



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Criminal Appeal 226 & 271 of 2005**

**1. SARAH NJOKI KARABA**

**2. GEORGE GATIMU KARABA..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu, J) dated  
28<sup>th</sup> August, 2005**

**in**

**H.C. Cr. Case No. 8 of 2003)**

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

**JUDGMENT OF THE COURT**

The two appellants in the consolidated appeals were jointly charged with murder contrary to **section 203** as read with **section 204 of the Penal Code** in the superior court. **Sarah Njoki Karaba** (1<sup>st</sup> appellant) was the second accused while **George Gatimu Karaba** (2<sup>nd</sup> appellant) was the first accused at the trial. They are sister and brother. They were convicted after trial with assessors and each sentenced to death. This is their first and final appeal against the conviction and sentence.

The particulars of the charge alleged that on 23/2/2002 the two appellants jointly with others not before the court murdered **Aurelius Ngari Karathi**. The prosecution called 15 witnesses, eight of whom gave direct evidence relating to the murder of **Aurelius Ngari Karathi** and the circumstances under which he was murdered. Those eight material witnesses are **Mary Waruguru Ngari**, wife of deceased (**PW 2**), **James Njogu Ngotho (PW 4)**, **Peter Muthee Kimiru (PW 5)**, **Kennedy Kinyua Maru (PW 7)**, **Peter Macharia Munene (PW 8)**, **Daniel Mwangi Muriithi (PW 9)** **David Mwangi Njagi (PW 10)** and **Charles Muremi Muriuki (PW 12)**.

According to the evidence on record, on the material day, that is, 23/2/2002 the deceased went to his farm at about 8 a.m. to fetch firewood. He was accompanied by **PW 5**, **PW 7**, **PW 8** and **PW 12** who had been employed to cut, split and load the firewood into a pick-up. **PW 5** was using a power saw to cut the firewood. **PW 4** who owned a pick-up registration number KWA 533 and had also been employed by the deceased to transport the firewood, also went to the farm. **PW 2** and **PW 9** were picking tea on another part of the farm. The deceased had bought the farm recently from one **Mubea** who is the father of both

appellants. The second appellant used to live on the land but he had recently been evicted through a court order and his house demolished. At about 9.30 a.m., the second appellant accompanied by the first appellant and two other sisters, **Nduta** and **Phoebe**, went to the farm. The second appellant was armed with bow and arrows. **Nduta** was armed with a panga while **Phoebe** and the first appellant had sticks. The second appellant claimed that the land belonged to them and that the deceased should never step into the land. The second appellant told the deceased and his employees to leave the land but the deceased resisted. The second appellant shot an arrow but it did not hit anybody (see evidence of **PW 7**). Some of the people working in the farm ran away. The deceased was chased by the two appellants and their two sisters. The deceased ran to where **PW 4** had parked the pick-up and entered into the vehicle telling **PW 4** to drive off. **PW 4** entered into the vehicle and as he was looking for the ignition key, the two appellants and the two sisters arrived demanding that the deceased should come out of the vehicle.

The deceased opened the door and ran to the rear of the vehicle. He was chased by the four to the neighbouring home of **Ngagi Njanjo**. The deceased was hit with a panga at the back of the head but managed to run into the kitchen of the neighbouring home of **Njagi**. The appellants and their two sisters removed him from the kitchen and pulled him to the road side where he was shortly found lying dead with multiple cut wounds. **Dr. Antony Kaane Maina (PW 1)** who performed the postmortem found multiple cut wounds – stab wound, on the left knee, deep cut wound on the right wrist joint separating the two bones of the hand, deep cut wound on the right thumb, scalp wound on the head frontal area, cut wound on the left parietal area deep to the bone, deep cut wound at the back of the head severing the spinal cord and spinal column at the base of the skull. He formed the opinion that the cause of death was severed spinal cord at the base of the skull by a cut inflicted with a sharp heavy object.

Both appellants raised a defence of *alibi*. According to the first appellant, she was attending her business of a salon at Kangaita market the whole day on 23/2/2002. On his part, the 2<sup>nd</sup> appellant stated that he was in Maralal attending to his livestock business from 16/2/2002 to 25/2/2002 when he left for Nairobi.

All the three assessors were of the opinion that the 2<sup>nd</sup> appellant was guilty of murder. One assessor found the first appellant guilty of murder while two assessors exonerated the 1<sup>st</sup> appellant.

The learned Judge in an elaborate judgment, evaluated the evidence and considered the respective defence of *alibi* and came to the conclusion that both appellants were guilty of murder. She said in part with respect to the first appellant:

***“As regards the second accused, she also claimed to have been away at her business premises at Kangaita on the material day. This was confirmed by her witness DW 4 who swore that 2nd accused never left the salon until about 8.30 p.m. Nevertheless PW 5, PW 8, PW 9, PW 10 and PW 12 all maintained that they saw 2<sup>nd</sup> accused who was well known to each of these witnesses at the scene of the murder. Both PW 4 and PW 7 who did not know 2<sup>nd</sup> accused before were not able to identify her as one of the women who came to the scene. However the other witnesses were certain that they saw and identified 2<sup>nd</sup> accused. I do believe and accept the evidence of PW 5, PW 8, PW 9, PW 10 and PW 12 that the 2<sup>nd</sup> accused was also at the scene of the murder on the material day and I do therefore reject the alibi as false.”***

The learned Judge also considered the evidence against the 2<sup>nd</sup> appellant and his defence of *alibi* and concluded:

***“PW 4, PW 5, PW 8, PW 9, PW 10 and PW 12 all stated that they saw the 1<sup>st</sup> Accused person at the scene of the murder on the material day. All these witnesses were persons who knew the 1<sup>st</sup> Accused well including PW 10 who is a cousin to the 1<sup>st</sup> Accused. There is no possibility of all these witnesses having been mistaken about seeing the 1<sup>st</sup> Accused at the scene. Although the 1<sup>st</sup> accused and DW 3 claimed the 1<sup>st</sup> Accused was away in Maralal on a business trip, this could not have been true. The 1<sup>st</sup> Accused claimed that PW 14 had a grudge against him however none of the witnesses who claimed to***

***have seen 1<sup>st</sup> Accused at the scene including his own cousin PW 10 had any grudge against him. I do therefore reject the alibi of the 1<sup>st</sup> Accused as false. I find that the 1<sup>st</sup> Accused was in fact at the scene of the murder.***”

Lastly, the learned Judge considered whether the offence of murder was proved against each appellant and made the following finding:

***“I am satisfied that both the Accused persons were acting in concert and had a common intention of causing grievous harm or death to the deceased. I find that this was a clear case of a cold blooded murder committed in broad day light. I concur with the opinion of Assessors in respect of 1<sup>st</sup> Accused but disagree with the majority opinion of the assessors in respect of 2<sup>nd</sup> Accused. She not only acted in concert with 1<sup>st</sup> Accused but also actively participated in the assault perpetrated against the deceased .....*”**

There are 13 grounds of appeal. **Ms Lucy Mwai**, the learned counsel for the appellants, argued mainly grounds number 4 and 7 and submitted that, basically, the appellants are complaining that they were not properly identified; that no identification parade was held; that there were inconsistencies in the evidence; that the defences of *alibi* were not considered and that the underlying land dispute was not considered as a mitigating factor. She submitted that the evidence did not indicate that the appellants assaulted the deceased with a panga; that none of the witnesses said how the deceased died; that an identification parade should have been held to establish the identity of the “boy” and “sister” that the witnesses referred to and that if the underlying land dispute was brought to the attention of the assessors, it is possible that they may have found that malice aforethought was not established. **Mr. Kaigai**, learned Senior State Counsel, supported the conviction and sentence. He submitted in part that there was clear evidence of the attack and clear evidence of the identity of the attackers. He referred to the evidence of **PW 4**, **PW 8** and **PW 10** and submitted that the land dispute was the motive for the assault and that the totality of the evidence showed that the appellants committed the offence.

This being a first appeal, the Court has a duty to reconsider the evidence, re-evaluate it and draw its own conclusion - see **Okeno v. R [1972] EA 32**; **Ngui v. Republic [1984] KLR 729**. Further, that in doing so, the appellate court should be mindful of the advantage enjoyed by the trial Judge who saw and heard the witnesses and should not disturb the finding on the credibility of witnesses by the superior court unless it is clear that no reasonable tribunal could make such a finding – see **Ogol v. Murithi [1985] KLR 359**. Similarly, findings of fact by the superior court cannot be disturbed unless it is shown either that the court misdirected itself or that there was no evidence to support the findings of fact.

In this case, there was clear and consistent evidence that the deceased was attacked in broad daylight. **PW 2** saw four people armed with pangas chasing the deceased although she did not identify them. According to **PW 4**, the 2<sup>nd</sup> appellant and his three sisters chased the deceased up to where the pick-up was parked. He was inside the vehicle when the four people were forcing the deceased out of the vehicle. The four people then chased the deceased towards the home of **Njagi**. He had known the 2<sup>nd</sup> appellant for over 10 years. **PW 5** identified the four people as the two appellants, **Phoebe** and **Nduta**. He attended the same school with the 2<sup>nd</sup> appellant and had known him for many years. **PW 7** identified the 2<sup>nd</sup> appellant as the one who shot an arrow.

**PW 5** had known the 2<sup>nd</sup> appellant for 5 years and he saw him cut the deceased with a panga on the head. **PW 9** saw the two appellants and one **Nduta** cutting the deceased with a panga. **PW 10** – a cousin to the appellants and who lives in the neighbouring farm, saw the two appellants, **Kaira** and **Nduta** chasing the deceased up to his mother’s house. **PW 12** identified the two appellants, **Nduta** and **Pheobe** as the people who went to the land and chased the deceased.

There is also consistent evidence from **PW 2**, **PW 4** and **PW 8** that the four people chased the deceased up to the neighbouring home of **Njagi**. According to **PW 10**, the two appellants are among the people who chased the deceased up to his mother’s home and removed him from his mother’s kitchen and pulled him towards the road.

The learned Judge evaluated all that evidence and made firm finding of fact that the two appellants were among the people who killed the deceased. The trial Judge saw the witnesses and believed them. It has not been shown that the learned Judge misdirected herself in any way. Although the witnesses did not see the appellants attack the deceased after they removed him from the kitchen and pulled him towards the road, the deceased was found lying dead at the roadside with multiple injuries shortly thereafter. The appellants had chased the deceased from the land and they and two others were the people who were last seen with the deceased. That is a circumstance which irresistibly leads to the conclusion that the appellants are among the people who killed the deceased. The 1<sup>st</sup> appellant did not disassociate herself from the acts of the 2<sup>nd</sup> appellant. She was not a passive observer. On the contrary, she actively participated in the commission of the offence. There was ample evidence to show that she was a principle offender.

There is no doubt that the deceased was attacked because he had bought the land from the appellants' father and had caused the 2<sup>nd</sup> appellant to be evicted from the land. That fact alone cannot be an act of provocation in the circumstances of this case. We respectfully agree with the finding of the learned Judge that this was a clear case of cold- blooded murder.

On our own evaluation of the evidence, we are satisfied that there was overwhelming evidence to support the conviction.

In the result, the consolidated appeals are dismissed.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of August, 2006.**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**