé and that she was not at Thiambu's house on the material night but was at her home. The accused was purporting to raise an alibi defence that she was not at the scene of crime.

The court of Appeal considered the circumstances in which an alibi may be raised in the case of **Karanja v. Republic 1983 EA 501**. The court said:

**1. "The word "alibi" is a Latin verb meaning" elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.**

**2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."**

For an accused to rely on a defence of alibi, sufficient notice should have been given to the prosecution to rebut the same or call evidence to do so. Failure to raise the alibi at the earliest opportunity possible renders it worthless. In my view, accused 2's defence is an afterthought. Despite the fact that she was

defended, the alibi was never alluded to during cross examination of the prosecution witnesses. In the end, I find that her alibi was ably dislodged by the evidence of PW2 and 3 who placed accused 2 at the scene of crime.

As to whether or not accused 2 is the wife of Thiambu, the owner of the house, which is the scene of crime, even though the accused 2 denied being the wife, she admitted to being a fiancé and that she had lived with Thiambu before. Accused 1 testified that accused 2 is indeed the wife of Thiambu. I have no reason to doubt PW2 and 3. They knew accused 2 well and accused 2 must be Thiambu's wife.

Accused 2 then alleged that PW2 and 3 had had a dispute with her before this incident in that their children used to steal maize from her, whenever she complained, the children would throw stones at accused 2's family. Again, that came as an afterthought in her defence. I dismiss that allegation as such and do not believe that there existed any dispute or grudge between accused1 and 2 on one hand and PW2 and 3 on the other hand.

Accused 1 also raised an alibi in his defence; it is to the effect that on the material day, he had gone to sell his miraa in Meru and arrived at his home at 4.00 p.m. and never went to Thiambu's house. He denied killing the deceased or assaulting him. He went on to allege that he had a dispute with PW3's father over land. During the taking of the prosecution evidence, at no time had accused 1 alleged that a dispute existed between him and PW3's father. Accused 1 denied that PW2 had any dispute with him. If that is the case, why would PW2 (Grace) make false accusations against the accused, that he assaulted the deceased? I am satisfied that PW2 and 3 were truthful witnesses and they did see both accused persons assist Thiambu in assaulting the deceased.

PW1 produced a post mortem (Pex1) report in respect of the deceased. The Doctor found that the deceased sustained a cut wound on the scalp, multiple bruises on the anterior chest wall, fracture of the first rib on both sides, haemothorax, and rupture of the small gut. The doctor formed the opinion that the cause of death was blunt injury to the chest. The findings of the Doctor are consistent with PW2 and 3's evidence that they saw Thiambu cut the deceased on the head first, then the accused 1 and 2 descended on the deceased with metal bars. PW2 and 3 said that they were seated outside the house and there were electricity lights and I have no doubt in my mind that the 2 accused assisted Thiambu in assaulting the deceased. PW2 and 3 also said that there were no other people at Thiambu's house except Thiambu, the two accused, PW2, PW3, and one Rebecca and the deceased who found all of them there.

PW2 and 3 said that Thiambu disappeared after the said incident. It seems the 2 accused were not arrested until after about 6 months. Both PW2 and 3 told the court that both accused and Thiambu disappeared. To date Thiambu has not been arrested. PW5 is the one who arrested the 1<sup>st</sup> accused in November, 2011, after he was sighted in a drinking place. It is not disclosed when accused 2 was arrested save what she told the court that she too was arrested in November, 2011, 6 months after the occurrence of the incident. She denied having left the home at any time. The investigating officer did not really give a satisfactory explanation as to efforts made if any, to arrest the accused persons and Thiambu. The delay in the arrest of the accused persons notwithstanding, I am satisfied that PW2 and PW3 did identify the two accused having been with Thiambu when they assaulted the deceased. As observed earlier, I dismiss their defences as afterthoughts which do not amount to an alibi defence.

Whether malice aforethought has been proved, I am satisfied that the multiple injuries found on the body of the deceased are indicative of the presence of malice aforethought. Besides PW2 and 3 told the court that the deceased complained that a metal had been inserted in his anal cavity and that he was bleeding profusely. PW4, the deceased's father, alluded to that fact. It is interesting that the doctor did not take note of the item inserted in deceased anus. However, the post mortem disclosed rupture of the small gut. That injury to the gut may have been caused by the metal inserted in the deceased's anal cavity. The act of putting an object in the deceased anus in addition to the other injuries inflicted on the deceased can only be described as malice on the part of the accused persons. Section 206 of the CPC defines malice aforethought as an intention to cause grievous harm to another or cause death, or knowledge that the act or omission will cause death or cause grievous harm. In the instant case, the injuries inflicted on the deceased were so serious that the only conclusion one can arrive at is that the accused persons intended to

cause grievous harm and caused the death of the deceased.

Although the two witnesses did not say exactly what each of the accused did, except that Thiambu cut the deceased on the forehead, PW2 and 3 said that accused beat the deceased all over the body with metal rods. There were injuries on more than one part of the body and I am satisfied that the accused persons had a common intention, that is, to grievously injure the deceased and the injuries that the deceased sustained were a probable consequence of their acts.

In the end, I am satisfied beyond any doubt that the two accused with another not before the court beat up the deceased resulting in him sustaining serious injuries that caused his death. I reject the accused's defences, find them guilty, and convict them of the offence of murder under section 322 of the Criminal Procedure Code.

**DATED AT MERU THIS 14<sup>th</sup> DAY OF NOVEMBER 2014.**

**R. P .V. WENDOH**

**JUDGE**

**Mr. Omari for Accused**

**Mr. Mulochi for State**

**Jane/Kirimi Court Assistant**

**Both present Accused.**