



REPUBLIC OF KENYA

High Court at Embu

Criminal Case 24 of 2009

REPUBLIC PROSECUTOR

VERSUS

PETER IRERI KIMOTHO1ST ACCUSED

STELLA NJOKI MWANGI3RD ACCUSED

STEPHEN KATHURI KIMOTHO 4TH ACCUSED

J U D G M E N T

PETER IRERI KIMOTHO, STELLA NJOKI MWANGI and STEPHEN KATHURI KIMOTHO hereinafter referred to as Accused 1, Accused 3 and Accused 4 stand charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in the information is that Accused1, Accused 3 and Accused 4 on 8th October 2009 at Gathunguri village Kiaruri sub-location, Karumandi location in Kirinyaga District within Central Province jointly murdered Joseph Gitari Mucoki.

I would wish to clarify that the accused persons were charged alongside their brother called JOHN MBOGO KIMOTHO (Accused2) whose charges were withdrawn following his continued confinement at Mathare Mental Hospital. The Prosecution called a total of ten (10) witnesses to support their case. The Prosecution case was that on 8/10/2009 morning PW1 went to the shamba to pick tea. She left her husband (the deceased) at home. At 8am Accused 4 approached her asking her when she would be through with picking the tea, as this was a lease which had expired. She informed him she would ask the deceased. The deceased came and they talked and Accused 4 told them to continue picking tea. Later at around 10am Accused 1 came running towards them while carrying an axe. They left the farm for the road and stood there. Accused 1 reached where they were and cut the deceased on the left side of the head and shoulder. Immediately John Mbogo arrived with a panga and cut the deceased at the back of the head and he fell down. The two attackers started cutting him all over the body. Accused 3 also arrived and picked Mbogo's panga and cut him on the legs. Accused 4 also arrived, picked the axe and started cutting him. PW1 screamed but no one came to her aid. She left for her home two (2) kilometres away. On the way she met her brother-in-law James Muchoki and reported to him. The Assistant Chief was called and he came. She accompanied him to the scene and he left. A report was made at the Karumandi A.P. Camp. The body of the deceased was then collected from the scene. She indicated that they had leased the tea from a brother to the accused persons by the name Duncan Muchoki Kimotho. The lease was for five (5) years.

PW7 the Assistant Chief Kiaruri sub-location was in his office on 8/10/2009 at 7am when he received a call from Accused 4 telling him he had a quarrel with the deceased at the brother's shamba, and

the quarrel was about the lease of tea bushes which Accused 4 said had expired. The witness told Accused 4 he would call them for a discussion. At around 9am the same day he received a call from an unmarked number saying the accused persons had been fighting on the shamba. He informed the AP incharge of Karumandi AP Post and they went together to the scene. On the way they met the accused persons going to report the death of the deceased. In cross-examination he confirmed that the accused and deceased had been having quarrels and the person who had leased the land to the deceased was a brother of the accused called Danson Gachoki who had disappeared. This witness had earlier on had discussions with the deceased and the accused persons over the issue of tea and the lease.

PW4 a police officer was at Karumandi A.P. Post on 8/10/2009 when he was instructed by Cpl Kathuri to arrest and place in cells four (4) murder suspects who were coming to the post. The four suspects came and told him they had killed Joseph Gitari and had come to surrender. He placed them in cells. Later the suspects were taken away by police officers from Kianyaga Police Station from where they were charged.

PW9 of scenes of crime Embu processed a film given to him. He produced six (6) photographs taken at the scene of crime (EXB 4) (i-iv). PW10 visited the scene in company of other officers. He explained what they found. They did not recover any weapon. PW5 found all the accused persons i.e. (Accused 1, Accused 3 and Accused 4) fit to stand trial while Accused 2 was found to suffer from mental retardation (EXB 1) (i-iii) and (EXB 2). And Doctor Gatangi (PW6) found the deceased to have suffered over 26 deep cut wounds. He found the cause of death to be due to the deep cuts on the head and other limbs (EXB 3).

The accused persons gave unsworn statements. Their evidence is to the effect that Accused 3 had visited Accused 4 as per prior arrangement for some money for fees. They left for the town to get the money when they met Accused 1 and started walking together. On the way they met the Assistant Chief who asked them to see him at his office. They faithfully went to the said office and were arrested and placed in cells. They denied leasing any tea leaves to the deceased. Infact they said their young brother was having a love affair with PW1 and they did not approve of it and this put them in problems.

Mr. Githinji filed written submissions in which he stated that PW1 mentioned JAMES MWENDIA (brother to deceased) and her mother in law ESTHER WANJIKU MUCHOKI as people she had told about the killing of the deceased. And that since these two people were not called as witnesses it was fatal to the Prosecution case since PW1's evidence was not corroborated. He wondered why nobody responded when PW1 screamed. He further submitted that the absence of blood stained clothes and weapons was also suspect. And that PW2 – PW6 contradicted themselves as to what transpired at the chief's camp. The motive of the murder though alluded to was not established. The officer who produced the photographs is not the one who had taken them. He asked the Court to acquit the accused persons.

This is now the case before Court for determination.

From the evidence on record the fact of death is not disputed. It was confirmed by the doctor (EXB 3). The doctor further confirmed that the deceased died as a result of deep cut wounds on the head and other limbs. There was also brain damage. This was therefore not a natural death.

The issue for determination by this Court is who caused the deceased's death. The evidence shows that besides the deceased's wife (PW1) there was no other eye witness. She has explained that Accused 4 had first come to the tea farm while she was alone. He waited until the deceased came, they talked and he left. PW7 the Assistant Chief testified that Accused4 had called him that morning and told him of a quarrel with the deceased over the leasing of the tea bushes. He further stated that the accused persons and the deceased had had several quarrels over these tea bushes. He further confirmed that the tea bushes had been leased to the deceased by a brother of the accused persons who had disappeared. As an area administrator he was aware of this problem between the accused persons and the deceased.

PW1 explained that Accused 1 arrived with an axe and cut the deceased on the head and shoulder. He was joined by Accused 2 the one in hospital who arrived with a panga and the cutting

continued. Then Accused 3 and Accused 4 came to the scene and took the axe and panga and continued to cut the deceased. Accused 3 used the panga and Accused 4 used the axe.

It is a fact as stated by the doctor (PW6) and all other witnesses who saw the body that the said body was badly mutilated. It had too many deep cut wounds. Even without relying on the photographs that were taken by an ungazetted person I believe the evidence of the witnesses which is supported by that of the doctor (PW6) that the deceased died as a result of bleeding from the deep cuts that were too many.

The time of incident was about 9am which was broad daylight. PW1 and the deceased were in the shamba picking tea. This shamba they were picking tea from belonged to the accused person's family but had been leased to the deceased by accused person's brother Duncan Muchoki Kimotho. PW1 screamed but nobody came to her rescue. She said their home was 2 kilometres away. This shamba was most likely within the vicinity of the home of the accused persons because it was their shamba. PW1 is very sure and clear on the people who attacked the deceased that morning. She has clearly demonstrated what each one of them did.

PW7 an Assistant Chief of both parties testified that the 4th accused had called him that morning (7am) and reported to him a quarrel between him (Accused 4) and the deceased over the lease of this shamba. This witness further confirmed that the accused and deceased had had several quarrels over the leasing of this shamba and he had had meetings with them over the same. The main quarrel being that the accused's family believed that the lease had expired while the deceased believed it had not. Yet in all this the lessor was at large.

In their defence the accused have raised an *alibi* and have denied leasing any shamba to the deceased. Instead they say PW1 had employed their younger brother whom she had turned into a lover and the deceased's family was up in arms over this. They further stated that there was no brother of theirs who was missing from home.

