



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 60 OF 2014**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**PETER KARUTI MUCHUI.....ACCUSED**

**JUDGMENT**

1. On 03/11/2014, **Peter Karuti Muchui (“the accused”)** was arraigned before this court with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code**. The particulars of the offence were given to be that on 11/04/2014, at Kiremu Village, in Tigania East Sub County within Meru County, the accused murdered **John Muchui M’Muguongo**.

2. The accused denied the charge and at trial the prosecution called 6 witnesses to prove its case. **Ann Nyambura (PW1)**, the wife to the accused, in her evidence said that she arrived home from the farm at about 6.40 pm. While in her house preparing dinner, she heard her mother in law screaming, calling her to go and witness what had happened. She answered to the call, went and found her father in law lying down but when she tried to lift him, he was weak and kept on falling down again and again. She finally told her mother in law that they should take him to the hospital. Since it was at night, they called a *bodaboda* owned by one Mr Mutuma and took the deceased to Muthara dispensary where he was attended to and discharged. They took him to the home of a sister called Muroru who lived near the hospital. She could not see whether he had been injured but he was smelling alcohol. PW1’s husband, the accused, was at work on that day and she did not know whether he met his father. She did not see any blood at her door and thought he fought and fell on rocks.

3. **Joyce Karimi (PW2)**, the accused sister, was on the material day called by PW1 at about 8.00 pm and told that their father had fallen down and they were planning to take him to the hospital. Since it was at night, she promised to go there the following morning but upon calling PW1 that morning, she was informed that their father had died and they should meet at home. She went there and found PW1, their mother, PW5 among other people but not the accused, DW1. She also did not see the body as it was not yet home.

4. On the material day at about 10.00 pm, **George Muithya (PW4)** was called on phone by an unknown person who told him that his brother, the deceased, was calling him. He went and found him on the ground. The deceased told him that his son namely, Peter Karuti, had hit him on the ribs with a stone. The witness then took the deceased to hospital at Muthara on a *bodaboda* and left him in the care of his child who was living near the hospital but he was later informed that he had died that night.

5. During cross-examination, the witness stated that the attack occurred at the home of the deceased in his absence and that he later met the deceased on the road about 200 meters from his home surrounded by many people whose names he could not recall except the daughter who was present. The deceased, who was in great pain, told the witness that he had been hit by a stone by his son with whom they were fighting over land. The witness and other people took the deceased to the hospital.

6. During re-examination, he stated that the deceased wife namely Mwari was also hit by the accused. He maintained that the deceased had told him that he was hit with a stone by the accused.

7. **Jacinta Mwari (PW5)**, the deceased wife, testified that on the material day at about 7 pm, she was at home when her husband came drunk, fell down and hit a stone and she called PW1 to witness what had happened. She denied recording any statement with the police. When cross-examined by the prosecutor after she was declared a hostile witness, she denied either being injured on the material day or having been taken to the hospital. She maintained that the deceased had come home at about 8.00 pm when he fell on a stone near the door which hit him on the ribs forcing him to down and she called PW1 who took him to the hospital by a *bodaboda* but she did not accompany them to the hospital. She further denied that police had come to their home and that the sign and/or thump print on the statement was hers.

8. **Michael Muraya (PW6)** took over the investigation of the murder file in July 2014 from PC Maina who had been investigating the case. He perused the file and noted that the offence took place on 11/04/2014. He also read the witness statements which stated that the accused hit his deceased father with a stone on the ribs after a domestic quarrel. The deceased was rushed to the hospital by family members but later succumbed to the injuries. The report of his death was made on 12/04/2014 at Muthara Police station by one of his relatives. OCS Muthara, Inspector Kakali and P.C Maina visited the scene and took the body to Meru Level 5 Hospital Mortuary. Post mortem was conducted in the presence of P.C Maina and the report was filed. He noted from the file that the accused went into hiding after the incident but on 30/8/2014,

he was arrested by P.C Lawrence from Ngarungilu Police station in Laikipia. On 1/9/2014, he went to Ngarungilu and took the accused to Muthaa Police station. Cautionary statement was taken by DCIO and the accused admitted committing the offence after which he was charged. He confirmed that the person he had collected from Ngarungilu police station was the one at the dock. During cross examination, he stated that assault report on the deceased was made on 11/4/2014 who subsequently died on 12/4/2014 and a report of his death was made on the same day. He stated that the killer stone was not collected for purposes of the case and further that no witness saw the accused hitting the deceased but some witnesses heard the commotion between the deceased and the accused. The witness added that hat the accused slaughtered and hanged the carcass on his door which in Meru meant that something serious had happened, then ran away from home which made them suspect him. The witness added that the accused did admit commission of the offence before the DCIO all of which informed his decision to charge him with the offence.

