



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 303 OF 2011

BETWEEN

NANA M'AMERU 1ST APPELLANT

JACOB MWITHALIE 2ND APPELLANT

KIBIKU M'IKIAMBA 3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Meru

(Lesiit, J.) delivered on 8th December, 2011

in

H.C.CR. C No. 6 of 2006)

JUDGMENT OF THE COURT

1. The appellants were jointly charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Cap 63 of the Laws of Kenya**. The particulars were that on the 19th day of March, 2005, in Meru North District within the then Eastern Province, the appellants jointly with others not before court murdered John Mugambi.
2. The evidence against the appellants was given by FK, (PW1), Stanley Kailunge Ntoibui, (PW2), Lucy Kairu, (PW3) and Peter Karomo (PW4), who gave eye witness account which formed the core of the prosecution case. PW1, FK, was 16 years of age at the time of his testimony. He gave evidence on oath after the trial court conducted a *voire dire* examination to determine if he understood the significance of an oath and the need to tell the truth. He testified as follows:

“ On 19th March, 2005 at 4.30 pm I was looking after cows near our home. The deceased was accompanied by his friends coming from Mutwate. His friends were

calling him a thief of miraa. One of his friends is called Kaburu. He is not in court. They were telling the deceased he had stolen miraa. The other friends who were with the deceased were Kibiko and Mwenda. The three called Jacob Mwithalie and Nana M'Ameru. They were told to accompany them as they went to look at the footsteps. When they entered the shamba, they started attacking the deceased telling him that he was undermining them. Nana cut the deceased on the neck with a slasher. The five of them had slashers. They started cutting the deceased on the back. I started screaming saying John was being killed by Jacob Mwithalie, Nana M'Ameru and Kibiko. People came to answer my cry among them my father and the wife of the deceased."

3. PW2, Stanley Kailunge Ntoibui, an adult male testified as follows:

"On 19th March, 2005, I was in my shamba weeding. While there, Kibiko M'Ikiamba came and he was with Daniel M'Mukiri and Mwenda Murungi while pushing the deceased who was walking ahead of them. They reached a place where there was a path. Nana and Kooru Jacob Mwithalie approached from the opposite direction and they put the deceased in the middle. Nana started cutting the deceased with a slasher. Jacob followed suit and cut him with a slasher; then Kibiko who had a small panga cut the deceased on the hand. I started screaming and Peter Karomo who is my father and Lucy Kario the wife of the deceased came. The attackers dispersed. The deceased and accused used to have quarrels between them."

4. PW4, Peter Karomo ,testified that on 19th March, 2005 he was at his home and that:

" I saw Nana M'Ameru and Jacob Mwithalie pass near my home and heckling sounds like demons saying "wapi yeye" and then I heard FK (PW1) scream "baba, Mugambi is being killed." I took a walking stick and went to see. On reaching, I found Nana M'Ameru, Jacob Mwithalie and Kibiko M'Ikiamba and three others surrounding the deceased. The deceased was being cut. We started screaming for help and then the assailants left."

5. The learned Judge upon hearing the evidence convicted the appellants for the charge of murder and sentenced them to death. Aggrieved by the conviction and sentence, the appellants have moved to this Court. In a supplementary memorandum of Appeal dated 26th November, 2013, the appellants cite three grounds of appeal as follows:

- *The learned Judge erred in law and fact in failing to appreciate that there was a grudge between the appellants and the family of the deceased.*
- *The learned Judge erred in law and fact by disregarding defence testimony.*
- *The learned Judge erred in law and fact by laying full credence to the testimony of the prosecution witnesses who were all members of the family of the deceased.*

6. At the hearing of the appeal, all the appellants were represented by learned counsel, Mr. Edwin Kimathi, while the State was represented by Senior Prosecution Counsel, Mr. Jalson Makori.
7. Counsel for the appellants emphasized that there was a grudge between the deceased and the appellants and the trial court should have found that the existence of the grudge weighed down the probative value of the prosecution's evidence. It was submitted that PW3, Lucy Kario, the wife of the deceased, testified that there was a grudge between the deceased and the appellants. Counsel submitted that because the prosecution witnesses were related to the deceased, they were not independent and gave evidence prejudicial to the appellants. It was submitted that each of the appellants gave an *alibi* which was not tested and disproved by the prosecution.
8. The State opposed the appeal emphasizing that the prosecution case was based on eye witnesses' account as given by PW1, PW2, PW3 and PW 4. It was submitted that the testimony of these witnesses was consistent and corroborative. That each of the witnesses gave a consistent account

of the role played by each of the accused persons in cutting the deceased and the offence was committed in broad daylight. The State submitted that the injuries sustained by the deceased as revealed in the post mortem report was consistent with the testimony of PW1, PW2, PW3 and PW4 as to how the appellants cut the deceased. That there were no material contradictions in the testimony of the prosecution witnesses.

