



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 53 OF 2019

BETWEEN

REPUBLICPROSECUTOR

AND

MBITI M'MAUTA.....ACCUSED

JUDGMENT

1. **MBITI M'MAUTA (Accused)** is 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 10th July, 2019 at Lukununu village in Antumbui Sub-Location, within Meru County, jointly with another before the court unlawfully murdered FRANKLINE MURIKI

PROSECUTION CASE

2. The prosecution called seven (7) witnesses in support of its case. **Frankline Muriki (deceased)** died on the night of 10th July, 2019. According to **PW1 Joseph Muriithi**, heard screams at about 09.00 pm and upon rushing out of his hotel armed with a torch whose light assisted him to see one Munoru cutting **Frankline Muriki** with a panga and accused hitting him with stones. He stated he went to look for assistance and returned to find **Frankline Muriki** had died. Accused was arrested the same night and handed over to the police.

3. **PW2 Charles Karuri** stated that he also went out upon hearing screams and with the assistance of electric lighting at the scene saw accused and his son Munoro who were armed with pangas assaulting **Frankline Muriki** who later died. **PW3 Henry Kobia** stated he met accused and his son Munoro at about 10.30 pm on material night and that each was armed with a panga. It was his evidence that he had a torch and there was moonlight.

DEFENCE CASE

4. In his sworn defence, Accused stated he did not leave his house on the material night and that he was arrested from his house on the material night at about 03.00am and was later charged with an offence he did not commit. Accused's wife similarly stated that he did not leave his house on the material night.

ANALYSIS AND FINDINGS

5. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients which are: the death of the deceased; that Accused committed the murder and that he was actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

(a) The death of the deceased

6. That **Frankline Muriki** died was confirmed by a postmortem form dated 18th July, 2019 tendered as **PEXH. 1** which reveals that the deceased died of cardiopulmonary arrest due to severe sharp head injury due to multiple cuts with intracerebral hemorrhage.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

7. In order to establish the accused's culpability, the prosecution relied on the evidence by **PW1 Joseph Muriithi** and **PW2 Charles Karuri** who stated that they were the first to arrive at the scene of crime.

8. The offence was committed at night and the first issue for determination is whether Accused was positively identified. Whereas PW1 stated that there was no electric lighting at the scene, PW2 said there was.

9. I have considered the evidence of visual recognition against the Accused as adduced by PW1 and PW2. Evidence of visual identification should always be approached with great care and caution (see **Waithaka Chege v R {1979} KLR 271**). Greater care should be exercised where the conditions for favourable identification are poor. (**Gikonyo Karume & Another v R {1900} KLR 23**). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See **Abdalla bin Wendo & Another v R, {195} 20 EACA 166; Wamunga v R, {1989}**).

10. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal stated as follows in relation to identification at night

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

11. In this case, the prosecution failed in its duty to lead evidence as to the nature of the torch light that PW1 had and the electric light alleged to have been there by PW2, the strength of the light, its size and its position relative to the Accused thereby rendering the evidence of identification unreliable.

12. That evidence of identification was unreliable can be explained from the fact that whereas PW1 and PW2 testified that they arrived at the scene at the same time, their evidence is contradictory with PW2 saying Accused had a panga and PW1 saying he did not. Their evidence leaves court in no doubt that there would be real danger in relying on conditions of identification whose quality has by evidence been proved to have been poor and not favouring safe identification/recognition.

13. Further to the foregoing, accused raised the defence of alibi that he was at home with his family. His wife testified that accused did not leave him that night.

14. The Supreme Court of Nigeria in the case of **Ozaki & Anor Vs The State (1990) LCN/2449(SC)** held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.

15. Our own Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held THAT: -

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

16. I have weighed the contradictory evidence by PW 1 and PW2 and the prevailing circumstances they testified to have identified Accused *vis a vis* the defence of alibi raised by Accused as corroborated by his wife and I have found that the alibi introduces into the mind of a court a doubt that is reasonable.

17. Accordingly, and for the reasons set out hereinabove, I have come to the conclusion that the prosecution case is not so strong against the Accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence that it is possible that he indeed murdered the deceased.

c) Malice aforethought

18. Since the prosecution has failed to prove *actus reus*, it would be futile for this court to delve into the issue of malice aforethought.

19. Consequently, I find Accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AT MERU THIS 20TH DAY OF MAY 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For the Accused - Mr. Muriira Advocate

For the State - Ms. Mbithe