



IN THE COURT OF APPEAL

AT NYERI

CORAM: GICHERU, SHAH & KEIWUA, J.J.A.

CRIMINAL APPEAL NO. 115 OF 2002

BETWEEN

1. PETER GACHOKI NJUKI

2. ANTHONY MBOGO NJUKI

3. OBED KARIUKI

MUTHIKE.....APPELLANTS

AND

REPUBLIC.....
.....RESPONDENT

(Appeal from a conviction and judgment of the High Court of Kenya at Nyeri (Juma, J) dated 25/11/99

in

H.C.CR.C. NO. 21 OF 1998)

JUDGMENT OF THE COURT

The appellants, **Peter Gachoki Njuki** and **Anthony Mbogo Njuki**, were found guilty and convicted by the High Court sitting at Nyeri (Juma, J) upon an information which charged them and one **Obed Kariuki Muthike** (who is now dead) with murdering **Patrick Kariuki Mwangi** (the deceased) on 22nd April, 1997 at Njoguini village in Kirinyaga District of the Central Province, contrary to Sections 203 and 204 of the Penal Code (as read together), and were duly sentenced to death. The assessors did not support the learned Judge and we will advert to this factor later on in this judgment.

On the night of 22nd April, 1997 **Robert Mugo Muthike (PW1)** (Robert) was asleep in his house at Njoguini village. So was the deceased. At about 1.00 O'clock in the morning Robert heard the voice of **Peterson Gachoki Njuki** (the first appellant) calling upon him to open the door to enable him to "remove his thing" meaning re-acquire his property. These persons were all neighbours. When Robert refused to open the door the three appellants forced open the door and entered the house. Robert was told he was to be taken to the sub-chief of the area. He was allowed to call his mother. When they all reached the gate of

one Patrick Ndegwa's house the first appellant slapped Robert. His (Peterson's) mother then came out with a 'panga'. Peterson snatched the panga from his mother and started beating Robert whilst the deceased was held by the other two appellants. The third appellant then took out a whip from his pocket and started whipping Robert and the deceased. They were beaten and led to the gate of **Ndungu Ndegwa** from the gate of **Patrick Ndegwa**. They were being accused of having stolen a pig allegedly belonging to the appellants. Although Robert offered to pay for the pig the appellants continued beating him. They were then taken to the home of **Judy Kimotho**, were laid bare and beaten. Eventually the deceased was taken away by his people. The appellants then ran away. Robert was hospitalized for 4 days. The deceased died at the hospital. What we have said so far is Robert's version of events. When cross-examined he denied being beaten up by a mob of angry villagers.

Philis Wanjiru Mwangi (PW2) (Philis) lived next door to Robert. That night she heard screams. On coming out to ascertain the cause of the screams she found the three appellants and the mother of first appellant beating up Robert and the deceased. Philis said that first appellant had a whip, his mother had a panga and Ndwigwa also had a panga. She knew all these persons. She said she saw them as the night was moon-lit. She also recognized them by voice. She denied that the villagers were beating up Robert and the deceased. She confirmed that it was raining, thus changing her earlier version of there being moonlight.

Louis Muthoni Murindo (PW3) confirmed more or less the version of events as narrated by Robert & Philis. **Luka Gachoki Mwangi (PW4)** also similarly confirmed the version of events as narrated by others. Luka did not accept a suggestion by defence counsel to the effect that the deceased and Robert were subjects of mob justice. **Joseph Mburia Mwangi (PW5)** also confirmed the earlier versions of events namely that the three appellants and the mother of the first appellant were involved in the beatings. He denied a suggestion by the defence counsel to the effect that the deceased and Robert were victims of mob justice. Similarly **Bernard Gichohi (PW6)** narrated that he saw the appellant and his mother Anna beating Mugo (Robert) and asking where the pig was; that **Chomba** and **Kariuki** (third appellant-now deceased) had sticks; they were beating up the two all over the body. He in fact asked them to stop the beatings and take the two to the sub-chief. He denied a suggestion that the population of the whole village was assembled there.

P.C. Edward Ndaru (PW7) arrested the appellant on 22nd April, 1997. He identified the body of the deceased to the doctor who carried out the post mortem examination. He escorted other accused persons to the same doctor on 17th July, 1997. The prosecution case was closed after the post mortem report was produced by P.C. Ndaru and which was marked as an exhibit without any objection from the defence.

In his unsworn defence the first appellant stated that he was not involved in the beatings: that he was engaged in the purchase and sale of French Beans. He said he had heard that the two, the deceased and Robert were beaten by the members of the public. He stayed away from the village in question for one month.

The second appellant also denied having been involved in the beatings and said he only heard about it. In other words, he said, he was elsewhere at the material time.

