



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Madan, Potter JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO 115 OF 1982

BETWEEN

1.WAWERU

2.MUIRURI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

JUDGMENT

We have consolidated the appeals of the above named two appellants. They were both convicted of the murder of Elijah Kariuki Komu on a date between July 18 and 22, 1980. A third accused with them named Karuga Mwangi was acquitted.

The deceased, Komu, was living on Kamirithu Farm, Elburgon at the material time. He had cattle and sheep, also three wives, one of them Esther Wangari.

In mid-August 1980 the deceased's son-in-law Samson Kanyiri Ng'ang'a and his wife, the deceased's daughter, visited the deceased's farm. They did not find him, or his cattle and sheep there. On a further visit later the deceased's house was found broken into. His personal effects were also missing. The deceased's relatives made inquiries. They received information as a result of which they went to a bush about 300 yards away from the deceased's home. There they found a coat, a vest, an underwear, a sisal mattress - all of which Esther Wangari identified as the deceased's property. They also found a human skull there, the upper teeth were intact and a big stone and two offcuts nearby. Samson identified the skull as the deceased's skull by the gap in the teeth in the lower jaw and also the coat lying around it. Esther Wangari also decided it was her husband's skull. On post-mortem examination, the parietal bone and the front bone of the skull were found fractured. Internally the brain had been drained. The cause of death was brain haemorrhage due to fractured skull due to injury with a blunt object used with considerable force.

During the course of their investigations, the police came to know about the sale of cows and sheep which had taken place at Arimi Farm about the time the deceased disappeared. On December 18, 1980, the police accompanied by the deceased's relatives went to the house of the appellant Waweru at Arimi where they also found the appellant Muiruri. Waweru was wearing a blue shirt, white sweater, jungle hat and black shoes. Esther identified all these garments as her late husband's property. She made Waweru take them off. She also identified the deceased's cow named Nyakahia and five sheep. When Esther Wangari spoke to the cow and patted it, it stopped near her. On being asked, Waweru said the cows had

been bought by him in Masailand and the sheep had been brought there on the previous day by Muiruri. On searching Waweru's house, the police found items of clothing which were also identified as belonging to the deceased. The appellants then told the police that they had sold cows and sheep to various persons. This was confirmed by the purchasers and the receipts for payment of the purchase price which the appellants had issued to them. The police ordered the cows and sheep to be sent to Elburgon Police Station where ten cows and five sheep were identified as belonging to the deceased. In particular, Samson identified a Jersey cow which he had helped the deceased to acquire from Egerton College.

The police also visited Muiruri's house where they found a pair of bedsheets, a small axe, a cow and calf. Muiruri said he had bought cows in Masailand. Waweru however did not have any cattle before July 1980.

The appellants also built a cattle shed during that month and thereafter for nearly two weeks they sold cattle and sheep from there to various members of the Arimi Farm. The police recorded inquiry statements from both appellants which were admitted in evidence after a trial within a trial in each case. Muiruri said in his inquiry statement that he had known the deceased since 1962 and Waweru for two years. He, Waweru and Karuga met on the evening of July 18 and agreed to rob the deceased. They went to his house at 9 pm on July 22. He was carrying a *rungu*, Waweru an iron bar and Karuga an axe. The deceased invited them into his house. He offered them tea which he refused. The deceased started to wash his feet. He then signalled to the other two how to attack the deceased and went out of the house. Karuga came and told them he had killed the deceased. Waweru and Karuga brought his body outside, it was put into a bag and placed on a mattress. Two sticks were used to carry the body. He himself carried a big stone to be used to throw the body into a pit. Later they decided to throw it in the bush, also the big stone. They took away the deceased's twelve cattle and eight sheep which they sold at Arimi, Njoro and Molo. They shared the money between the three of them and the deceased's personal effects, Waweru taking most of them.

In his charge and caution statement, Muiruri told the police the three of them went to the house of the deceased on the evening of July 22, 1980. He came out. He heard Waweru calling him. He went inside. He saw the deceased lying down and Karuga holding his axe. They arranged to dispose of the body. They threw it. When arrested, he showed the police where they threw the body. He did not kill the deceased. They had not arranged to kill, but to rob.

