



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: GICHERU, SHAH & OWUOR, J.J.A)**

**CRIMINAL APPEAL NO. 116 OF 2002**

**BETWEEN**

**1. FRANCIS MIAKA M'ITABARI**

**2. ISAAC KAENGA M'ITABARI .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from conviction and sentence of the High Court of  
Kenya at Meru (Mr. Omwitsa, Commissioner of Assize)  
dated 12th June, 2001**

**in**

**H.C. CR. CASE NO. 14 OF 1996**

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**DRAFT JUDGMENT OF THE COURT:**

At the hearing of this appeal on 29th October, 2002, Counsel for the appellants submitted that the appellants had admitted that they had killed M'ITOBU M'ITABARI, the deceased, but malice aforethought had not been proved. Consequently, the appellants were only guilty of manslaughter.

In convicting the appellants for the murder of the deceased, the learned Commissioner of Assize held that the circumstantial evidence of some of the prosecution witnesses such as **SUSAN MWAKACHUI (P.W.2), JOSEPH MIAKA KINYUA (P.W.3) and SAMUEL KALUMA MUTIGA (P.W.4)** corroborated the appellants' respective repudiated statements under inquiry which had been admitted in evidence after trial within a trial and which contained the details of the events leading to the killing of the deceased. According to the learned Commissioner of Assize, the appellants killed the deceased with malice aforethought and their conviction for the offence of murder contrary to **section 204 of the Penal Code** was inescapable. In his statement under inquiry, the first appellant is alleged to have said as follows:

"I am the above named Meru aged about 16 years. My father died some years ago. I remember on the 7th day of November, 1995 at around 10.00 p.m. I by the name of Francis Miaka M'Itabari, Jeremiah Gituya M'Itabari and Isaack Kainga M'Itabari jointly together while three went to the gate

of one M'Itobu M'Itabari where we took ambush waiting for M'Itobu M'Itabari.

The reason for us to ambush him was that we got annoyed with him for when our father died, he left a lot of property which he did not mention the heir nor did he leave it to any particular person. After the death of our father our elder brother whom we killed took everything for himself. He also refused to pay school fees for us and we dropped from school. After dropping from school, we started to get a lot of problems as the deceased refused to assist us.

Before killing him, we summoned the village clan elders and presented our grievances to them. He was summoned to the meeting and at first he refused to come and the meeting was put off. He said that he could not attend the clan elders' meeting and if we had any complaint to make we should go to the Chief's place. Together with the clan elders we presented our grievances to the Chief and the clan elders. They found out that we had the property left by the old man. Our elder brother refused completely to share the property with us. Then the elders told him to go home and think properly whether he will share out the property or not. Later even the Chief refused to help us. He refused to give us a letter to take to the D.O. We went to the D.O's office on our own. The D.O wrote a letter to the Chief advising him to help us. The Chief refused to help us completely. When we saw that we could not get any help, we decided to do one thing and that was to kill M'Itobu M'Itabari.

It was then on 7th November, 1995 at around 10.00 p.m. when we went to take an ambush and lay in wait for him. I had a "rungu" and Isaack M'Itabari had also a "rungu" while Jeremiah M'Itabari had a panga. We all attacked M'Itobu M'Itabari when he came at night. We all beat him until he died.

We then went to sleep at our home until the next day. Then we left and went to report the matter at Maua Police Station. We said that we had killed M'Itobu M'Itabari. That is all.

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The second appellant's alleged statement under inquiry was also as follows:

"I am the above named Meru male aged 15 years. I am a resident of the above named place. I am not married and I stay with my mother at Mituini village.

I remember on 7th day of November, 1995 at around 10.00 p.m. I, Isaack Kaenga M'Itabari, Jeremiah

Gitonga M'Itabari and Francis Miaka M'Itabari went to the home of M'Itobu M'Itabari where we laid an ambush for the said M'Itobu M'Itabari. I was armed with a club, Jeremiah had a panga and Francis Miaka was armed with a club too.

The reason why we went to lay the ambush was because our father died in 1988. When he died he left a lot of property. Our elder brother by the name of M'Itobu M'Itabari took everything for himself. We even left school as we could not go on since our brother refused to take care of us and also refused to pay the school fees. We actually lived in poverty and without any help from anyone. So we wanted to have a portion of the land on which we could cultivate and help ourselves. When we went to tell our brother who is the deceased about our need, he refused to listen to us. We took our complaint to the village elders. The elders summoned M'Itobu M'Itabari to appear before them but he refused. Instead of him coming before the elders he said he wanted to be taken to the area Chief who was his friend. We went to the area Chief and after the discussion, the Chief refused to help us. We then demanded a letter to take to the D.O.'s office since the elders had decided that we should be given a share of our land. The Chief still refused to give the letter. After finding that we could not get any help from anywhere, we then decided to take our own course. We then decided to kill M'Itobu M'Itabari who was the main cause of our troubles. So on the 7th November, 1995 we went to lay an ambush at his home. When he came we all attacked him after Jeremiah Gitonga M'Itabari stopped him on the face with a panga. We beat him until he died. We then left him there and went home.

On the next day we went to Maua Police Station where we reported that we had killed M'Itobu M'Itabari. We were then placed in the cells.

That is all to state."

In these statements under inquiry, the appellants respectively admitted in terms the offence of murder contrary to section 204 of the Penal Code for which they were jointly charged.

The evidence of P.W.2 who was the deceased's wife was that on 7th November, 1995 at about 10.00 p.m. while asleep in her house she was awakened by screams and noise of something that was being struck from the gate to their homestead which was about 10 metres from the house in which she had been sleeping. She recognised the screams as those of her husband, the deceased. She went to the gate and found her husband already dead. At the scene of crime she found a hoe handle near the deceased's body. The deceased had several head injuries with brain matter oozing out which, according to the doctor who carried out the post-mortem examination on the body of the deceased at Maua Hospital Mortuary where it had been taken from the scene of crime, comprised of crush fractures of the right occipitoparietal skull bones and the right frontal skull bone. These crush fractures had caused crush injuries to the brain matter which was the cause of the deceased's death. According to P.W.2. who had been married to the deceased for 13 years and had 5 children with him, on the material night there was bright moonlight. This was corroborated by P.W.3. who saw the appellants and others from where he was guarding a "miraa" "shamba" which was neighbouring that of the deceased. According to this witness, the appellants and others who were all brothers and whom he had known since their childhood were armed with "pangas" and "jembe" handles. About five minutes after they had pulled him from where he was standing guardian the "miraa" "shamba", he heard screams from the direction of the deceased's homestead. He ran towards that home and found the appellants and others beating the deceased. He was chased away by them and ran towards the deceased's homestead to inform his wife. Already the deceased's wife - P.W.2. was on the way towards the gate to their homestead in response to her husband's screams. They both found the body of the deceased lying about two feet from the gate to his homestead with the injuries mentioned earlier in this judgment and a "jembe" handle near his body.

According to P.W.2. , her father-in-law died in 1988. He had two wives, the elder wife being the mother of the deceased who was also the eldest son of his father. The appellants together with four others were the step-brothers to the deceased by his father's second wife. Before his death in 1988, the deceased's father had given some land to the deceased on which "miraa" was growing. This land was the subject of dispute between him and his step-brothers who claimed a share of the said land. The dispute over this land had been referred to the local elders and to the local chief but without being resolved. It was because

of this land dispute that the deceased's step-brothers threatened to kill him consequent to which threat he made a report at Maua Police Station. On 23rd September, 1995, P.W.4. presided over an elders' dispute resolution meeting relating to the land in question but in the absence of the deceased because, according to P.W.4. , he had reported to him that his step-brothers had threatened to kill him. In that meeting the deceased's step brothers were advised to go to the Land Office to confirm the ownership of the land in dispute but they expressed dissatisfaction and the first appellant is alleged to have said that they would get the land in dispute by force or kill the deceased. On 27th September, 1995 another meeting was convened with the local Senior Chief presiding. The deceased was in attendance. The Chief like P.W.4. told the deceased's step-brothers to go to the Land Office and ascertain the ownership of the land in dispute. They refused and the first appellant is again alleged to have told the deceased that they would kill him if they did not get the land in dispute. Less than two months later - 7th November, 1995 - the deceased was killed.

According to P.C. DANIEL MBUTHIA (9.W.8) , on 8th November, 1995 while on duty at Maua Police Station, the appellants and another made a report consequent to which he arrested them, searched them and placed them in the cells. The evidence of P.W.2, P.W.3 and that of P.W.4. which we have attempted to outline above is mainly what the learned Commissioner of Assize relied on as corroboration to the appellants' respective repudiated statements under inquiry which had been admitted in evidence after trial within a trial. This evidence together with the evidence of the arresting police officer - P.W.8. - is in consonance with the appellants' respective confessionary statements under inquiry as we set out towards the beginning of this judgment so that taken together, the appellants' conviction for the murder of the deceased was unavoidable. We can therefore find no merit in the appellants' appeal and save that they should have been sentenced to be detained during the President's pleasure under **section 25(2) of the Penal Code** and not under **section 17(1) of the Children and Young Persons Act** , Chapter 141 of the Laws of Kenya (now repealed) and we so order, the same is dismissed.

**Dated and delivered at Nyeri this 20th day of December, 2002.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**