



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE 13 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

FRANCIS KAMAU alias KAMWARA NCHUNDU.....1ST ACCUSED

JOSEPH IGUNA KAMWARA.....2ND ACCUSED

JULIUS MURIUNGI.....3rd ACCUSED

The three accused persons Francis Kamau Alias Kamwara Nchundu, Joseph Iguna kamwara and Julius Muriungi are charged with murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are:

“That on the 15th day of February, 2010 at Mukothima Division Kanjoro Location Muthini Sub Location Kamachavi Village in Tharaka Northi District within Eastern Province jointly murdered Paul Meeni.”

The facts of the prosecution case are that the deceased person who was 99 years old was living alone at Kamachavi Village. On the material day, 15th February 2010 his neighbour Olimpio Gitonga PW2 received 3 visitors who he identified as the accused persons. He said that the 3 of them left a bicycle at his place and that they told him they were going to the home of the deceased which was across the river from PW2's house, to resolve a land dispute case. He said that after some time he heard the deceased screaming for help. PW2 testified that he then saw the 3 accused persons leaving the direction of where the deceased was. PW2 testified that he went to check on the deceased and found him lying down injured and unable to walk. PW2 testified that he asked the deceased whether he had recognized the people who had beaten him and that the deceased gave him 3 names which are Nchundu, Iguna and Njeru.

PW2 called the brother of the deceased and later also called the sons of the deceased. The sons are PW1 and PW3. They found the deceased still alive and he gave them the names of the people who had beaten him in the presence of PW2. He also gave them a letter which was P. Exhibit 1. The deceased died at 3 am same night before the family could get means of getting him to hospital. Eventually the three accused persons were arrested and charged with this offence.

Each of the accused persons put forward an alibi as their defence and gave sworn evidence. They all denied ever going to Kamachavi Village on the material day. Each of them also denied knowing the

deceased. Each of them denied that they or their families had any grudge or land dispute with the deceased or his family. The 1st accused person stated that the name Nchundu Kamwara given by the deceased was not his but belonged to his step brother who is still alive. He had given his names to the court as Francis Kamau Kamwara.

In the case of the 2nd accused he gave his identity card showing that his names were Joseph Iguna Kamwara. He also said that the name Iguna Kamwara is a common name and cannot be said to be exclusively his. In the case of the 3rd accused he gave his identity card in which his name was indicated as Julius Muriungi Murea. He said he did not know his co-accused until they were arrested in this case. He also said that his name was not among those given by the deceased in his dying declaration.

The burden of proof lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused persons acting in concert attacked the deceased person causing him injuries that led to his death. Section 203 of the Penal Code under which the accused persons are charged provides:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Under section 206 the circumstances which constitute malice aforethought are stated 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 prosecution is relying on the eye witness account by PW2 Olimpio in which he contended that just before he heard the deceased screaming for help the 3 accused persons had gone to his house to leave a bicycle. He said the three told him that they are going to the home of the deceased for a land dispute case. This witness did not see the three men beating the deceased but he claims that he saw them coming from the direction of the deceased home soon after the screams.

I have carefully analyzed the evidence of Olimpio. It is very clear that he was not an eye witness of the incident because he did not claim to have seen the accused persons attacking the deceased in any way. According to him all he saw was the accused persons leaving the direction where the deceased was. On further scrutinizing the evidence of Olimpio I noted that he asked the deceased whether he had recognized the people who had beaten him. That confirms that Olimpio did not see who beat the deceased and that is why he put that question to the deceased.

I noted further that his evidence was rather disjointed. He started by saying that he had seen the accused persons on the material day coming from the direction of where the deceased was. It is only later in his evidence that he mentioned that the three accused had gone to his house to leave their bicycle before proceeding to the home of the deceased. In cross examination Olimpio said that the bicycle was taken to him in the morning of that day at about 11am. He also said that the beating of the deceased occurred at 6 pm. There is a big lapse of time between the time the accused persons were alleged to have taken the

bicycle to Olimpio and the time the attack took place. PW2 was clearly exaggerating details of the incident. First he gave the impression that the attack took place soon after the accused persons left their bicycle at his place. When cross examined on the actual time the bicycle was left with him, it transpired that it was 8 hours before the attack. PW2 said he was herding his goats when he heard the deceased screaming. He did not say he witnessed any attack and it's clear he did not for reason he was not in a position to. PW2 was clearly not a reliable witness.

In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283, MADAN, MILLER and POTTER JJA** held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

PW2 created an impression that he was exaggerating facts in his evidence. That creates concerns about his credibility as exaggerating evidence means one is not straightforward. His evidence needed corroboration on some material particulars implicating the accused persons. We shall see whether such evidence is available from the rest of the evidence.

The prosecution is also relying on a dying declaration that was given by the deceased to PW1 2 and 3. The law relating to dying declarations is well settled. In **REP –V- PETER MBURU MUTHONI NRB HCCR CASE NO. 27 OF 2004 [2005], e KLR**, where OSIEMO, J. referred to **CHOGE -V- REP 1980.KLR 1** and observed as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE –V- R [1985] KLR 1.”

The Court of Appeal in the case of **MICHAEL KURIA KAHIRI -V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)** observed,

“There is no doubt that the appellant’s conviction by the superior court was dependent on the deceased’s statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration...”

According to PW1 his father told him that he had been beaten by Nchundu Kamwara, Iguna Kamwara, and Njeru Mukunu. PW1 identified the first accused as Nciundu Kamwara and said that he was a teacher at Kathini Primary School which neighbored Nthoroni Primary School where he was a student. PW 1 identified the 2nd accused as Iguna Kamwara and said that he knew him because he used to sell him milk. PW1 identified the 3rd accused as Njeru Mukunu and said that he knew him very well. PW1’s brother PW3 said that he was also present when his father gave them the names of those who had beaten him. He gave those names as Francis Nchundu, who he identified as 1st accused. He said that he knew him very well because the 1st accused was a teacher at Kiouru Primary. PW3 later changed his testimony and said that the school where the 1st accused taught was Riamikuu. In addition PW3 said that the 3rd accused was his age mate and that he knew him well because they were heading goats together. PW3

further stated that the 2nd and 3rd accused persons were the children of one Kamwara and that the 1st accused was their clan mate.

The names given by PW1 as those he heard the deceased implicate with the offence in his dying declaration were inconsistent with those given by PW2 and 3. The names alleged to be those of 1st accused which the deceased gave were Nchundu Kamwara according to PW1, Nchundu according to PW2 and Francis Nchundu according to PW3. The three witnesses could not have been telling the truth about the names the deceased gave them associated with the 1st accused. The three witnesses were together when the names were given. It is not possible to determine in the circumstances which names he gave of those given by PW1, 2 and 3.

The inconsistency in their evidence regarding the names associated with the 1st accused was not resolved. It was made more complex by the 1st accused statement in his sworn defence that the name of Nchundu Kamwara was actually that of his step brother. The 1st accused gave his names as Francis Kamau Kamwara and said that he is not known by any other name. There was a further complication in the evidence of these 3 prosecution witnesses in that the schools where the 1st accused is alleged to have taught was controversial. PW1 had said he knew the 1st accused very well because he taught at Katithini Primary School which was next to the school where he learnt. PW2 on the other hand contradicted himself because he started by saying that the 1st accused taught at Kioru Primary but later changed and said it was Kiamingu primary. I do find that in regard to 1st accused the names the deceased gave associating him with the incident was inconsistent with the names of the 1st accused. The schools he is alleged to have taught were also inconsistent according to the evidence of PW1 and 3. The prosecution was unable to adduce evidence to establish beyond any reasonable doubt that the name of the first accused was one of those given by the deceased as one of his attackers.