Waweru said in his inquiry statement that he knew Muiruri for about two years, and the deceased from April 1980. On July 18, 1980 he and Muiruri agreed to rob the deceased. On July 22, the two of them accompanied by Karuga went to the deceased's house where they arrived at 9 pm. Waweru carried an iron bar, Muiruri a *rungu* and Karuga an axe. The deceased welcomed them. He made tea for them which everyone drank. Muiruri signalled to them to attack the deceased. Waweru said he did not understand the signal. He followed Muiruri outside. Karuga hit the deceased twice on the head. He died. They put the body in a bag then on a mattress. They carried it out from the house. Muiruri carried a big stone. Their intention was to throw the body with the stone into a dam so that it would sink. They decided instead to throw it into the bush. Muiruri threw the stone there also.

They returned to the house and searched till 4 am. They did not find any money. He took two coats, two sweaters, one shirt and one pair of shoes. Muiruri carried a blanket and one bedsheet. They locked the house and drove the cattle and sheep to his home. They sold all of them. He and Muiruri were arrested by the police on December 18, 1980. They showed the police the clothes and the people to whom they sold the cattle and sheep. It was Karuga who killed the old man.

In his charge and caution statement, Waweru said that his statement was the same as his inquiry statement. It was Karuga alone who killed the old man. He hit him twice on the head with the axe.

Muiruri told the court in his unsworn statement that he had nine head of cattle in 1977 which he bought at an auction. He left them with one Sululu for a time and collected them in June 1980. He found buyers for them at Arimi and sold them. He was arrested five months later. He was sorrowful because of Karuga who was his herd boy and surprised because of Waweru because the cows were his property. He was also

surprised by the bedsheets in court because they belonged to his children. He purchased one bedsheet which was cut into two because he had twins. He was shocked to hear that the axe which was removed from a cupboard in his house was used to kill someone. He did not kill the deceased. The witnesses had given a name to a cow. It was the first cow he had bought with a calf. He was going to sell the sheep which were seized. The brand mark was that of his clan, a torn ear after piercing.

Waweru also made an unsworn statement. He said he was at home on July 24. He saw a group of people and a number of cattle near his house. He went to find out what was going on. He saw cows and sheep being sold by Muiruri who had rented his cattle *boma* for three days. He bought a cow for Kshs 1,000 from him. Muiruri left. Waweru stayed behind. Muiruri came back after four and a half months on December 18, 1980 with five sheep which got mixed up with the cows which were there. After a while, the police arrived. He showed them his one cow which he had bought from Muiruri. They took away the cow. They took out a box from his house and told him to remove the clothes which he was wearing. They carried them away. He did not know the deceased. He had never heard of him; and he had nothing to do with his death.

It was a long trial as also the number of witnesses and the evidence. With respect, the learned judge handled it both patiently and competently.

Mr Onganyi, who appeared on behalf of the second appellant before us, strongly argued that the skull was not satisfactorily identified to be of the deceased.

The case can be sufficiently reduced to the important issues.

First, the skull which was found was identified by Samson to be Elijah Kariuki Komu's skull. The articles found lying near it which were identified as the deceased's property lent credence to Samson's evidence. Muiruri's statement that when he was arrested he showed the police where they threw the body further reinforced Samson's evidence. We concur in the learned judge's finding that Komu's death was established not only as a result of his disappearance over a long period and the finding of his skull, but also by the appellants' own statements that they threw his body into the bush. The cause of death was brain haemorrhage due to a fractured skull due to injury with a blunt instrument. He died in consequence of his skull injury. Whoever inflicted the skull injury had malice aforethought.

Secondly, the deceased's home in the forest was found broken into and his cattle, sheep and some personal belongings stolen therefrom.

Thirdly, the deceased's skull together with some clothes were found about 300 yards from his home in mid-August 1980. These included a mattress. There was also a big stone nearby.

Fourthly, the two appellants did not have any cattle before July 1980. They built a cattle shed during that month. They brought cattle and sheep there which they sold to various customers for nearly two weeks. On the orders of the police, the purchasers took the cattle and sheep which they had bought from the appellants to the police station. Among them were ten head of cattle and five sheep which belonged to the deceased.

Fifthly, when the police went to Arimi with Esther Wangari and Samson on December 18, 1980, the first cow which Esther Wangari saw was Nyakahia. She patted the cow, it stood close to her. The appellants had been arrested by police. She told Waweru to remove the coat, pullover, hat, shoes and the blue shirt which he was wearing. She claimed them as her husband's property. Inside his house she found a black coat, a yellow pullover, two black trousers and a whitish shirt, also her husband's property. A part from Nyakahia, she also recognized five sheep belonging to her husband by the marks she had cut on them - one ear sliced off and one ear slit. Later Esther Wangari identified one cow, its calf, two bedsheets and an axe at the home of Muiruri, all as her husband's property.

Sixthly, both appellants repudiated their inquiry as well as charge and caution statements. In any event, they were not confessions. They were, however, a part of the circumstantial evidence against the

appellants to be considered as a whole in each case with appropriate weight only.

In their inquiry and charge and caution statements, which were made voluntarily, both appellants admitted that they went to the deceased's house on the evening of July 22. Their statements also corroborated Esther Wangari and Samson's evidence of the finding of the mattresses and a big stone near the deceased's skull.

The evidence of the several purchasers proved that the appellants were in possession of the deceased's cattle and sheep which were stolen from his house and which the appellants sold for cash. The appellants' possession of the deceased's stolen cattle corroborated Muiruri's and Waweru's inquiry statements that they stole the deceased's cattle and sheep. It also corroborated Waweru's charge and caution statement which he said was the same as his inquiry statement.

The appellants sold several head of cattle and sheep which belonged to the deceased on July 24. Immediately before that day they did not have any cattle. They had acquired possession of the deceased's stolen cattle and sheep. Muiruri's claim that he had bought nine head of cattle at an auction in 1977 could not but be false as also that the brand mark of the sheep was his clan.

Equally false must also be Waweru's unsworn statement that the seller of cows and sheep was Muiruri only. They both sold and they both issued receipts to the purchasers for them. For the same reason equally false also was Muiruri's unsworn statement that the cows were his property which he was selling. Also for the same reason equally false was Waweru's unsworn statement that he bought a cow from Muiruri for Kshs 1,000 and that Muiruri's five sheep got mixed with his cows three days later on December 18, 1980.

The finding of a mattress and a big stone near the deceased's skull corroborated Muiruri and Waweru's statements, and also Waweru's charge and caution statement for he said it was the same as his inquiry statement.

We have looked for corroboration as related, always advisable to do so, because the appellants repudiated their statements. Both appellants were found in possession of the deceased's clothing about four and a half months after the estimated date of his death. In *John Macharia Gichoi v Republic* Cr App 20 of 1982 we said that in the circumstances of the case a period of three months was not so great as to exclude the presumption that the accused was the thief rather than guilty as receiver. Here also, in all the circumstances of the case, in particular the attendant features to which we have expressly drawn attention we do not consider the period of four and a half months was so great as to exclude the presumption that the appellants stole the deceased's cattle and sheep.

Both appellants said that they did not plan to kill the deceased, that their intention was to rob him of money only, and it was Karuga by himself who killed the deceased with the axe.

If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.

The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit, but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault *R v Tabulayenka s/o Kirya* (1943) 10 EACA 51.

Apart from the direct evidence of possession of the deceased's stolen cattle and sheep and his garments by both appellants, the remaining circumstantial evidence was such as to be explained only upon the hypothesis of the appellants' guilt and incompatible with any other innocent explanation. The three assessors were unanimously of the opinion that both appellants were guilty of murder. We agree.

The appellants were convicted and we order their appeals to be dismissed.

Dated and Delivered at Nakuru this 24th day of March 1983.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

Z.R.CHESONI

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR