



**IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 66 of 2007**

HARON KIMATHI MBUI 1ST APPELLANT
NELSON MWITI GIKUNDA 2ND APPELLANT
GEOFFREY MUTWIRI GIKUNDA 3RD APPELLANT
ZAKAYO MWITI MBUI 4TH APPELLANT
MICHAEL KAIMENYI KINOTI 5TH APPELLANT
JOHN KIMONYE KINOTI 6TH APPELLANT
NATHAN KIMAITA GUANTAI 7TH APPELLANT
NICHOLAS GITONGA 8TH APPELLANT
SOLOMON NDEREBA MIRURA 9TH APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Meru (Lenaola, J)

dated 25th June, 2007

In

H.C. Cr. C. No. 50 of 2003)

JUDGMENT OF THE COURT

The nine appellants herein together with one Japhet Gichuru Gitonga were tried before Mr. Justice Lenaola sitting with assessors (as the law then provided) on information which charged them with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the information were as follows:-

“Nelson Mwiti Gikunda 2. Zakayo Mwiti Mbui 3. Haron Kimathi Mbui 4. Solomon Ndereba M’Irura 5. Geoffrey Mutwiri Gikunda 6. Michael Kaimenyi Kinoti 7. Nicholas Gitonga Murithi 8. Japhet

Gichuru Gitonga 9. Nathan Kimaita Guantai 10. John Kimonye Kinoti: On the 5th day of November, 2002 at Kararene sub/location, Kiamiogo location in Meru Central District within Eastern Province jointly with others not before court murdered STELLA KINYA.”

The trial in the superior court commenced on the 27th March, 2006. The learned Judge and the assessors heard evidence from a total of eight witnesses called by the prosecution. At the close of the prosecution case the appellants and their co-accused, Japhet Gichuru Gitonga, were put to their defence when each of them defended himself by either giving unsworn statement or giving evidence on oath. Thereafter the learned Judge summed-up the case to the two remaining assessors. The two assessors unanimously advised the learned Judge that the appellants were not guilty. In a reserved judgment the learned Judge, however, disagreed with the two assessors, found all the appellants, except one of them (Japhet Gichuru Gitonga) guilty of the charge of murder and duly sentenced each of them to death. The nine appellants now appeal to this Court against the conviction and sentence.

The facts of this case are rather disturbing and distressful. The summary of the evidence adduced before the superior court was as follows:-

On 23rd October, 2002 at about 1.00 a.m. Glory Kendi Daniel (PW1) was woken up by people banging on her door. She recognized some of them as Kaimenyi (6th accused), Mwiti (2nd accused), Kimathi (3rd accused) and Kimonye (10th accused). She (PW1) testified that there were more people including the deceased Kinya who had a baby. PW1 and her sister Nkirote (PW3) covered the baby with a piece of cloth but these people started assaulting the deceased and Nkirote. Then on 5th November, 2002 at about 1.00 p.m. a group of people arrived at her home. These people were armed with whips, sticks and rungus. They took the deceased and her husband towards the chief's camp but when they reached near a swamp they set upon the deceased with all manner of weapons which led to her death.

Ezekiel Nteere (PW2), the husband of the deceased Kinya testified that on the 23rd October, 2002 at about midnight he was asleep when he was woken up by people knocking on the door and when he opened he saw Mwiti (1st accused), Mbui (2nd accused), Kimathi (3rd accused), Ndereba (4th accused), Gichuru (5th accused), Kinoti (10th accused), Kimaita (9th accused) and Gitonga (7th accused). These people were armed with sticks, whips and rungus. They demanded for the deceased as they wanted to take her to the chief. They took the deceased and Nkirote (PW3) but the following morning the deceased came back. On 5th November, 2002 at about 12.30 p.m. the same group and others came to the home of PW2 and took him away together with the deceased. The group set upon PW2 and his wife (deceased) but PW2 managed to escape and went to report at Kiirua police station. On coming back from the police station PW2 found that his wife had died as a result of the beatings inflicted on her by the gang.

Catherine Nkirote Daniel (PW3) was with PW1 and PW2 and her evidence supported the earlier eye witness account given by the first two witnesses. It was Nkirote's evidence that the deceased was asked what he had done to the 6th accused who had gone mad. The deceased expressed ignorance over this allegation but this did not stop the gang from coming back on 5th November, 2002 when they beat the deceased to death.

Gladys Muthimbi Daniel (PW4) was the mother of PW1 and PW3 and she (PW4) too gave evidence similar to that of her two daughters (PW1 and PW3).

Frederick Mwangera Kiugu (PW5) was the Chief of Kiamiogo location and testified to the effect that on 24th October 2002 at about 8.00 a.m., PW3 reported to him that their home had been raided by a group of people who claimed that the deceased had bewitched Kaimenyi (6th accused).

Dr. Monica Kariuki (PW6) examined Kaimenyi (6th accused) and formed the opinion that the 6th accused suffered no mental disability.

P.C. James Njeru (PW7) was the police officer who received the murder report on 5th November 2002.

Lastly, Dr. Isaac Mwangi Macharia (PW8) produced the postmortem report. According to that report there were injuries to the deceased's shoulder, face, arms, legs, external genitalia, and neck. The doctor concluded his report by stating that the cause of death was asphyxia due to strangulation.

Each appellant defended himself by stating that he was not involved in the commission of the offence. Indeed each of them said that he was elsewhere so that each of them gave an alibi as a defence.

The learned Judge went over the evidence adduced before him and the submission by learned counsel and in the end came to the conclusion that this was a well planned scheme by the 6th accused which was executed by all the appellants and others in broad daylight leading to the painful death of the deceased. In the course of his judgment the learned Judge said:-

“59. on the first question above the witnesses for the Republic principally P.W1, PW2, P.W3, P.W4 and P.W5 have all said that they knew all the accused persons before and some of the accused persons in their defences have said as such (see the defence of the 1st, 3rd, 5th and 9th accused persons). What cannot be in doubt is that the 6th accused, Michael Kaimenyi Kinoti was involved in all the machinations to punish the deceased for allegedly being a witch and having used witchcraft to “make him mad”. P.W5, Fredrick Mwongera Kiugu received P.W3's report pm (sic) 24.10.2002 the day after her first ordeal with “Kaimenyi's gang” proceeded to the 6th accused's home and spoke to his parents about the threat to P.W3 by among others their son aforesaid. P.W1, PW2, P.W3 and P.W4 all stated that the 6th accused was present on both occasions and participated fully in the threat, kidnap and assault of the deceased which assault led to her death. He premeditated the death because he thought that she had bewitched him and after giving her notice to make him same (sic) again and having not complied, he organized and executed her death in broad daylight. There is little more to say and the conclusions of the eye witnesses cannot be faulted.”

The learned Judge considered the submissions made on behalf of the appellants and concluded his judgment thus:-

68. These being my conclusion, I should only say this; the 1st – 7th and 9th - 10 accused persons for completely illogical reasons ganged up violated the body of Stella Kinya, who was said to be a prayerful person ripped her private parts open with sticks and stuffed soil into her mouth and strangled her to death. The excuse was that she bewitched the 6th accused who was said to have gone mad, a charge discounted by the evidence of P.W6. Their actions were reckless, callous and inhuman. They are all convicted of the charge of murder save that the 8th accused is found not guilty of the said offence.”

Having so said the learned Judge convicted each appellant and sentenced each to death.

It is from the foregoing that the appellants now come to this Court by way of first appeal and that being so, it is our duty to reconsider the evidence re-evaluate it and come to our conclusions, but always remembering that we have neither seen nor heard the witnesses - See Okeno v. R. [1972] E.A. 32.

This is the appeal that came up for hearing before us on 28th October, 2008 when Mr. Ken Muriuki appeared for all the appellants, while Mr. C.O Orinda, the learned Principal State counsel, appeared for the State.

The first issue taken up by Mr. Muriuki was that the learned Judge erred in law by not complying with section 322 (1) and (2) of the Criminal Procedure Code in that he failed to give reasons why he differed with the views of the assessors. To buttress his submission Mr. Muriuki cited the decision of this Court in Kinyua v. Republic [20002] 1 KLR 256 in which it was held inter alia:-

“16. It is a firm rule of practice that where a judge disagrees with the opinion of assessors, he should give reasons for doing so, because assessors are part of the trial and their opinions are entitled to due weight and respect though not binding upon the judge. In cases such as this where three assessors return a unanimous opinion the need to give reasons for disagreeing with them is even greater.”

It is to be noted that section 322 (1) and (2) of the Criminal Procedure Code (now repealed by Act No. 7 of 2007) merely provided that the judge may sum up the evidence for the prosecution and the defence and shall require each of the assessors to state his opinion orally and that the judge shall then give judgment but in doing so shall not be bound to conform to the opinions of the assessors. Our understanding of that provision is that the judge gets the opinion of the assessors which opinion does not bind him. However, it was good practice that where the judge disagrees with the opinion of the assessors he should give reasons why he disagreed with the assessors. In our view, failure to give reasons was not fatal. Indeed as submitted by the learned Principal State Counsel the reasons why the learned Judge disagreed with the assessors are to be found in the body of the judgment.

Mr. Muriuki further submitted that the learned Judge was biased as he acquitted the 8th accused and yet the evidence was the same. With due respect to Mr. Muriuki the fact that one co-accused has been acquitted does not automatically mean that the rest are to be acquitted. The learned Judge considered the evidence against each appellant. He was perfectly entitled to consider the evidence against each appellant.

Mr. Muriuki raised a rather novel argument that the charge sheet was defective in that the word “murder” was used in the charge sheet. There is no basis for this submission since the charge sheet in question was drafted in accordance with the second schedule of the Criminal Procedure Code which provides for the form of stating offences in an information.

The main issue in this appeal was about the identification of the appellants. It was argued that there were loopholes in the prosecution case.

We have carefully gone over the evidence adduced in the superior court and it is quite clear that the commission of the offence of murder could be traced from the first incident of 23rd October 2002 when the gang visited the home of the deceased. It has emerged that these people went to warn the deceased that she had bewitched the 6th accused (Kaimenyi) and that she should do something to restore his state of mind. It must be pointed out that the “bewitched man” one Kaimenyi (6th accused) was examined by Dr. Kariuki (PW6) who found him to be mentally sound. It is also to be observed that the same Kaimenyi fully participated in assaulting the deceased.

The second incident was the one that took place on 5th November, 2002. This incident took place in broad daylight and the witnesses were able to identify the appellants. Those were people known to each other. We have considered the evidence adduced by the eyewitnesses together with the surrounding circumstances, and like the learned Judge, we have come to the conclusion that those witnesses cannot be faulted. The evidence implicating the appellants was clearly that of recognition. As was sated in Anjononi v. R. [1980] KLR 59, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger.

Mr. Muriuki took up the issue of malice aforethought. It was his submission that malice aforethought was not proved. Mr. Orinda on his part submitted that malice aforethought was proved by the manner in which the plan was executed especially in view of the injuries sustained by the deceased.

On our part we can do no more than refer to the definition of malice aforethought under section 206 of the Penal Code which provides:-

“206. 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 had committed or attempted to commit a felony.”*

Taking into account the fact that these people went to the home of the deceased on 23rd October, 2002 and warned her on what she had allegedly done (bewitched 6th accused), the subsequent visit by the gang to the deceased’s home on 5th November, 2002 and inflicting of serious injuries on the deceased leading to her death, malice aforethought was disclosed. In our view this was a wicked scheme based in the belief that the deceased had bewitched the 6th accused and for that reason took upon themselves to eliminate the deceased. The manner in which the gang behaved and the severe injuries inflicted could lead only to one conclusion that these people intended to kill or cause harm to the deceased. We are satisfied that the charge of murder was proved.

Having considered the evidence adduced the submissions by learned counsel appearing we are satisfied that the appellants were convicted on very sound evidence.

As regards the sentences meted out on the appellants, Mr. Muriuki pointed out that three of the appellants were minors and hence it was wrong for the learned Judge to impose death sentence on these minors. Mr. Orinda, very properly conceded that point. We have considered this issue and our perusal of the record reveals that it is true that three of the appellants were, according to P3 forms produced in evidence, 17 years old. These three are Nathan Kimaita Guantai, Nicholas Gitonga and Zakayo Mwitwi Mbui.

Section 25 (2) of the Penal Code provides:-

“Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President’s pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.”

Pursuant to the foregoing we find that it was wrong to impose death sentence on the three young boys (Guantai, Gitonga and Mbui) and hence the sentence of death passed on them is set aside and in its place we order that the three shall be detained at the pleasure of the President .

We have said enough in this appeal. The final position is that save what we have said in respect of the three young men, we find no merit in the appeals of the other appellants. For the foregoing reasons their appeals are hereby dismissed.

Dated and delivered at Nyeri this 31st day of October, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.