Regarding the 2nd accused again there is inconsistency in the evidence of PW1,2 and 3. While PW1 said that the deceased had given the name Iguna Kamwara, PW2 said that he gave only one name Iguna. PW3 contradicted his own evidence because he first said that the deceased gave the names Iguna Kamwara but he later changed and said that the names given were Iguna Mukunu. In cross examination of PW3 it came out clearly that in his statement to the police he had said that he did not know the 2nd and 3rd accused before the arrest. The evidence of PW3 that the 2nd accused was well known to him could not have been true. I also noted that PW3 had testified that the 2nd and 3rd accused were brothers. That was denied by the accused persons and it was demonstrated by their names that it was the 1st and 2nd accused who are brothers. In regard to the 2nd accused it is clear that PW3 did not know him before the incident. PW1, 2 and 3 contradicted each other as the names given by the deceased connecting the 2nd accused to this offence. The contradiction and inconsistency in their evidence remained unresolved at the cross of the case.

In regard to the 3rd accused PW1 said that the deceased gave the name Njeru Mukunu and PW2 said that he gave the name Njeru. PW3 was not sure which name was given because he first gave the name Njeru Mukunu and then later connected it to Njeru Kamwara. The 3rd accused came with his Identification card and that card does not bear any single one of the names given by the deceased associated with him as per the evidence of PW1, 2 and 3. In fact the names of the 3rd accused Julius Muriungi Murea were not any one of those mentioned by the 3 prosecution witnesses who alleged to have been present when the deceased mentioned the names. These three witnesses purported to identify the 3rd accused as one Njeru and they all claimed they knew him very well before this incident.

The charge sheet gives the names Julius Muriungi as the names of the 3rd accused. There is no *alias* name associated with him in the charge sheet. In his regard therefore it has been proved that the person named by the deceased could not possibly have been the 3rd accused person. The burden lies with the prosecution to establish a nexus between the names Njeru Mukunu or Njeru or Njeru Kamwara and the 3rd accused. The prosecution has totally failed to establish.

The prosecution was relying on a motive for the attack as being a land dispute between the accused persons and the deceased. For this fact the prosecution relied on a letter that the deceased gave to his sons PW1 and 3. That letter was Exhibit 1. It was written in Kimeru language and was dated 1st February 2010. That letter was interpreted by PW1 in his evidence. He explained that the letter read that the deceased should not be found in that shamba. PW1 said that the letter was written by the Sub-Area of that region one Kamwana Ciangathure. The prosecution had the burden to establish nexus between the letter and the contents of it and the accused persons. The first shortcoming is that the maker or makers of that letter were mentioned as Kamwana Ciangathure and one Julius Mugoo. These two people were neither arrested in connection with this offence nor called as witnesses. At the end of the day, the prosecution did not establish any connection between the accused persons and the letter.

In the evidence of the investigating Officer CIP Kiprono he mentioned that investigations revealed that there was a long standing dispute between the families of the deceased and the accused. That fact of a land dispute was denied in the evidence of PW1 and 3 the sons of the deceased. Even PW2 who was a neighbour of the deceased also denied the existment of any land dispute between the deceased and any other people. The 1st and the 2nd accused who said in the defence that they were step brothers being sons of the same man said that that they were not aware of a land dispute pitting their family and the family of the deceased. The prosecution did not establish that a land dispute existed between the families named or that it was the motive behind the attack against the deceased.

The prosecution has not established on the required standard that the accused persons are the ones who attacked the deceased and caused his death. It did not establish that they were anywhere near the scene of attack on the material day.

Having carefully considered the entire evidence adduced in this case, I find that the prosecution did not discharge its burden of prove in this case. The prosecution was unable to prove the charge of murder against all three accused persons. I therefore give them the benefit of doubt and acquit all three of them of the charge under section 306 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED THIS 11TH DAY OF OCTOBER 2012

LESIT, J.
JUDGE.