9. The trial Judge in convicting the appellants expressed herself as follows:

“The prosecution is relying on the evidence of four eye witnesses, PW1, PW2, PW3 and PW4. These witnesses were not together. PW1 was herding his father’s cows 50 meters from the scene of attack. PW2 and PW3 were each at their homes when they heard screams and went out to investigate. PW4 was working in his shamba and saw the entire episode right in front of his eyes. The account by each of the four witnesses was consistent, corroborative and forth right. I heard the witnesses and had occasion to examine their demeanour. They impressed me as honest, sincere and worthy of belief. The four described the attack on the deceased. They were consistent as to the weapons each of the accused was armed with...The defence did not put questions to the witnesses in cross-examination....I find the issue of the witnesses being relatives unreliable and an afterthought. The accused persons were well known to the witnesses being fellow villagers. The incident took place in broad daylight. There was nothing obstructing the view of the scene of attack from any of the witnesses.... I have considered the alibi of each of the accused persons. I find that the evidence by the prosecution was very strong and watertight against them.”

10. On our part, we have considered the submissions by the appellant and the State; we have analysed the judgment of the High Court. This is a first appeal and it is our duty to re-evaluate the evidence on record and come to our own independent conclusions. The key issue in this appeal is whether the alibi defence raised by the appellants was adequately considered and evaluated by the trial court. The other issue is whether the grudge, if any, that existed between the deceased and the appellants is a defence to the charge of murder.

11. The prosecution’s case hinges on the testimony of eye witnesses PW1, PW2, PW3 and PW4. Our re-evaluation of the testimony by these witnesses leaves no doubt in our mind that the appellants were properly identified and recognized as the persons who cut and killed the deceased. The identity of the persons who committed the offence is not in doubt. As regards the *alibi* raised by each of the appellants, it is a truism that save for a miracle no person can be at two different places at the same time. Each of the appellants in their *alibi* deny being at the scene of crime. The eye witness account of PW1, PW2, PW3 and PW4 place each of the appellants not only at the scene of crime but identifies them as the persons who committed the offence. It is our finding that the eye witness account of PW1, PW2, PW3 and PW4 displaces and disproves the alibi raised by each of the appellants. We adopt and cite the case of ***Ramadhan Kombe –vs- Republic, Criminal Appeal No. 168 of 2002***, wherein the cause of death of the deceased was patently obvious; the weapon used was clear; there was no other version of how the deceased was killed nor by whom. We find that the trial Judge did not err in considering the alibi defence and arriving at the conclusion that the alibi was an afterthought and it did not shake or dent the watertight prosecution evidence.

12. As regards the grudge between the deceased and the appellants, it is our considered view that such a grudge did not prevent the appellants from having the requisite malice aforethought for the offence of murder. The evidence on record shows that the appellants cut the deceased. In the case of ***Daniel Muthee – vs- R, Criminal Appeal No. 218 of 2005 (UR)***, Bosire, O’Kubasu and Onyango Otieno, JJ.A while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and

watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

13. We entirely adopt the statement by the learned Justices of Appeal made in the **Daniel Muthee** case. The three appellants in this case by cutting the deceased with slashers intended to kill him. As was stated in ***Francis Kimtai Rono – vs- R, - Criminal Appeal No. 78 of 1997***, the burden was on the appellants to offer a reasonable explanation justifying their behaviour. That was a matter within the appellants own knowledge and by dint of **Section 111** of the **Evidence Act, Cap 80 of the Laws of Kenya**, a court will be perfectly entitled to infer malice aforethought from the unexplained conduct of the appellants. We find that the evidence against the appellants from four eye witnesses PW1, PW2, PW3 and PW4 is overwhelming and cogent. The fact that these four witnesses are related to the deceased did not affect what they saw as eye witnesses. It is our considered view that the appellants suffered no prejudice because the four main prosecution witnesses were related to the deceased. The upshot is that we find this appeal has no merit and is dismissed.

Dated and delivered at Meru this 30th day of April, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR