



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 6 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

MARWA MAGIGE KIEUSI.....1st ACCUSED

MAKONGE WANGWI MARWA alias

MOKONGE WANGWI MASELI.....2nd ACCUSED

JUDGMENT

The two accused, namely **Marwa Magige Kieusi and Makonge Wangwi Maseli**, accused 1 and accused 2 respectively, are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 5th and 6th June, 2020 at Karosi Village in Bukira East Location, Kuria West, within Migori County, jointly murdered Thomas Moroga Makuri alias Thomas Moronga Makuri. The accused denied the offence and the case proceeded to full trial.

The State was represented by prosecution counsel **Mr. Kimanthi**, while the defence was led by Ms. Okota and Mr. Singei for Accused 1 and accused 2 respectively.

PW1 Denis Mayeka Mogaka, a friend to the deceased's family recalled that on 6/6/2020 about 7:00 a.m. the deceased's wife **Samwela Makuri PW2**, who was residing in Nairobi, called him and requested him to go to check whether the deceased was at his home. PW1 proceeded to the home, knocked on the gate but got no response as the gate was locked with a padlock from inside. He went to the deceased's mines where he found the deceased's servants, **Ayub Magubo PW3** and **Musa Wambura, PW6**, who went with him to the gate. They knocked but there was no response. PW1 called PW2 again and PW2 allowed them to break part of the fence and enter the home. On entering, there were padlocks on the doors. At the servants' quarters the door was open but it was empty and the two workers Marwa and Makonge, Accused 1 and Accused 2 were not there. PW1 informed PW2 what they found and she instructed him to break the padlocks to the doors just in the event the deceased had been taken ill. At the door, they noticed blood stains and on the path towards the tank and there was a trail of blood leading to the tank. He informed PW2 and went to report at Kehancha Police Station. In company of the police officers, they went to the Servants quarter where they found a bag with keys and the keys opened the deceased's house. On opening the said house, they found a lot of blood at the entrance. They also found the deceased's phone which was smashed and later found the deceased's body in the water tank. On being removed from the tank, they noticed that the body had injuries to the head, back and head. PW1 said he had known the accused persons for one month when the deceased introduced them to him as his workers.

PW2 recalled that on 5/6/2020, she talked to the deceased in the evening about 5:00 p.m and they agreed to talk about 10:00p.m as they usually did. She called at 10:00 p.m but the deceased could not be found on phone. On 6/6/2020 she called PW1 to go to the home to find out what had happened; that PW1 kept updating her of which he had found and she later instructed him to break the fence and enter the home. He later informed her that they had found the deceased in the water tank and called police. She travelled home from Nairobi on 7/10/2020 and found the deceased's body at the mortuary. On 8/6/2020, she identified the deceased's body before post mortem was done. She found that household things were scattered all over the house and blood all over the floor and walls of the house.

She denied having met the accused persons because of the Covid restrictions on travel, but the deceased, had informed her that he had hired the two Accused on 10/5/2020 from Tanzania. She said that the deceased had not complained of any disagreement with the Accused persons.

PW3, Ayub Magupo Kibicho, an employee of the deceased, identified the Accused persons as his neighbours in Tarime Tanzania; that the deceased had sent him for workers and he brought the two accused to the deceased's home on 10/5/2020. He said that the Accused persons were the only workers in that home at the time; that to enter the deceased's compound, one had to knock at the gate and the deceased would come to check who was at the gate. He recalled how PW1 called him on 6/6/2020 about 2:00 p.m to accompany him to deceased's home. He confirmed that he was with PW1 and Musa (PW6) when PW2 authorized them to break the gate and enter; that they found drag marks which led to the water tank and there was a lot of blood on the tank. They called police, pulled out the deceased's body, from the tank, noted injuries on his head, hand and back. PW3 said that they did not find the workers, accused 1 and Accused 2 in deceased's home. The police found keys in a bag in the servants quarters and opened the house where they found blood splashed all over the house and deceased's smashed phone. PW3 called his wife in Tanzania to find out if Accused persons were there and she confirmed having seen them. He said he had last seen the accused persons on 4/6/2020 when the deceased sent them to him.

Post mortem on the body of the deceased was conducted by **Dr. David Keboye (PW4)** of Migori County Referral Hospital on 10/6/2020. He found that the deceased had sustained five (5) deep cut wounds on the head and the back. i.e A big wound on head, 15cm from frontal bone deep through to the left ear upto the occipital area; a cut through the left ear deep into the neck, deep cut on parietal area 10cm; A deep cut on the mandible from the chin upto the neck; Extensive cut through the thoracic vertebrae from T1 to T10 – 10cms and amputation of the left arm. PW4 formed the opinion that the cause of death was bleeding secondary to deep cut wounds on the head and the back.

PW5 CPL James Olango of DCI Migori, a scenes of Crime Officer was on 6/6/2020 requested to proceed to the deceased's home where he took photographs of what he was shown, an underground plastic water tank where the deceased's body was found; pit latrine where two blood stained pangas were found; the servants quarters where a brown carrier bag which contained blood stained piece of cloth and bunch of keys were found; pool of blood in the main house – kitchen and bed room where items were scattered. He took 30 close up view photographs of the items and the deceased's body, PEX 3 (1-30).

PW6 Musa Wambura was with PW1 and PW3 when they managed to enter the deceased's home and found the deceased's body in the water tank. He reiterated what PW1 and PW3 told the court. PW6 said he last saw the accused persons at the deceased's home on 5/6/2020. He confirmed that accused persons lived in the deceased's home but they did not get them in the home on 6/6/202.

PW7 Dalmas Kibet Kisang a Government Analyst based at Kisumu recalled that on 19/1/2020, some items, i.e cartilage and finger nails of Thomas Moranga; two pangas, a cream piece of cloth and swabs from the scene were submitted to their laboratory. On analysis, he found that the panga item B and C were highly stained with blood of human origin; that the cloth was heavily stained with human blood. He analysed the blood samples and the DNA profiles and found that the DNA in the blood samples matched the DNA samples of the deceased, Thomas Moranga. But the blood from the pieces of cloth belonged to unknown – male. He found nothing to connect the Accused persons to the crime.

PW8 PC Tonui Gilbert, the investigating officer narrated how the case was allocated to him. He visited the scene, was shown the deceased's body floating in the water tank. He also entered the deceased's house which was covered in blood all over the house and things thrown all over; that the deceased's workers could not be traced. He took possession of the keys, carrier bag, as exhibits and he called the scenes of crime officer PW5, to document the scene. On 7/6/2020, when family members came to the home, they spotted pangas in a pit latrine which were also retrieved. He attended the post mortem and took samples of finger nails and cartilage from deceased for analysis. He prepared the exhibit memo form and forwarded the pangas, cartilage, finger, nails, swabs from the scene, and carrier bag, to the Government analyst, PW7. On 18/6/2020, he was informed that one of the suspects had been arrested in Tanzania and on 21/6/2020, the suspect was handed to him i.e. Accused 1. On 11/8/3 he was instructed to proceed to Namanga where Accused 2 had been detained and he took him to Kehancha Police Station where both accused were then charged. They were certified fit to plead.

The Accused were called upon to defend themselves after the close of the prosecution case.

Accused 1 Marwa Magige Kieusi, stated on Oath that he hails from Tarime in Tanzania and on 10/4/2020, **Ayub PW3** took him to the home of the deceased; that they sat at the gate of the deceased's home to discuss the job to be done which was weeding trees; that PW3 told him that nobody was allowed to live in that home and that he would work till midday and go to live at Kehancha; that he completed the work on 21/5/2020 and he went back home to Tanzania. He was suddenly arrested and taken to Tarime and then transferred to Kenya and charged with an offence he did not know about.

DW2 Makonge Wangwi Marwa also denied committing the offence he faces. DW2 told the court that on 9/4/2020, PW2 asked him if he was interested in working in Kenya and that on 10/4/2020 together with DW1 and PW3, came to the deceased's home; that the deceased met them at the gate, they talked and agreed on the work to be done; that deceased had no room in his home for them to reside but they had to look for a place to stay which they did. They used to come to work and go back to their residence. They worked till 21/5/2020, when the deceased paid them, they refunded Ayub his money and left for Tanzania; that he stayed there till 4/6/2020 when he got information that his mother's sister had died and he travelled to Morogoro on 6/6/2020. He had no fare to go back home and remained there helping his cousin with work till he was arrested.

Both counsel for he accused filed joint submissions on 2/11/2021 in which it was submitted that it was admitted by witnesses that the accused persons and the deceased enjoyed a cordial relationship and there is no proof of malice aforethought in terms of Section 206 of the Penal Code.

It was also submitted that there was no evidence to prove that the accused lived with the deceased in the same compound nor were they with him on 4/6/2020, 5/6/2020 or 6/6/2020; that there is no evidence to link the accused to the crime.

It was further submitted that the prosecution intend to rely on circumstantial evidence but that the evidence on record has not met the

threshold of circumstantial evidence that can be relied upon to convict. Counsel relied on the decision of **Ahamad Abolfathi Mohammed and Another =vs= Republic (2018)eKLR, Erickson Chengoli Wanyonyi =vs= Republic (2018) eKLR and Sawe =vs= Republic (2003) eKLR and GMI =vs= Republic Criminal Appeal No. 38 of 2011**. The court was urged to acquit the Accused.

Mr. Kimanathi, the prosecution counsel submitted that the deceased admitted to having worked for the deceased but denied having resided in the deceased's compound; that PW3 testified to seeing the Accused on 4/6/2020; that PW6 confirmed that both accused lived in the deceased's compound, that PW2 also confirmed that the accused lived with the deceased in his compound and worked as watchmen and that there is sufficient evidence to prove that the accused lived in deceased's compound till the date of his death; that the circumstances point to the accused persons as the culprits. Counsel relied on the decision in **Kipkering Arap Koske & Another (1949)EACA 135** which was echoed in **GMI =vs= Republic (2013)eKLR**. Counsel further urged that the accused lived with the deceased in the compound alone, and the fence was secure; that after the murder, the accused were no where to be found and that the gate was locked; that the circumstances of this case taken cumulatively form a chain so complete that there is no escape from the conclusion that it is the accused who committed the offence.

As for malice afterthought, counsel urged that the injuries inflicted on the deceased and efforts to conceal the body by throwing it in the water tank are evidence of malice afterthought.

I have now considered all the evidence tendered in this case and submissions of counsel. The accused persons face a charge of murder under Section 203 of the Penal Code. To prove the said charge, the prosecution has to prove beyond reasonable doubt the following ingredients:-

- 1) The death of the deceased;**
- 2) That the two accused caused the death by their unlawful act or omission;**
- 3) That the accused possessed malice aforethought**

Death of the deceased:

The death of the deceased is not in issue. There is overwhelming evidence from PW1, PW3, PW6 on how they discovered the deceased's body in the underground water tank, with multiple head injuries, the hand and back. PW2 later identified the body to the PW4, the doctor, before post mortem was done. PW5 and PW7 also saw the deceased's body at his home. PW4 formed the opinion that the cause of death was bleeding secondary to deep cut wounds to the head and back. The injuries found on the deceased were not by natural cause but were inflicted by somebody.

Whether the accused persons caused the death

This case turns on circumstantial evidence because nobody witnessed the deceased's murder. The burden always rests on the prosecution to prove its case beyond reasonable doubt and it is no easy burden to do so as it was held in **United States =vs= Smith 267 F. 3d 1154**. If the court finds that there is any doubt in the prosecution case, it must return a verdict of not guilty.

Blacks Law Dictionary 10th Edition defines circumstantial evidence as:

“Evidence based on inference and not on personal knowledge or observation. All evidence that is not given by eye witness testimony.”

In the case of **Ahamed Abolfathi Mohammed and Another =vs Republic 2018 EKLR**, the Court of Appeal stated as follows:-

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilty of an accused person just as direct evidence. Way back in 1928 Lord Howard CJ stated as follows of circumstantial evidence in R v Taylor Weaver and Donovan (1928) CR APPEAL R 21

“It has been said that the evidence against the applicant is circumstantial. So, it is but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

In **Musili Tulo =vs= Republic Criminal Appeal No. 30/2013** the court laid down the test to be considered whether or not circumstantial evidence laid before the court can support a conviction. The court said:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. Appl. No. 32 of 1990, this court set out the conditions as follows:

‘It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;

iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else'

In the case of **Sawe vs Republic** the court added on the test that:-

“In addition, the prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt.”

I now wish to examine the evidence to determine whether it met the above tests. There is no doubt that PW3 brought the two accused from Tanzania to work for the deceased. It is admitted that the accused arrived at the deceased's gate on 10/5/2020. The accused's defence is twofold, that by the and 6th June, 2021, they were no longer working for the deceased but had left for Tanzania on 21/5/2020 and secondly that they never lived in the deceased's home but only worked there and had rented a house at Kehancha. According to PW3, he had never entered the deceased's home before because whenever one knocked at the gate he would come to the gate. He stated that both Accused lived in the deceased's home and when one knocked, the accused would come to the gate, see who it was and then go to call the deceased. PW3 told the court that he had seen the Accused on 4/6/2020 when the deceased sent them to him. PW2 the deceased's wife though, she had never seen Accused persons because of the Covid restrictions on travel, she knew from the deceased that PW3 had brought two workers to the deceased and that the deceased had liked the work of Makonge Accused 2. She said that they had been with the deceased for about twenty five (25) days. PW6 also confirmed that the accused lived in the deceased's home and worked as watchmen as well as taking care of the chicken. PW6 also said that Accused used to come to draw water from the home where he worked and that he had seen them last on 5/6/2020. Having heard the evidence of these three witnesses, I have no doubt in my mind that the Accused were still working for the deceased as of 4th June and 5th June 2020. Their defence that they had left by 21/5/2020 is not truthful I believe PW3 who brought them from Tanzania would have known of it and in any case, PW3 saw them on 4th June 2020 while PW6 saw them on 5th. There is no reason why PW3 and PW6 would frame the accused persons.

Both PW3 and PW6 told the court that they knew the Accused person as good people and that is why PW3 brought them to work for the deceased. As to whether or not they lived in the deceased's home, or slept at Kehancha, is neither here nor there because the fact is that the accused had access to the deceased's home in order to do their work. I find that the accused persons had an opportunity to commit the offence and I hereby dismiss the accused's defence that they were in Tanzania as of 25/5/2020. If the Accused lived in Kehancha and did not commit the offence, then they should have been found in Kehancha. I find that the accused fled the deceased's home once they committed the offence and that is why Accused 1 was back in his home in Tarime while Accused 2 had gone very far off in Morogoro, the other extreme part of Tanzania.

Though the evidence on record is that the Accused persons had a good working relationship with the deceased, PW2 and PW6 told the court that the deceased had only complained of Marwa not being a good worker but praised passed Accused 2 to PW2. It is only the Accused persons and deceased who know what transpired before the fatal attack.

I must point out that the investigating officer in this case conducted shoddy investigations. Although he collected exhibits from the scene which were blood stained, yet he did not take any blood samples from the accused for profiling, so that it was never determined whose blood it was on the carrier bag. It beats logic what the purpose for collecting blood samples from the deceased and the exhibits that were recovered was.

Whether there was malice aforethought

Malice aforethought is defined under Section 206 of the Penal Code as

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) an intention to commit a felony;

d) an intention by the act or commission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In the case of **Rex vs Tubere s/o Ochen (1045) 12 EACA 63**, the East African Court of Appeal held that :-

“In determining existence or non existence of malice, one has to look at the facts proving the offence the offence used, the manner in which it is used and the part of the body injured.”

All the witnesses who saw the deceased's body narrated how he had sustained deep cut wounds, PW4 specifically found five (5) deep cut wounds on the head, the wrist was chopped off, and other injuries to the back. After killing the deceased, the body was dragged and thrown in the water tank, trying to conceal the murder. The injuries that were inflicted on the deceased were clearly meant to end his life and the accused's conduct of fleeing the home after commission of the offence is proof of malice aforethought.

In the end, I find that the facts are firmly established that the accused persons were working for the deceased as of 5th June 2020 and lived in his home. The deceased was murdered on the night of 5th and 6th June, 2020 and the body found on 6/6/2020 and the accused were nowhere to be found on 6/6/2020 till they were traced back in their home country Tanzania. I find that the circumstances unerringly point at the guilt of the accused persons and the chain of events cumulatively point to the accused as the murders. I find that the circumstantial evidence meets the threshold required to convict the accused of the offence of murder, I find both accused guilty of the offence of murder as charged and convict them accordingly.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 24TH DAY OF FEBRUARY, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Kimathi for the Respondent.

Mr. Singei for Accused 2 and holding brief Ms. Okota for Accused 1

Appellant present.

Nyauke Court Assistant