



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 284 & 299 of 2006

1.GABRIEL WANYEJI KURIA

2.PETER KIBANDE KIMUHU APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J.)
dated 18th July, 2006

in

H.C.CR.C. NO. 33 OF 2005)

JUDGMENT OF THE COURT

Gabriel Wanyenji Kuria and **Peter Kibande Kimuhu**, hereinafter the 1st and the 2nd appellant respectively, were tried before Khamoni, J. sitting with assessors, on an Information that had charged them with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars contained in the information were that on the 22nd day of August, 2005 at Ngenda Village in Maragua District within Central Province, the two appellants jointly murdered **Henry Mwaniki Kibui**, hereinafter "*the deceased*".

At the trial of the appellants, a total of eleven witnesses testified on behalf of the Republic and each appellant chose to make an unsworn statement. Thereafter, Mr. Waiganjo, the learned counsel who appeared for both appellants during their trial, made a very brief submission, simply stating that the evidence on record did not "*collate*" with witness statements, that witnesses appeared to contradict each other and that the defence should benefit from the contradictions in the prosecution's case. The alleged contradictions were not specified. Mr. Orinda, the learned Principal State Counsel for the Republic equally made a short reply to the defence submissions and thereafter the learned Judge summed-up the facts of the case to the assessors. The Judge simply confined his summing-up to the facts of the case and said nothing about the law, for example, what constitutes murder, to the assessors. The assessors, after due consideration, unanimously returned a verdict of guilty against each appellant. In a reserved judgment dated and delivered on 18th July, 2006, the learned Judge agreed with the assessors, convicted each appellant on the charge of murder and duly sentenced each one of them to death. The appellants now appeal to this Court and theirs being first appeals to the Court, they are entitled to expect from the Court a fresh re-evaluation and exhaustive scrutiny of the entire evidence upon which the trial court based its conviction – see **OKENO V. REPUBLIC** [1972] E.A. 32.

On the morning of 22nd August, 2005 at about 9.00 a.m. the deceased, his wife **Mary Njoki Mwaniki** (PW1) and two other people, **Philip Muturu Kimandio** (PW2) and **Joseph Waruhiu Njogu** (PW8) were working on a shamba which was at Ngenda village; the deceased and his wife Mary lived at Kahuho village, Kiriaini, Maragua District. The distance between the two villages is not clear from the recorded evidence but it is clear from that evidence that the people named herein knew each other well and that there was a dispute between the deceased, on the one hand, and the two appellants on the other hand, over the land upon which the deceased and his party were working on that morning. The deceased, Philip (PW2) and Joseph (PW5) were working in a different part of the land; the two witnesses were to dig furrows on the land to enable the deceased install irrigation pipes. Mary (PW1) was watering cabbages about 100 metres from where the men were; it was not possible for her to see what was going on at the place where her husband and Philip and Joseph were. It was generally the evidence of Joseph and Philip that as they were working, the 2nd appellant passed by and after some time, the 2nd appellant returned with the 1st appellant. The dispute between the deceased and the appellants over the land was known to Philip and Joseph. The two appellants and others had in fact been charged at a Thika court with the offence of creating a disturbance likely to cause a breach of the peace. The deceased was the complainant in the Thika case. The brother of the deceased, **Stephen Waweru Kibui** (PW5) said he was approached at his home by the two appellants on 5th August, 2005 and that they had told him (Stephen) to warn the deceased not to again visit the land at Ngenda village and that if the deceased visited the land again, they, i.e. the appellants, would take some unspecified action against the deceased. It appears from the evidence that it was this warning which made the deceased lodge a complaint with the police as a result of which the appellants and others were charged in the Thika case. These things were known to Philip and Joseph so that when the two of them saw the appellants appear at the place where they were working with the deceased the witnesses became apprehensive and they asked the deceased that the work should stop. Joseph thought the 1st appellant had a panga or a straightened slasher. Philip said the appellants were armed with pangas and slashers. We can at this stage point out that the evidence of these two witnesses with regard to the weapons carried by the appellants was not as satisfactory as it ought to have been, but we must also point out that as soon as the deceased saw the two appellants approach, he started to run away even without warning the two witnesses. On seeing the deceased running away, Philip and Joseph also ran away in different directions and the only important thing they said thereafter was that the deceased was killed that morning.

We return to the evidence of the widow Mary. She heard screams coming from the direction where her late husband and his party had been working. The screams which Mary heard were obviously those of Alice Wairimu Irungu (PW9). Mary said that when she reached the scene, she found the two appellants "*cutting him*" i.e. her husband. She also screamed asking them why they were killing her husband. According to her the 1st appellant had a panga while the second appellant had a panga and slasher. Mary swore:

" Each was using a panga to cut my husband. Kibande was holding a slasher in his left hand, a slasher used to cut grass which was sharp on both sides. My husband was lying down on the ground, not talking. I was seeing those who were cutting my husband on his head. I had reached the scene. I was where they were. The two were people I knew them (sic) very well as they were fellow villagers at Kahuho. But they are not related to us. I did not see the people my husband had gone to bring. After I collapsed, I was carried to Irungu's home as people tell me".