The three assessors found the appellant not guilty. The first assessor Kaguora opined that the evidence adduced did not prove who amongst the three appellants inflicted the fatal blow and that the evidence showed that offence of manslaughter was committed. The second assessor Muthui stated that although the three initiated the beatings they did not inflict the fatal blow. He said there was doubt on account of part played in the beatings by Edward Muriuki and the mother of the first appellant. He was of the view that a lesser offence of manslaughter was committed. The third assessor, Wangombe, found the accused persons not guilty; he stated that the weapons used to inflict the beatings were not produced.

It does appear that the first two assessors were at least satisfied that the appellants took part in the beatings but that there was no evidence who inflicted the fatal blow and that hence they ought to be found guilty of the lesser offence of manslaughter

The learned judge concluded that the state witnesses knew the appellants well as they were

neighbours. They knew and recognized their voices. He concluded that these witnesses must have known whom they were talking to all the time. But that is not all. All the prosecution witnesses stood by their version of events that is to say that they two were not victims of mob justice. All state witnesses pointed fingers at the three appellants and the mother of the first appellant, only, and no one else

Mr. Mahan who appeared for the two appellants began his arguments by pointing out the initial purpose for which the appellants went to Robert and the deceased was to look for a stolen pig and retrieve the same; that it was difficult to see at what point in time the 'melee' and beating up of the two started; that it was difficult to recognize voices; that voice test identification was not carried out; that it is possible the whole village was involved in the beatings up: that it was possible the two were beaten up by the villagers: that it was not possible to say if the appellants and the mother of the appellants were the only ones involved in the beatings; that at the material time, that is, between 2.00 a.m. and 4.00 a.m. when it was raining heavily, it was difficult if not impossible to say who was beating up who.

Mr. Mahan relied on the case of Dracaki S/O Afia & Another vs. R (1963) E.A. 363 to say that no common intention was established; that is to say there was no proof that the three appellants had formed a common intention to kill the deceased or cause a grievous harm to Robert. The facts of the Dracaku case are that the first appellant struck the deceased one blow on the head with a stick and the deceased fell to the ground. The second appellant then picked up a stick and www.kenyalawreports.or.ke 6 hit the deceased on the head as he lay on the ground. The medical evidence did not establish which blow caused the fatal injury or that both blows were fatal but the judge in convicting the appellants of the murder came to the conclusion that they had acted in concert to beat the deceased, and that the case fell within the definition of "common intention" in the then S.22 of the Penal Code. On appeal the then Court of Appeal for Eastern Africa reduced the charge to that of assault causing actual bodily harm. There are certain common factors. Which blow caused the death? It is not known. The post mortem report does not show that. However there are further factors namely that in the instant case the beatings continued for a long time. Not just two blows were given. The process of beating went on. What is the position in these circumstances? We will answer that soon enough.

Mr. Mahan also relied on the case of Augustino Orete & Others vs. Uganda (1966) E.A. 430, to say that it was not established that the appellants and others shared a common intention to kill or to do grievous harm and that therefore, their conviction for murder on the basis of such common intention could not be supported. It was held by the Court of Appeal for Eastern Africa in the Augustino case that the question whether the death of the deceased was a probable consequence of the prosecution of the unlawful purpose of beating suspected thieves was not considered by the court below and the assessors might well have advised that the death of the deceased arose fortuitously from the deliberate act of an individual, and that it was not a probable consequence of the prosecution of the unlawful common purpose. That court reduced the offence to that of manslaughter.

On a first appeal we are bound to re-evaluate the evidence and we have done so. We keep in mind that we must test the evidence on record in a trial against and for each appellant of course remembering that we did not see or hear the witnesses or the appellants and we must make our own assessment and findings as to credibility, facts and relevant law.

Having set out the evidence for the prosecution as well as the defence we conclude that it is not clear who gave the fatal blow but it is clear that the appellants were involved in mercilessly beating up the deceased, as well as Robert. The assessors, at least two of them, correctly advised the learned judge that they could not be sure who inflicted the fatal blow. They therefore, settled for the lesser offence of manslaughter and in our view they were right in so thinking.

Whilst in the Dracaku case (supra) the offence was reduced to that of assault causing actual bodily harm we are of the view that in this case the length of time taken up in the beatings and the severity thereof, as opposed to two blows, calls for a conviction of manslaughter contrary to section 205 of the Penal Code.

We accordingly allow this appeal, quash the conviction for murder, set aside the sentence of death

and substitute in the case of each appellant a conviction of the offence of manslaughter contrary to section 205 of the Penal Code. As to sentence we take into account that the appellants have been in custody for five and a half years. We must take into account the fact that the beatings went on for a considerable time and the same were merciless. We sentence each appellant to imprisonment for a term of seven years from 25th November, 1999.

Dated and delivered at Nyeri this 13th day of December,

2002.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

M. Ole KEIWUA

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR