



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL CASE NO.6 OF 2002

REPUBLICPROSECUTOR

VERSUS

1. JOHN MWANGI MAINA ALIAS) MUNAA

2. ROBERT MWAURA WAITHERA).....ACCUSED

JUDGMENT

The two accused persons are charged with murder contrary to Section 203 as read with Section 204 of the penal Code. The particulars of the offence are that on the 7th March, 2001 at Majengo Estate in Thika District of Central Province they jointly murdered **JOB MWANIKI KIHARA**.

Briefly the prosecution case is that on the 7th March 2001 at around 9 p.m. the deceased and PW3 Lawrence Chege went to Wanyua to take drinks. They left at around 10.45 p.m.

On their way home they were attacked by the accused persons who stabbed the deceased on the chest which injury caused his death. The matter was reported to the police who came and collected the body from the scene and later the accused persons were arrested and charged with this offence.

In order to prove its case the prosecution called 8 witnesses. PW3 Lawrence Chege who was with the deceased at the material time in his evidence told the court that the deceased was his neighbour at Majengo estate. On the material date they decided to go to Wanyua Bar to take drinks where they stayed up to about 10.45 p.m. On their way home they met with the accused persons who attacked them. First they attacked him and robbed him of Shs.400/=. While they held him the deceased shouted at them asking them to release him. When they were done with PW3, they turned to the deceased who accused kicked on the stomach and he fell down. When accused stood up he became furious and drew a knife and stabbed the deceased on the chest. He was able to recognise the two accused persons whom he knew well and they were from the same estate. He rushed to get a taxi to take the deceased to the hospital but when he arrived with the taxi he found the deceased had already died. The matter was reported to the police who came and collected the body. The attack was also witnessed by PW1 ISIAH MWANGI who in his evidence told the court that on the material date at around 11 p.m. he had just arrived from a funeral in company of his wife. When reached his gate he opened and entered.

But before he entered the house he heard screams from the road nearby. He opened the gate and saw the accused attacking the deceased. He flashed a torch and saw when the deceased kicked accused and he fell down and when accused stood up he drew a knife and stabbed the deceased on the chest. He was able to see and recognise the accused well whom he had known before by names. The accused ran away. They

gave the names of the accused persons to the local vigilante who later managed to trace the accused and arrested them and took them to the police station where they were rearrested by PW5 NO40271, PC DAVID NZIOKA and PW6 NO.75662 PC FRANCIS NJOGU and were charged with this offence.

The doctor who performed the post mortem on the body of the deceased formed opinion that the cause of death was due to a stab wound on the chest due to a sharp object.

Both the accused persons deny the charge. Accused 1 JOHN MWANGI MAINA in his defence told the court on the material date the 7th March, 2001 he closed his business at around 9 p.m. and went to his room. He left his room and went somewhere and at about 11 p.m. he went to drink and then went back to his room and slept. Later at a time he could not recall because he was asleep. KANU YOUTH WINGERS came to his house and arrested him and took him to the police who rearrested him and placed him in the cells.

Accused 2 ROBERT MWAURA WAITHERA in his defence denied the charge and told the court that on the material date the 7th March 2001 he left his place of work at around 7 p.m. and took a *matatu* and went to a place called Holy Fellowship to see his mother but she was not in. He waited for about 1 and a half hours and decided to go away. He arrived at his house at about 9 p.m. and went to sleep.

Later while asleep KANU YOUTH WINGERS came to his house and arrested him and took him to the police who rearrested him and placed in custody and was later charged with this offence jointly with accused 1.

It is upon the prosecution to prove the charge against the accused persons as required by the law. Section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. It is the duty of the prosecution to prove the act of killing and malice aforethought. The accused persons were positively identified by recognition by PW3 Lawrence Chege who was with the deceased and PW1 Isaih Mwangi who flashed a torch after he heard screams and saw the accused well. The names of the accused were given to the KANU YOUTH WINGERS who looked and arrested the accused persons the same night and were taken to the police station.

There is evidence that accused 1 stabbed the deceased after the deceased had kicked him on the stomach and forced him to the ground. There is no evidence that the accused had earlier formed the intention to murder the deceased.

This is a circumstance that would reduce the charge of murder to that of manslaughter. The 3 assessors returned a unanimous verdict of guilty of manslaughter for accused 1 and a verdict of not guilty for accused 2.

But I disagree with their verdict.

Both the accused persons were together and had a common intention to commit a crime and I therefore find both accused guilty of manslaughter contrary to Section 202 as read with Section 203 of the penal Code and convict them accordingly.

Delivered and dated this 28th day of October, 2004.

J.L.A. OSIEMO

JUDGE