The people whom her husband had gone to collect were, of course, Philip and Joseph. Mary could not see them at the scene because as we have seen, they had run away in different directions. We said the screams which Mary had heard and which made her go to the scene must have been those of Alice (PW9). Listen to what Alice told the Judge and the assessors:

"I am a farmer. I knew Henry Mwaniki Kibue [deceased]. At 9.30 a.m. on 22nd August,

2005 I left home and went to the home of James Ndegwa, my neighbour in Kienda-Andu village. I was alone and went to borrow a crow-bar. I found James Ndegwa's wife called Jane Wambui and asked her for the crow-bar. While there I heard something as if a cow running in the neighbouring shamba. I observed while stepping back. I was able to see that it was people who were running going down hill. They were three people about 30 metres away from me – like here and where the kiosk is at the gate (pointed at). That was in a maize plantation. They passed besides where I was as they proceeded down hill. I could identify Gabriel Wanyenji and Peter Kibande. I saw the person who was in front also but I could not recognize him. Peter Kibande was in the middle and behind was Gabriel Wanyenji. Peter Kibande held a panga and a stick and Gabriel Wanyenji had a panga. The person running ahead was not armed. Gabriel Wanyenji and Peter Kibande were fellow villagers at Kienda-Andu village and I had known Kibande for about one year and Wanyenji for about six years. I cannot describe their clothings but I knew them from their appearance as the place between me and them was an open space. When they reached somewhere, Kibande reduced his speed as Wanyenji was left behind and the person in front was still running. Then Kibande increased the speed and was able to reach the person who was running in front of him. So Kibande using his panga cut the person running in front on that person's leg. That person fell down and that frightened me as Kibande repeated (sic) cutting. I screamed. The person stood up and surrendered. He called out Joseph. That is when I recognised who he was – that he was Henry Mwaniki. I screamed more 'Huuihui'. I was with Jane whom I had met at the shamba. I did not scream before knowing who was being cut.

After that person had stood up, he fell down again as he received more cuts from Kibande. Wanyenji joined Kibande. He also started cutting Mwaniki as Kibande now ran away and I continuing (sic) screaming. Jane was just running up and down to and fro where I was also screaming. When other people started coming, they were coming where I was standing, as Wanyenji continued cutting Mwaniki. That was near the home of James Ndegwa in a garden. Later I fainted but I had seen Wanyenji going away. When fainting, I did not know what continued. But when I woke up, there were a lot of onlookers. I woke up after about 10 minutes and started saying that Wanyenji and Kibande had killed Mwaniki. I said that repeatedly automatically.”.

We see from the evidence we have so far set out that Philip and Joseph who were in the company of the deceased that morning said they ran away from the scene because the two appellants had come to the scene armed and that the appellants chased the deceased from the place where the two witnesses and the deceased had been working. Mary heard screams from the portion of the shamba where she had been working. She ran to where the screams were coming from and she said she found the appellants attacking the deceased. They were using pangas and a slasher to attack the deceased. We do not think we need to add anything in respect of the evidence of Alice which we have set down in extenso.

Dr. Ian Njeru (PW3) examined the body of the deceased on 29th August, 2005. According to Dr. Njeru, the left leg had three sharp cuts. The head had three deep cuts. The first cut was on the level of the left eye. Underneath that cut, there was a fracture of the skull. The second cut was on the fore head and extended upto the bone. The third cut was just below the left ear and it cut through the muscles. On the left forearm there were two deep cuts. As a result of all these cuts, Dr. Njeru concluded that the cause of death was severe cut injuries and when Dr. Njeru produced the post-mortem report, no questions were put to him in cross-examination.

Upon the prosecution completing their evidence, each appellant was put on his defence and as we have already said each made an unsworn statement and called no other evidence. Once again, listen to the 1st appellant's unsworn statement:

“On 22nd August, 2005 I was at my home working when at about 9.50 a.m. I went to borrow a machine at the home of Wamugure. When I climbed the mountain and at the

gate of Wamugure 30 metres away – I then reached the gate and entered the home. Found nobody. As I walked away and was outside the home, I heard screaming. That is when I reached where the trench was being dug. I heard screaming the second time, I stood and listened. I heard more of it and then went downwards from up the hilly place where I was. As I went I reached a side foot path and while there I found Mwaniki, the deceased in this case lying down. I had known him before screaming was still going on.

As I thought that being alone, I could not assist him in any way, I walked away. I went now to the police at Makuyu Police Station arriving there at 12 noon. I found the officer who has been here (points at PW10). I told him I had seen Mwaniki with cuts on his body. He asked whether my name was Wanyenji. I said yes. In fact he knew me before. He locked me in.

That is all. I do not know about this offence. That is all”.

Again, now hear the 2nd appellant’s unsworn statement:

“On 22nd August, 2005 I left my home about 7.30 a.m. for Muranga Lands Office to book an official search. I reached Muranga about 10.30 a.m. and started dealing with what took me there. In the evening, I went to Mangu in Kiambu District where I discussed some matters with Chairman and Treasurer of Ngenda New Farmers Company. From that time to Friday 26th August, 2005 I was in Nairobi concerning title deed LR. 324 A PROPERTY To Ngenda New Farmers. Later went to Thika Law Courts where I was arrested by a police officer without knowing why I was arrested.

As a result I gave my brief case containing my documents to somebody. I was taken to Makuyu Police Station where I was informed why I was arrested. I gave my statement to the police telling them I did not know anything about murder of Mwaniki. But they continued to hold me and charged me with this offence. That is all I have to say”.

Earlier before making this statement, the 2nd appellant had told the Judge that he had some documents to produce but which he did not have with him. The Judge refused to adjourn the case and proceeded to hear the defence of the two appellants. The failure by the Judge to give the 2nd appellant an opportunity to produce the document forms the basis of Ground 1 of the Supplementary Memorandum of Appeal filed by Mr. Ndirangu on behalf of the two appellants on 7th November, 2008.

On evidence as we understand it, the 2nd appellant raised the defence of an *alibi* while the 1st appellant though admitting being in the vicinity where the deceased was attacked and killed said he had nothing to do with the attack and only came upon the deceased after he (deceased) had been attacked. We have already set out in detail the evidence of the various witnesses who say they saw the two appellants attack the deceased. Philip and Joseph ran away from the scene because they saw the two appellants approach them and they knew the two appellants had problems with the deceased over the land upon which they were working. They also swore they saw the deceased run away and being followed by the two appellants. Then there is the evidence of Alice very detailed in nature and which squarely put each appellant at the scene of the attack and we cannot imagine that anyone could, out of thin air, make up the very detailed facts narrated by Alice in her evidence. Nobody ever suggested to her how she could have possibly manufactured her story and for our part we can fathom no reason which would make her create the story. Then there was the evidence of the widow Mary and that evidence fully supported that of Alice. The learned trial Judge and the assessors saw these witnesses testify before them. The Judge and the assessors had absolutely no hesitation in believing that evidence. Mr. Ndirangu, whom we must say put up a valliant effort on behalf of the two appellants, did not point out to us any particular reason or reasons upon which we, on the bare written word, can come to the conclusion that the Judge and the assessors were wrong in

believing the prosecution's case and rejecting the unsworn statement of each appellant. We think the Judge was probably wrong in not giving the 2nd appellant the chance to produce the document he (2nd appellant) wanted to produce but even if that document had been produced, it would not and could not have rebutted the very clear evidence of the prosecution witnesses, namely, Mary, Philip, Joseph and Alice that the 2nd appellant was at the scene and they saw him attack the deceased. The document, as far as we understand was to show that the 2nd appellant had gone to the Lands Office in Muranga; that is the story the 2nd appellant told the Judge and the assessors. The story was rejected and as we have pointed out, there is nothing shown to us to make us take a contrary view. The evidence on the record fully justified the conclusions of the Judge and the assessors. Ground 1 which deals with the failure to allow the 2nd appellant an opportunity to produce the document must accordingly fail. On the facts alone, the appeals cannot succeed.

But Mr. Ndirangu next argued that the constitutional rights of the two appellants were violated because they were brought to court more than fourteen days prescribed under **Section 72 (3)** of the Constitution. The two appellants were, right from day one represented by counsel in the High Court, the current constitutional court in our country. Applying the principle set out by this Court in the case of **JAMES GITHUI WAITHAKA AND ANOTHER V. REPUBLIC**, *Criminal Appeal No. 115 of 2007* (unreported) we hold that the two appellants must now be held to have waived their right to complain against any alleged violation of their constitutional rights.

The other ground which Mr. Ndirangu feebly put before us was that the language in which the proceedings in the superior court were conducted is not quite clear. There is no substance in that contention. Virtually all the witnesses, except the "official" ones like Dr. Ndirangu and the police officers, testified in Kikuyu language and for those witnesses who testified in English, there was always a Kikuyu court clerk present in court. The court knows from its own experience that among the functions of such clerks is the interpretation of evidence from one language to the other, where it is necessary to do so. The appellants themselves gave their unsworn statements in Kikuyu language. The complaint about interpretation of the proceedings is baseless and as we have said Mr. Ndirangu virtually abandoned it.

Having gone through the written word in the record of appeal, we are, like the Judge and the assessors, fully satisfied that the charge of murder was proved against each appellant beyond any reasonable doubt. The injuries they inflicted on the deceased were of such a nature that any reasonable person would know that they would either kill the deceased or cause him very grave harm. In any case, the appellants themselves had gone to Peter Waweru Kibue (PW5) the brother of the deceased and told Peter to warn the deceased not to go to the shamba where he was killed and that if the deceased did so the appellants would take action against him. The action they took when the deceased did visit the shamba was to kill the deceased. The appellants were not entitled to do so. The Judge and the assessors were right to conclude that with malice aforethought the two appellants caused the death of Henry Mwaniki Kibue. Their appeals against the conviction fail and we order that they be and are hereby dismissed. The death sentences imposed on them have been commuted by His Excellency the President to life imprisonment. The appellants must continue to serve those sentences.

Dated and delivered at Nyeri this 6th day of November, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR