



**IN THE COURT OF APPEAL  
AT NYERI**

**(CORAM: O’KUBASU, ONYANGO OTIENO & NYAMU, J.J.A)**

**CRIMINAL APPEAL NO. 11 OF 2010**

**BETWEEN**

**PETERSON KARANI NJOGU ..... 1<sup>ST</sup> APPELLANT  
JULIUS MUTHI MUCHEMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a sentence and conviction of the High Court of Kenya at Nyeri (Makhandia, J) dated 5<sup>th</sup> February, 2010***

**In**

**H.C. Cr. C. No. 40 of 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The two appellants PETERSON KARANI NJOGU (1<sup>st</sup> appellant) and J.M.M alias M (2<sup>nd</sup> appellant), were according to information dated 10<sup>th</sup> July 2008 arraigned before the High Court of Kenya at Nyeri, charged with murder contrary to **section 203** as read with **section 204** of the Penal Code.

It was alleged that on 25<sup>th</sup> day of May, 2008, at Kibingo Village in Kirinyaga District within Central Province they jointly with others not before court murdered NICHOLAS KARIMI MWANGI (the deceased). The appellants denied the charge and their trial commenced before Makhandia, J on 29<sup>th</sup> September, 2009. The prosecution called a total of nine witnesses.

Rebecca Mukami Karimi (PW1) was the wife of the deceased and it was her evidence that on 25<sup>th</sup> May, 2008 at about 11.00 a.m. whilst at home with the deceased, the appellants came in the company of three others and asked her to call the deceased from the house for them. When the deceased came out, the appellants held him and started assaulting him. The 2<sup>nd</sup> appellant made a call requesting for a vehicle and when the vehicle arrived the deceased was forced into its boot by the appellants and driven off. At about 2.00 p.m, Rebecca reported the incident to Kerugoya Police Station where she was informed that the deceased had been referred to Kerugoya District Hospital. She proceeded to the hospital and found the deceased admitted but unconscious. When she went back to the hospital the following day, she found that the deceased had passed on.

Michael Gitari Ngugi (PW2) testified that on 25<sup>th</sup> May, 2008 at about 9.00 a.m., whilst at home washing clothes, the appellants approached him and ordered him to accompany them to the road. At the road, they came across a vehicle parked into which the appellants forced Ngugi (PW2) where he found the deceased bleeding from the forehead. From there the two were driven to the home of one Leonard Kinyua who was picked up too and forced into the boot of the vehicle. They were all driven to the home of one Muthie where they were ordered out of the boot. The appellants then set on those, ordered out of the boot beating them with rungas and metal rods. The appellants hit the deceased's legs until he was unable to walk.

Leonard Kinyua Magondu (PW3) testified how he was forced into the boot of the car by the appellants on the material date.

Obadiah Mwangi Wanyeri (PW4) was the father of the deceased and his testimony was that he witnessed the deceased being beaten on the material day.

Peninah Wairimu Wangunda (PW5) testified that she saw the appellants take away her son (PW3).

Nicholas Ngugi Douglas (PW6) testified that he heard PW5 screaming and when he went to the scene he found the deceased, PW2 and PW3 badly beaten. Those people were taken to hospital where the deceased passed on.

Dr. Andrew Katangi (PW7) is the one who conducted postmortem examination on the body of the deceased. It was Dr. Katangi's opinion that death of the deceased was as a result of severe injuries inflicted to the head causing head injury as a result of an assault.

James Mithamo Gathuku (PW8) is the clinical officer who examined PW2 and PW3 as to the injuries inflicted.

PC Mike Chesire (PW9) is the one who arrested both appellants.

When put to their defence the 1<sup>st</sup> appellant stated that on the material day he woke up at about 4.00 am. and went to the stage with the driver and collected their bus KAX 540C, picked passengers and left for Nairobi. He came back from Nairobi in the evening and on 27<sup>th</sup> June, 2008 he was arrested.

The 2<sup>nd</sup> accused defended himself by giving evidence on oath. He denied killing the deceased by stating that on the material day he worked until 6.00 p.m. when he went home, only to be arrested on 27<sup>th</sup> June, 2008.

