



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 97 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

HENRY KAILUTHA NKARICHIA.....1ST ACCUSED

AMBROSE MUNGATHIA NKARICHIA.....2ND ACCUSED

JUDGMENT

1. Henry Kailutha Nkarichia and Ambrose Mungathia Nkarichia (“the accused”) were charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya*. It was alleged that on 5th November, 2005 at **Kisima Location in Buuri Sub County** within Meru County, the accused jointly murdered **Stanley Nkarichia**. He did so and the elders dispersed to their respective homes.

2. The accused denied the charge and the prosecution called seven (7) witnesses in support of its case.

3. The prosecution case was that on 15/5/2005, the deceased called **David Nkiri (PW2)** to his home with five other elders and informed them that he wanted to give his sons, the accused, land. The two were living within the deceased’s homestead. He did so and the elders dispersed to their respective homes.

4. On 5/11/2005 at about 5 pm, **Derefina Nkatha (PW1)** was in her kiosk which is about 800 metres from the deceased’s home. The 2nd accused came to buy cigarettes in the company of one **Reuben Mwenda**. The 2nd accused informed **PW1** that he would kill the deceased before the deceased could sell his land. The witness was not happy with what she heard and she chased them away. Later that night at about 11 pm, she heard screams coming from the deceased’s home. She did not know what happened until the following day when she learnt that the deceased’s house had been burnt, the deceased killed and his wife taken to hospital.

5. On the material night, **Margaret Karuki (PW3)** was sleeping with the deceased when he awoke her at about 11 pm and informed her that the house was on fire. The deceased led her to the door but they found it locked. He kicked it open and went outside but fell down a few metres from the door. She then saw the 2nd accused, assault the deceased with a club which threw him to the ground. The 1st accused then cut the deceased with a slasher on the neck. Thereafter, the 1st accused hit her with a piece of timber on her right shoulder and she lost consciousness. She would gain consciousness at Meru General Hospital after about a week. She got serious burns on her waist downwards whereby it took her about four months to get healed and be discharged from hospital.

6. According to her, she screamed and neighbours came led by **Kaura and Johana**. The 1st accused then joined the rest of the neighbours in putting off the fire and in the morning, he went to the Police to report the incident. She denied having attempted to sell the deceased’s land in 2007 to **Moses Kirimi** and **Wilson Murori**. She confirmed however, that she was a witness in **CM’s Cr. Case No. 1705 of 2015** where the children of the 2nd accused had been charged for destroying the property of **Moses Kirimi** which he had planted in the deceased’s land occupied by the family of the 2nd accused.

7. The step brother of the deceased, **John Kariko (PW4)** recalled having received a call on the same day from his nephew, **Benjamin Chebere**. Chebere informed him that the deceased had been killed and his house burnt. That it was the accused who had killed his step brother. The following morning, he and others went to the deceased’s homestead and found the smouldering fire and blood on the ground. They went to report the matter at Subuiga Police Station where they found the 1st accused in the cells. The 2nd accused went into hiding but was arrested after five days. He later identified the body for post-mortem at the Meru Teaching and Referral Hospital Mortuary.

8. He told the court that the deceased had earlier on in that year informed them that the accused had made threats over his life and demanded land from him. He asserted that the accused were not sons of the deceased.

9. **PW5 Joseph Mikwa**, recalled how he accompanied **PW4** to the deceased's home on the day following the incident. He also asserted that the accused were not children of the deceased as their fathers were still alive. **Dr. Maria Mwangi (PW6)**, a medical officer attached to Meru Teaching and Referral Hospital produced the post mortem report. The report showed that the body of the deceased had both external and internal injuries. It was opined that the cause of death was haemorrhagic shock.

10. **Mark Bundi (PW7)** testified on behalf of **Obadiah Rikura**, the investigation officer who had since retired. He told the court that from the investigation file, the investigations officer accompanied other police officers to the scene on the material night. They found the deceased's body near the door of the 1st accused's house. That the body had injuries which were inflicted by a blunt object and it had visible injuries on both the legs from the fire. **PW3** was at the scene and had bruises on the leg and right shoulder and was crying out for help.

11. The investigation diary showed that the 1st accused was arrested after he went to the police to report about the fire while the 2nd accused was arrested on 9/11/2005 in Laikipia County. Charges of arson and grievous harm were preferred against the accused but he did not know the outcome. One of the witnesses, **Gedion Kaura** had told the police that when he heard creams and rushed to the deceased's compound, he found five men including the 1st accused putting out the fire.

12. When put on their defence, the accused gave sworn testimony but called no witness. The 1st accused testified that on the material day, he was at home sleeping. That he was woken up by barking dogs. When he went outside to find out the reason, he found his father's house up in smoke. That it was raining at the time. He started screaming and get water to put out the fire. The neighbours and the 2nd accused came to assist in putting out the fire. He was at the time calling out for his father.

13. He later saw the deceased with injuries lying on the ground about 15 metres from his house. **PW3** was there and she started accusing he and the 2nd accused of the act. He went to report the incident at Subuiga Police Station where he was told to return the following morning. When he went in the morning, he was arrested at the instance of **PW3**. He took issue with the testimony of **PW3**, **PW4** and **PW5** that he and the 2nd accused are not children of the deceased. He concluded that the charges were a frame up by **PW3** and her cohorts who wanted to have them locked up and then take over the deceased's land.

14. The 2nd accused corroborated the testimony of the 1st accused. He told the Court that he and his co-accused had no reason to kill the deceased as he had given them their portions of land and settled them. That on the material night, he was sleeping when he heard screams. Upon going outside, he found his father's house on fire. He joined them those present to put out that fire. The following morning, he went to Timau to tell his uncle about the tragedy. His uncle advised him to report the incident at Timau Police Station. When he went to that station to report the incident, he was arrested and kept in the cells for 3 days when police officers came from Subuiga Police Station to collect him. He denied killing his father and stated that the charges were framed by **PW3** and those who want to grab their father's land.

15. The court has carefully considered the evidence on record and the submission of Counsel.

16. The accused face a charge of murder. From the definition of murder in **section 203 of the Penal Code**, the prosecution must prove the four ingredients that constitute the offence beyond any reasonable doubt. These ingredients are; *the fact of the death of the deceased, the cause of death, that the death was caused by an unlawful act or omission on the part of the accused and that the accused had malice aforethought*.

17. On the first and second ingredients, the prosecution case was that on the material night, **PW3** was sleeping with the deceased when the deceased woke her up. The house they were sleeping in was on fire. The deceased led her out. However, when they reached outside, the deceased was assaulted and sustained injuries from which he died. **PW4** would later identify the body at the Meru Referral and Teaching Hospital Mortuary.

18. The post-mortem report (**PExh.1**) produced by **PW5** established that the cause of death was haemorrhagic shock resulting from massive harmoperitorium secondary to a ruptured spleen.

19. From the foregoing, the prosecution was able to prove the fact and the cause death of the deceased beyond any reasonable doubt.

20. The next issue is whether the death of the deceased was caused by an unlawful act or omission on the part of the accused. **PW1** told the Court that earlier on that day at about 5 pm, the 2nd accused came to her kiosk with one **Reuben Mwenda** and told her that he would kill the deceased before he could sell some piece of land.

21. Later that night at about 11 pm, the deceased woke up **PW3** and told her that the house they were in was on fire. The deceased led her out only to fall down immediately he kicked the door open as it was locked from outside. While on the ground, **PW3** saw the 2nd accused hit the deceased with a club. The 1st accused then cut the deceased with a panga. The neighbours came and started to put off the fire and were joined by the 1st accused. She then passed out and only gained consciousness a week later at the Meru Referral and Teaching Hospital Mortuary. She was admitted for burns and remained in hospital for four months before being discharged.

22. **PW6** testified on behalf of the investigations officer who had since retired from the Service. He told the Court that, upon receiving the report that night, the then OCS of Subuiga Police Station visited the scene with other officers. They found the body of the deceased lying next to the house of the 1st accused. That the 1st accused was arrested the following day when he went to the Police Station to report an incident of fire. He was pointed out by **PW3**. The second accused was arrested days later in Laikipia County where he had gone hiding.

23. In their defence, the accused stated that on the material night, they were sleeping in their respective houses. The 1st accused, whose house was near the deceased's house, heard dogs barking repeatedly. He went out and found his father's house engulfed by fire. He called for help and neighbours came to help in putting out the fire. It is then that he saw the deceased lying about 15 metres from his house. With the help of

others, they removed the deceased from the rain and sheltered him at his house.

24. He went to report the incident at Subuiga Police Station but was told to return the following morning when however, he was locked in at the instance of **PW3**. He maintained that he was being framed so that **PW3** and his uncles, **PW3 and PW4** can take their land.

25. The second accused heard the screams and when he went outside, he found his father's house on fire. He joined those present in putting out the fire. The following day he went to his uncle at Timau and told him about the incident.

26. The central issue in this case is the recognition and/or identification of the accused. The law relating to identification is clear. The courts have variously pronounced themselves on this issue. In **Francis Kariuki Njiru & 7 Others v Republic [2001] eKLR**, the Court of Appeal held:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error".

27. In **Donald Atemia Sipendi v. Republic [2019] eKLR**, Mativo J held:-

"To determine whether identification is truthful, that is, not deliberately false, the Court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not a honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before".

28. Finally, in **Toroke v. Republic [1987] KLR, 204**, the Court of Appeal held:-

"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification".

29. In the present case, the only eye witness was **PW3**. The case turns on her identification and recognition of the accused. She came to the deceased's homestead as a wife in 2002. She had been in that homestead for 3 years by the time of the incident. She must have therefore been familiar with the two accused.

30. On the material night, it had been raining from 7 pm. The incident occurred at about 11:00pm. When she and the deceased came out of the burning house, it was still raining. There was darkness. She and the deceased must have been terrified for by waking up and finding the house engulfed by fire.

31. Her testimony was that the moment they stepped outside and the deceased fell down, he was assaulted by the accused. That she used the light from the fire flames to identify the attackers. The accused did not speak to them and neither did she or the deceased speak to the accused. She only identified them from the light coming from the fire flames.

32. This Court entertains doubt at the recognition by **PW3**. She and the deceased had just emerged from a scaring event of fire. They must have been in panic mood especially when they found that the door had been locked from outside. She admitted that the fire had started from the door through which they used to come out. They had emerged from an environment that must have been engulfed by smoke. The conditions for identification must have been very difficult in the view of this Court.

33. Then, the contradiction between her testimony and that of **PW7** as to the events that followed the incident does not add confidence to her testimony. She stated in her evidence in chief that after the accused had assaulted the deceased, the 1st accused assaulted her on the right shoulder. She then fell unconscious and regained consciousness at Meru Referral and Teaching Hospital one week later.

34. On his part **PW7** stated that it was **PW3** who pointed out the 1st accused to the then Subuiga OCS the morning after the incident while at the Subuiga Police Station. The 1st accused confirmed that it was **PW3** who pointed him out for arrest when he returned the following morning to Subuiga Police Station to report the incident. Despite the Court issuing Summons to the Superintendent of Meru Referral and Teaching Hospital to produce the records of **PW3**'s admission to that hospital at the material time, nothing came out of it.

35. The Court stepped her down for the prosecution to procure the evidence of her having been admitted and treated at the said facility. However, the prosecution did not come up with any evidence. The letter from that hospital dated 4/12/2018 and addressed to the Deputy Registrar of this Court read in part: -

"After searching through records, we have established that there was no patient named Margaret Karuki who was admitted on the started (sic) date. However, the admission register has a patient named Margaret Johana who hailed from Katheri Location, Nkiriri Sub location who was admitted on the same date as the one stated".

36. **PW3** did not tell the court that her other name was Margaret Johana. Further, she told the court that she hailed from Kisima in Subuiga and not Katheri. The two locations are far apart.

37. It is clear from the foregoing that, **PW3** was lying to the Court when she stated that she was injured and that she sustained burns from which she was admitted for 4 months in a hospital that disclaimed her. She was at the Subuiga Police Station the morning following the incident and not in hospital.

38. The defence of the accused, which was never challenged, was plausible. That they heard the barking of dogs (1st accused) and screams (2nd accused) outside. When they came out of their respective houses, they found their father's house engulfed with fire. They went to try and put off the fire only to find that their father was lying about 15 metres from the burning house with injuries. They removed him from the rain and put him to shelter in the 1st accused's house.

39. There are several issues that remained unanswered. Was there any forensic analysis undertaken on the fire debris to ascertain the cause? Could it have been that the deceased was murdered in the house then brought outside in the rain then the house set on fire to destroy evidence?

40. The post-mortem report did not show that there was any soot in the deceased's lungs. Neither did the body have any burns. This means that the deceased came out of the fire unscathed. How would this be possible when **PW3** stated that the house had been engulfed with fire when they were coming out and that she was badly burned from the waist downwards? Why would the fire have spared the deceased and only concentrate on **PW3**?

41. Why would the accused murder their father, who is said in the testimony of **PW2**, to have given them land (2 acres each) on 15/8/2005? Is it plausible that they would kill their father in the presence of their step-mother (with whom there was no love lost) and leave her alive? What would have been the natural instinct and consequence if it be true that **PW3** witnessed them kill off their father in her presence? It would be difficult to believe that they would have only hit her on the shoulder and leave her to live.

42. One other thing that came out strongly and was proved beyond reasonable doubt is that; immediately after the deceased was murdered and the two accused placed in custody, **PW3** and the deceased's step brothers moved with speed to take over the deceased's land both at Kisima and Tigania and dispose off the same. There was evidence and **PW3** admitted in her statement to the police in respect of **Meru CM Cr. Case No. 1705 of 2015**, that she had sold the land which the deceased had divided to the accused during his lifetime, to **Wilson Murori Kithinji, Moses Kirimi and James Muriungi**.

43. While all the witnesses had told the Police that the two accused were children of the deceased, at the trial, the step brothers of the deceased and **PW3** were only out to show that the two were not children of the deceased. That showed the bad faith with which their testimony was. **PW2**, an independent witness and a long time neighbour of the deceased was firm that he had known the two to be sons of the deceased.

44. To this Court, it came out clearly and proved beyond peradventure that; the two accused were the children of the deceased from his first wife whom he had divorced when they were young; the deceased had settled the two accused on 2 acres each in his 5 acre farm; **PW3** lived with the deceased for only 3 years and they did not have any child together. People desirous of taking over the deceased's land murdered him and in order to disinherit the two accused of the same framed them with the current charge. They proceeded to have the families of the two accused evicted from the land at Kisima while the deceased's land in Tigania is said to have already been sold.

45. Accordingly, I find that the prosecution has not proved its case against the accused to the required standard. I find the accused innocent and I acquit them of the offence of murder.

Orders accordingly.

DATED AND DELIVERED AT MERU THIS 30TH DAY OF JANUARY, 2020.

A. MABEYA

JUDGE