



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Case 26 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH NGUGI MWANGI.....ACCUSED

JUDGMENT

By an information presented to this court on 31/3/2010, Joseph Ngugi Mwangi was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 10/3/2010, at Pipeline Estate in Nakuru District, he murdered William Gachingiri Ngugi. The accused denied the offence and the case proceeded to full hearing. The prosecution called a total of 13 witnesses. The accused gave a sworn defence and called one witness.

PW1, Nancy Nduta Ngugi, is the mother of the deceased. She recalled that on 7/3/2010, her cow had a problem and so it was slaughtered for the meat to be sold. On 8/3/2010, when the deceased was supposed to go and sell it, the accused arrived and they went to sell the meat to the Internally Displaced Persons (IDPs) at their camp near Pipeline. The accused person went to her home again and together with the deceased went to sell more meat using a bicycle. On Wednesday, they took more meat for sale but did not return. On Thursday the accused went to her home and asked for the deceased but she had not seen him since he left with accused the previous day. Before the accused left, the deceased's aunt by name Rose came and informed PW1 that something had happened but before she could disclose what it was, the accused ran away. Rose informed PW1 that the deceased had been found murdered near the IDP camp. In company of many other people, they went to the scene where she confirmed that the deceased was indeed murdered; his stomach had been cut and intestines were exposed. PW1 did not know the accused before but when he went to her home on 7/3/2009 the deceased introduced him as his friend; she denied knowing of any disagreement between the deceased and the accused.

PW2, Lucy Nduta, a resident of IDP Camp Pipeline testified that on 10/3/2010, about 4.00 p.m. accused and deceased went to take 'busaa' at her house. PW2 knew the accused as "Jose". Both accused and deceased were her customers. She saw each of them with a bicycle. They left at about 6.00 p.m. Next day, she learnt that the deceased had been murdered and went to view the body in the field.

PW3, Julius Mwaniki Maina was walking to IDP Camp at Pipeline on 10/3/2010 at about 7.00 p.m. He was going to visit a friend at IDP Camp. When near Baltimore High School he heard noises ahead of him and the two people ahead of him had each a bicycle. When he approached, he heard them arguing over money and one was telling the other that he had used his mother's money on drinks and the other answered that there was no problem with money which was his mothers. Another then said that the other had torn his T-shirt because he wanted to steal from him. He listened to the conversation which was in

Kikuyu language. One demanded to be paid, made the other fall and they faced each other and the one who was demanding money said the other should be injured where people could see. He described the mode of dress of each of them whom he observed for about 10 to 15 minutes. He did not know the people. He looked at them keenly. After he had passed he heard screams from behind from the one whose T-shirt was torn as he jumped up. He walked on to the camp. Next day in the evening, he heard that somebody had been killed. He went to report to the police as to what he saw and heard on 10/3/2010. When shown photographs of the scene and deceased's body, PW3 said that he is the person he saw quarrelling with another who he identified in court as accused.

PW4, Joseph Wachira Gathembi, recalled that he was at the IDP Camp on 10/3/2010 when PW3 went to his hotel at about 7.00 p.m. to 8.00 p.m. He came back home on 12th and it is then PW4 informed him of the murder and PW3 then related to him how he had found people who were quarrelling along the road and he was told to go and record his statement to police. PW4 knew both accused and deceased and had seen them together that evening as they sold meat.

PW5, Dickson Mbugua, recalled that on 8/3/2010, the accused sold to him meat and went for the payment on 10/3/2010, at 5.00 p.m. He recalled that the accused claimed to have been with a friend who was outside the gate. PW5 did not see the accused's friend. He heard of a murder having taken place.

PW6, David Muchina, is one of those who slaughtered PW1's cow and the accused and deceased started selling it. Later, he learnt of deceased's death. He denied having known of any disagreement between accused and deceased. He said that the accused took part in deceased's funeral arrangements.

PW7, Harrison Mwaniki, the deceased's brother was at work on 11/3/2010 when he received a call that the deceased had died. On 16/3/2010 he identified the body of the deceased to the doctor for purposes of post mortem. He was present at the funeral when the accused was arrested.

PW8, Seargent Joseph Mutemi, received a report of murder from the deceased's mother. He visited the scene of crime and invited CID personnel to take photographs of the deceased's body and the scene. After investigations, he arrested the accused at the deceased's funeral.

PW9, APC Yaah Kombe, received a report from the deceased's mother about the murder and went to the scene. He was one of the officers who arrested the accused at the funeral.

PW10, PC Laban Solo, of Mwariki Police Post re-arrested accused when he was taken to the post and helped investigate the case.

PW11, PC Frankline Gitonga, visited the scene of crime, called Scenes of Crime to take photographs and assisted in investigations by recording the witnesses' statements.

PW12, Dr. Titus Ngulungu produced the post mortem report in respect of the deceased. Which had been prepared by Dr. Omboga who conducted the post mortem on the deceased. Dr. Omboga found that the deceased had several stab wounds on the neck, right side of the chest, upper side of the back, linear cut wound 15 cm long on upper abdomen with complete evasation of spleen orentum and intestines. He found the chest cavity had massive haemathorax, lungs and heart were ruptured. The Doctor formed the opinion that the cause of death was severe haemorrhage due to several stab wounds into the chest and abdominal cavities. PW12 also produced a report filled by Dr. Onchere who did a mental assessment on the accused and found the accused fit to stand trial.

PW13, PC Githae of Scenes of Crime, visited the scene, took photographs and produced the photographs of the scene as PEx.1.

When called upon to defend himself, the accused said on oath that the deceased who was his friend; the deceased asked him to help sell meat of his mother's cow which had been slaughtered. They sold meat on 7/4/2010, 8/4/2010 and he gave the deceased the money from the sales. On 9/4/2010 they went to collect debts for the meat they had sold on credit. They parted about 4.00 p.m. as the deceased went to Pipeline

to collect money owed to him while the accused went with his friend Mbugua (DW2) to his house, stayed with him till 8.00 p.m. when he left. On 10/4/2010 the accused went to the deceased's home but did not get him nor did he get the mother. He checked on deceased later and it is then a neighbour came and informed them that the deceased had been found murdered near IDP Camp. PW1 sent him to go and confirm what had happened and he did. From then on, he used to go to deceased's home to assist with preparation of funeral arrangements and even went to get the body from the mortuary. Nobody ever alleged that he was involved in the murder. After burial is when he was asked to go and record a statement and was arrested. It is his defence that on the day the deceased was allegedly murdered, he arrived home about 5.30 p.m. and he denied knowing PW3. He denied ever disagreeing with the deceased.

The second defence witness was David Mbugua Wainaina (DW2). He was a resident of Pipeline between 2008 and 2010 November. He recalled that on 9/3/2010 when on his way home about 4.00 p.m., he met the accused and the deceased standing on the road and the deceased said he was going to Baranabas. He had a bicycle. DW2 and accused first went with accused to DW2's house and then they went to accused's house at about 5.00 p.m., they chatted till about 8.00 p.m. and parted ways. The next day he travelled to Eldoret and he learnt of deceased's death in April 2010 and that the accused had been arrested for the murder of the deceased.

Nobody witnessed the murder of the deceased. The best evidence we have as to what may have happened on that fateful day is that of PW3. PW3 recalled how he saw two people quarreling while on his way to IDP Camp. That was about 7.00 p.m. He said there was still light sufficient for him to see the two people who were quarrelling. He did not know the purpose before. He said he looked at the people keenly from about 3 metres away and was able to see them well. Even after he heard screams after passing the two people, he did not go back but he saw the person whose T-shirt was torn jump up. PW3 on being shown the photographs taken of the scene, said that the deceased was one of those two people he saw quarrelling over money on the evening of 10/3/2010. PW3 was not present when the accused was arrested but in court, he identified the accused as the person he saw quarrelling with the deceased. The investigating officer did not explain why no identification parade was conducted considering the fact that the accused was not arrested immediately after the offence. What we have is dock identification. In **Rep v Eria Sebwato [1966] EA** the court said:-

“where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.”

The circumstances under which PW3 allegedly saw the two men who were quarrelling were not favourable to identification because it was about 7.00 p.m. and must have been getting dark. There was need for other independent evidence whether direct or circumstantial to corroborate PW3's evidence.