9. **Dr. Dennis Mutuma (PW3)** produced the postmortem report on behalf of his colleague James Kihuba. The report revealed that the body of the deceased had no obvious bruises or fractures because it had moderately decomposed. Upon dissection, there was liver laceration with massive blood in the abdominal cavity. The cause of death was opined to be exsanguination due to liver laceration secondary to blunt trauma which meant that blunt injury caused tear of the liver resulting in death. On cross examination, he stated that it was difficult to see bruises due to decomposition and the injury to the liver was caused by a blunt trauma say a stab and blood trauma. In re- examination, he asserted the cause of death to have been blunt trauma.

10. In his defence, the accused stated that on the material night at about 8.00 pm, he was at a place taking traditional liquor. At 7.00 pm, he met with his father at the gate on his way home. His father entered his house and he entered his and went to sleep as he was drunk. While he was sleeping, he was called by his wife, PW1 who told him that his father had fallen next to their home. His wife together with Mugambi, Mutuma and Joyce Karimi, PW2 took the deceased to the hospital. He was informed the following day at around 11.00 that his father had died while in Munoru Johana's house. He went there but found the body had already been taken to the mortuary and they started burial arrangements. It was then that his uncle, PW4 started accusing him of having killed the deceased. PW4 gave him an opportunity to go and work in Ngare Nyiro in Nanyuki but he subsequently followed him there with police who arrested him. After the arrest, he was taken to Ngare Nyiro Police Station for two days before being taken to court. He denied the existence of bad blood between him and the deceased as they used to drink and eat together. During cross-examination, he confirmed that on the material day he was drinking with another person after which he came home at about 6.00 pm when he met the deceased as well as his wife, PW1. He denied having any weapon and stated that after the death of the deceased, he went back to Laikipia where he worked as he had been home on permission. He did not leave in bad faith but to avoid his uncle who was accusing him of having killed his father.

11. The parties filed their respective submissions on 07/04/2021 and 24/02/2021. The accused's submissions were to the effect that although the cause of death was ascertained by PW3, it did not link him with the death of the deceased. He contended that the only evidence linking him with the commission of the offence is that of PW4 which amounts to a dying declaration. He contends that it is unsafe for the court to rely on the dying declaration by PW4 as it is marred with contradictions and unsupported by the evidence of other witnesses. According to him, the evidence of PW4 is an afterthought as it detracts from what he had initially recorded with the police when the incident was still fresh. The court is urged to resolve the contradictions in the evidence of the prosecution witnesses in favour of the accused.

12. On its part, the prosecution submitted that the defence by the accused that he came home from drinking and slept was a general denial which did not shake the strong prosecution evidence. It was asserted that the mentioning of the assailant by the deceased to PW4 in the dying declaration placed the accused person on the scene. According to the prosecution, it had proved the case beyond reasonable doubt as its case was well corroborated and consistent. It relied on **Philip Nzaka Watu v R (2016) eKLR**, in support of the proposition that a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence under section 33(a) of the Evidence Act.

13. This being a murder trial, the prosecution must prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought. In other words, the prosecution must prove both *actus reus* and *mens rea*.

14. There is no doubt the prosecution was able to prove the fact and cause of death to the required standard. It was established by the medical evidence, PW3, that he conducted post mortem examination on the deceased and formed the opinion that the cause of the death was exsanguination due to liver laceration with massive hemoperitoneum secondary to blunt trauma. That evidence was never shaken and I find that death and the cause thereof have been established beyond any reasonable doubt.

15. The issue in dispute is whether the said death was caused by unlawful act of omission or commission on the part of the accused. I have carefully perused the investigation diary and noted that the deceased had made an assault report on the material day at 2110 hours that he had been hit on the ribs with stones by a person known as **Kailibi**. I have equally noted that none of the prosecution witnesses referred to the accused or anyone else by that name. The only eye witness called by the prosecution to the alleged murder of the deceased was PW5 who was subsequently declared hostile. The gist of that evidence and testimony had little and, in fact, no probative value to connect the accused with the death. To the contrary, the evidence went along way to exculpate the accused.

16. PW1 in her the witness told the court that while she was at the door leaving her house, she found her husband arguing with his mother and raised an alarm. When she came out from hiding after 30 or so minutes, she met with a lot of people on the path who informed her that her mother-in-law and the deceased had been taken to the hospital. It must not be lost that the treatment notes from Muthara dispensary where the deceased was allegedly treated and discharged were not produced in evidence. PW4 testified that he was the one who took the deceased to the hospital and that PW5 had also been hit by the accused. He further stated that when he came to see the deceased after being called by an unknown person on the phone, the deceased daughter was present among other people whom he did not recognize. PW2, the deceased daughter, testified that she did not go to the deceased house after being called by PW1 who told her that the deceased had fallen down and they were planning on taking him to the hospital. PW1, who came after being called by PW5, testified that although she found the deceased lying down, she thought he had fought and fallen on the rocks. She does not say whether PW5 was injured or not but maintains that they called a bodaboda and took the deceased to the hospital. If the prosecution had called Daniel Mwitii, Fredrick Mugambi and James Mutuma to testify, that evidence would have assisted the court to reach an appropriate determination.

17. The other evidence was by PW4 who alleged to have been informed by the deceased that it was the accused who had hit him with a stone, which amounts to a dying declaration. I am unconvinced that this was the true account of events as a daughter to the deceased who according to PW4 was also present did not hear the deceased confessing to PW4 that it was the accused who had hit him with a stone.

18. In this case, none of the prosecution witnesses witnessed the alleged hitting of the deceased by the accused with a stone. PW1 testified that the accused was at work when she was called by her mother-in-law. PW6 told court that they arrested the accused person because he went into hiding after the incident. DW1 in his defence stated that he went into hiding to avoid his uncle, PW4 who was accusing him of having killed the deceased. I therefore find that the prosecution witnesses who have been unable to place the accused person at the scene, have totally failed to prove that the death of the deceased was caused by the accused yet it was upon the prosecution to prove its case against the accused beyond reasonable doubt and that burden does not, at any time in the life of the case, shift to the accused to exonerate himself. I do find that evidence adduced by the prosecution witnesses fell short of linking the accused herein with the death of his father.

19. What the investigators appear to have relied on to arrest the accused and arraign him was the strong suspicion that because he had ran away from home, slaughtered and hanged on his door, he must have committed the offence. As authoritatively observed by the court of appeal in *P.O.N. v Republic [2019] eKLR* : “.....no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not....”

20. Having said so, I need to comment on the evidence of PW4, George Muithya. He was never an eye witness to the injury of the deceased but alleged to have been told by the deceased that it was the accused who had hit him with a stone. That evidence takes the character and identity of a dying declaration which is excluded from the application of the hearsay rule, even without corroboration, provided the court cautions itself that a conviction founded on such a statement is all the same safe. In *Phillip Nzoka Watu vs Republic (2016) eKLR* the Court of Appeal reiterated the trite position of the law that a dying declaration is admissible as an exception to the hearsay rule and without the need for corroboration save that the court must administer a caution to itself that a conviction thereby reached is safe. The court said: -

**“While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe”.**

21. In this case, even though PW4 repeated in cross examination that the deceased told him having been assaulted by the accused with the use of a stone, he admitted that that important matter was never told to the police and recorded in his statement. That, when aligned to the evidence by the Accused that it was this Uncle Pw 4, who accused him of the death during burial arrangement, I do find that it is unsafe to rely only in such evidence to find a conviction. I find that the failure to record that fact with the police at the first instance invite doubt whether it was not just an afterthought.

22. Owing to the highlighted paucity of evidence to connect the accused with the assault and subsequent death of the deceased, I find and hold that the prosecution failed to prove the fact that the accused caused the death of the deceased, the case cannot stand but is dismissed. I acquit the accused of the charge of murder and direct and order that the accused be released forthwith from custody, unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY, BY MS TEAMS THIS 21ST DAY OF MAY, 2021.**

**PATRICK J O OTIENO**

**JUDGE**