In cross examination of PW1 and PW7 the defence never took PW7 to task over the issue of the lease; disappearance of their brother, the many meetings he held with the two families over the lease, and even Accused 4's call to PW7 that morning. Secondly nowhere in cross-examination of PW1 did the defence allude to any intimate relationship between PW1 and their missing brother, or their younger brother.

A short while after the call by Accused 4 on the morning of 8/10/2009 PW7 received a call informing him that Accused 1, Accused 4 and John Mbogo had been fighting in the shamba. He immediately went to the scene with PW2 and another and they found the deceased's body lying on an access road near the shamba. PW7 knew the persons involved in this dispute and he even knew the shamba in issue. And as they went to the scene they met Accused 1, Accused 3, Accused 4 and another going to the A.P. Camp. They may not have had any weapons or bloody clothes. That alone does not imply they were not involved. The fact that no one responded to PW1's screams does not prove she is a liar. This scene was on the shamba of the accused persons so one can know who the neighbours of the shamba were. PW3 and others who went to the scene stated that they met a crowd but no one wanted to divulge any information.

All the accused persons have denied surrendering to the police. They say they had met the assistant chief who asked them to go to his office which they did. And it was while there that they were arrested. This cannot be true because of the evidence of PW1-PW4 and PW7. PW2, PW3 and PW7 met with the accused persons who told them they were going to the A.P. Post to report the murder. And PW4 received the four reportees and placed them in cells. It cannot therefore be true that the Assistant Chief directed them to their arrest. They have also not stated which assistant chief told them this. If it was their Assistant Chief who is PW7 then its not true that he told them so. They would have questioned him on this in cross-examination. They did not.

The evidence of PW1 is evidence of a single identifying witness. In the case of *KIILU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 174* the Court of Appeal held;

“Subject to certain well known exceptions, it is trite law that a fact may be proved by 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 probability of error”.

The time of incident was around 9-10am which was broad daylight. These are people who knew each other very well. PW1 has explained what each of the attackers did to the deceased. Though PW1 is a single identifying witness I have cautioned myself on the dangers of relying on her evidence alone to convict. I have found corroboration of her evidence in the evidence of PW7. He had been informed of a quarrel by Accused 4. The quarrel was between Accused 4 and deceased. It was over the leased shamba of tea leaves. Within a while he was informed via telephone of a fight on the said shamba involving the accused persons. On rushing there PW2, PW3 and PW7 met the accused persons who told them they were headed to the AP Post to report the murder of the deceased. There is no reason that would make PW1 and PW7 lie against the accused persons. The defence raised by the accused persons has been displaced by the strong Prosecution evidence on record. My finding is that the accused persons herein jointly assaulted the deceased who died from the deep cuts inflicted on him.

The next issue to determine is whether malice aforethought was established. Section 206 of the Penal Code defines malice as follows;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c) an intent to commit a felony;**
- d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The evidence is that Accused 4 first came to the shamba and confronted PW1. He was asked to wait for the deceased which he did. He talked to the deceased and left. Shortly thereafter Accused 1 arrived with an axe and attacked the deceased. Another brother came followed by Accused 3 and Accused 4. Accused 3 and Accused 4 picked up from where Accused 1 and the other had reached and continued to cut the deceased on the body and limbs. All these cuts led to heavy bleeding and he succumbed to them.

When the accused persons were doing all these to the deceased it was clear that their motive was to kill him and/or cause him grievous harm. And all this arose from the fact that he had refused to surrender the leased shamba of tea leaves to them. They took the law in their own hands.

For my part I do find the charge of murder established against Accused 1, Accused 3 and Accused 4. I convict them **ALL** of the offence of Murder under section 322 (2) Criminal procedure Code.

DATED AND DELIVERED AT EMBU THIS 12TH DAY OF APRIL 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Miiri for State

Mr. Githinji Karuri for accused

Accused

Njue – C/c