Dock identification has been held to be worthless. In **Kamau Njoroge v Rep [1982-88] KLR 1134**, the Court of Appeal said:-

“Dock identification is worthless unless preceded by a properly conducted identification parade. The complainant should also be asked to give a description of the suspect, and police should arrange for a fair identification parade....”

However, in **Muiruri and Others v Rep [2002] KLR 294**, the court held that not all dock identification is worthless and a court might base a conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of the possible dangers of mistaken identify. In his evidence, PW3 described how both the accused and the deceased were dressed. He said **‘one had a hat (round) striped white and black T-shirt, the one whose T-shirt had been torn. The other had a jacket for sports. It was blue or black.’** PW3 on being shown the photographs taken by PW13 of the scene, confirmed that they represent the scene and that the torn T-shirt belonged to the deceased. I had the opportunity to see PW3. He gave detail of the events, his evidence was not shaken and he impressed me as a truthful witness. I believe he told the court the truth.

PW2 told the court that on 10/3/2010, the accused and the deceased were at her house drinking ‘busaa’ from 4.00 p.m. till about 6.00 p.m. when they left together with their bicycles. PW3 also told the court that the people he saw along the road looked drunk and had bicycles. PW2 knew both accused whom she knew as “Jose” and deceased as they were her customers. I am satisfied that PW2’s evidence does corroborate PW3’s evidence in material particulars. PW5 also recalled that on 10/3/2010, about 5.00 p.m. the accused went to get money from him for the meat he had sold to him. PW5 did not see the accused’s friend who remained at the gate. I am satisfied that the prosecution demonstrated that the accused was with the deceased till late in the evening of 10/3/2010. I appreciate that the witnesses are not expected to give the exact time because one does not always check their watch to ascertain the time because they did not anticipate such occurrence but it is an estimate.

The accused and DW2 gave evidence on the events of 9/3/2010. DW2 claimed to have been with accused on 9/3/2010 from 4.00 p.m. upto 8.00 p.m. and he left for Eldoret the next day. He did not know when the deceased met his death. DW2 does not know what happened on 10/3/2010, because he had gone away and so his evidence is irrelevant to this case and not helpful to the defence. The accused also talked of the events of 9/3/2010. He did not explain where he was on 10/3/2010. There is overwhelming evidence that the accused was the last person to be seen with deceased when he was still alive on 10/3/2010. Under **Section 111** of the **Evidence Act**, it was incumbent upon the accused to explain what happened to the deceased. It does not amount to shifting the burden of proof onto the accused. Instead the accused talked of 9/3/2012, a date when deceased was still alive. The accused’s conduct leaves no room for doubt in my mind that the accused caused the deceased’s death. See **Susan Mitongori Mwita v Rep CRA 313/06**, where the Court of Appeal considered **Section 111** of the **Evidence Act**.

PW2, PW4, PW5 and PW6 who came in contact with the accused and deceased confirmed that there seemed to be no disagreement between the accused and the deceased. They were friends. However, PW2 and PW3 do confirm that the accused and deceased drunk ‘busaa’ on the evening of 10/3/2010. The court has no idea how much alcohol they drunk. PW3 said he noticed that the two people who were quarreling were drunk and it was over money. The two had been selling meat for PW1.

Has malice aforethought been proved? The post mortem was done by Dr. Omboga. The report was produced by PW12. The deceased suffered several stab wounds on the neck, chest, upper side of the back, a cut wound on the upper abdomen which exposed the intestines. The injuries inflicted on the deceased speak for themselves and are evident of the accused’s intention to cause grievous harm to the deceased. The photographs were taken of the deceased’s body while at the scene. It was a gory site to behold. The injuries inflicted on the deceased are consistent with one who wanted the deceased dead, and they go to prove the necessary malice aforethought.

In his defence, the accused told the court that he took part in the funeral arrangements and never ran away. The accused’s conduct alone cannot be proof of his innocence. I find that there is overwhelming evidence on record that the accused is the person who murdered the deceased after they disagreed over money. I am satisfied beyond any doubt that he murdered the deceased. I find him guilty as charged and convict him accordingly convicted under **Section 322** of the **Criminal Procedure Code**.

DATED and DELIVERED this 13th day of July, 2012.

R.P.V. WENDOH
JUDGE

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PRESENT:

Mr. Maragia for the accused.

Mr. Omari for the State.

Kennedy – Court Clerk.