The learned Judge considered the evidence and the submissions by counsel appearing for the parties and came to the conclusion that the appellants had killed the deceased. In the course of his judgment delivered on 5<sup>th</sup> February, 2010, the learned Judge said:-

***All these witnesses testify to the fact that the accused with their cohorts in fact collected the deceased, PW2, PW3 from their homes from where they fetched them. It appears to me that the accused were persons well known to the deceased, PW1, PW2 and their parents. If indeed they claim that they did not know these witnesses, on what basis would they have known their respective homes. The accused did not at all suggest that these witnesses were lying. On my part I must hasten to add that I observed the demeanor of all these witnesses and they all struck me as honest, truthful and candid witnesses. They had nothing to gain by falsely testifying against the accused nor a bone to grind with them.***

***On the whole I am satisfied that it is the accused in the company of others who inflicted fatal injuries on the deceased that led to his subsequent death. They were properly and positively identified in the act by the witnesses aforesaid. They knew that their actions would probably cause and indeed did cause the death of the deceased."***

The learned Judge then proceeded to consider the issue of motive in a bid to determine whether the evidence disclosed the offence of murder and he concluded his judgment thus:-

***“The upshot of the foregoing is that I find each of the accused guilty as charged. Accordingly I convict each of the accused for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.***

***I will now invite respective counsel to address me on matters of sentence”***

After considering whatever was said in mitigation, the learned Judge proceeded to sentence the appellants as follows:-

***“With regard to the 1<sup>st</sup> accused, he has not given me any reasons why I should not impose the mandatory death sentence. Accordingly I sentence the 1<sup>st</sup> accused to death in the manner authorized by law.***

***As for the 2<sup>nd</sup> accused there is evidence that at the time of the commission of the offence, he was aged 17 years. Accordingly he was a minor. In lieu of sentence of death I sentence the 2<sup>nd</sup> accused to be detained during the President’s pleasure. Both accused are reminded that they have a right to appeal within fourteen (14) days from the date hereof.”***

It is the foregoing that provoked this appeal which came up for hearing on 1<sup>st</sup> November, 2011, when Mr. J. Macharia appeared for both appellants, while Mr. J. Kaigai (Acting Principal State Counsel), appeared for the State.

The gist of Mr. Macharia’s submission was that the evidence disclosed the offence of manslaughter rather than murder.

In conceding the appeal, Mr. Kaigai was of the view that the evidence against the appellants was overwhelming but for the offence of manslaughter. He reminded us that the appellants and others took the law in their hands.

We have deliberately set out the testimony of each witness before the trial court in a bid to demonstrate what evidence was adduced against the appellants. This being a first appeal, it is our duty to re-evaluate the evidence, subject it to exhaustive examination and come to our own decision on that evidence – see **MWANGI V. R. [2004] 2 KLR 28**. We have re-evaluated the evidence and we agree with Mr. Kaigai that the evidence against the appellants was overwhelming. There was no doubt that the deceased was collected from his home by the appellants and others who beat up the deceased leading to his death. This incident took place in broad day light in the presence of witnesses who knew both appellants.

From the foregoing, it cannot be denied that it was the appellants (and others) who caused the death of the deceased. The only issue for determination in this appeal is whether the appellants were guilty of murder or manslaughter. The learned Acting Principal State Counsel, invited us to find that the appellants were guilty of manslaughter.

In our view, the evidence adduced points to the fact that what the appellants wanted to do was to discipline the deceased (and others) and take him to the police station and not to kill, but ended by subjecting them to what appears to have been a form of mob justice. Malice aforethought (the intention to kill) was in the circumstances absent.

Having carefully considered the evidence adduced during the trial and taking into account what has been stated by both Mr. Macharia and Mr. Kaigai, we agree with Mr. Kaigai that the evidence was overwhelming but the offence disclosed was manslaughter rather than murder.

In view of the foregoing, this appeal is allowed to the extent that the appellants’ conviction for murder is

quashed and in its place we substitute a conviction for manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. Accordingly, the death sentence imposed on the 1<sup>st</sup> appellant is set aside and in its place we sentence the 1<sup>st</sup> appellant to **ten** (10) years imprisonment, which sentence will be served from the date of conviction by the High Court i.e. 5<sup>th</sup> February, 2010.

As regards the 2<sup>nd</sup> appellant, who was a minor when the offence was committed, we order that he be detained at the pleasure of the President as previously ordered by the High Court.

These shall be our orders in this appeal.

Dated and delivered at NYERI this 1<sup>st</sup> day of December, 2011.

**E.O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**