



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 27 OF 2019**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**FREDRICK MBINDYO MULEI.....ACCUSED**

**JUDGMENT**

1. **Fredrick Mbindyo Mulei** the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on an unknown date and time between the 8<sup>th</sup> day of September 2019 and 15<sup>th</sup> September 2019 within Ukia location Makueni sub-county Makueni county the accused murdered MKM.

2. He denied the charge and the prosecution called ten (10) witnesses while the accused gave an unsworn statement of defence.

3. **PW5 DNM** aged 15 years is a sister to the deceased. She testified that on 8<sup>th</sup> September 2019 she was with the deceased and Josephine when they went to get water at the bore hole. After getting the water they went home leaving the deceased playing with other kids. Upon their return they missed the deceased. They returned home and reported to their parents and a search started. The deceased's jerrican with water was found behind their house.

4. In cross examination she said they had gone to fetch water at 1.00 pm. Those playing with her were CM and VK who were also minors. The witness found her later at Kikongooni school and they returned to the borehole at 5pm. As they went home the deceased walked slowly behind them. She did not reach home and they never saw her again.

5. **PW6 JMM** is mother to the deceased. She is left with four (4) children after the deceased's death. She said the deceased was aged 6 years. It was her evidence that on 8<sup>th</sup> September 2019 she left home for the market at 2.30 pm and returned at 5.30 pm and only found three (3) of her children. The deceased and K were not present. PW5 informed her that the two had remained at the borehole. Later she returned saying only K was there.

PW6 plus two of her children went out to look for the deceased. After a short distance they saw the jerrican the deceased had had. It had a piece of wood placed on it.

6. After failing to get her they returned home. She informed the village elder and the chief, the same day. The assistant chief was notified the next day and he advised her to report at Makueni police station which she did, and the church was also informed. On 14<sup>th</sup> September 2019 she was called by PW2 (OK). She went to his home, and he informed her that the deceased was at M's home and he went and reported at the station. Accompanied by church members they went to M's, where they found a crowd.

7. Contents of a certain cut container (EXB4 a & b) were poured out and she identified the deceased who had been tied with a net (EXB5). She was able to identify the clothes and shoes she had worn on the day she disappeared.

8. In cross examination she said they had looked for the child in bushes and at the neighbours. A neighbor's child (M) had talked of having seen the deceased pass there at around 6.30 pm. It was one LN who was sent by PW2 to call her. She also saw the letter which PW2 had with him. It was written in Kikamba.

9. PW1 was a protected witness. He testified that his parents had separated and he lived with his father and brother. On 8<sup>th</sup> September 2019 he slept home and the next morning he served his older brother and a child with mandazi and mbocho. This "child" was not of the family and he did not know whose child it was. After eating, him and the brother went to the shamba but the child remained at home. The brother then left him at the shamba for the market. He left the shamba for home at 6.00 pm, arriving home at about 8.00 pm.

10. When he reached home he did not find anyone not even the child. There was moonlight which enabled him to see. He went outside the house at 9.00 pm to look for a jembe for the father and that's when he found a hole being dug. He saw a person inside the hole but he could

not identify the person. After the digging he saw the child who had been lying on the grass being tied with a net by his brother. The hole digger had not come out. He saw another person near the hole and the child was finally put in the hole, which was covered with soil.

11. He left secretly as he did not want to be seen, and he went to sleep. On a Friday at 6.00 am he saw a spade and a jembe, and soil being thrown into a toilet. This was after his dad had left for work at 5.00 am. The toilet was a new one at their home. After seeing all this he went to his aunt's place where he found his cousin's son Mulei with whom he shared the ordeal. Mulei recorded all this on a piece of paper. He feared any exposure.

12. The next day he went to church from where he heard that his brother (*aged 17 years*) and a man aged 40 years had been arrested. That evening he went home with his dad and they slept. The next day he went to greet his paternal uncle who told him of their drum which had been cut and he returned home. He did not find the drum. On his way to the market he met a police vehicle with his brother (*accused*) inside. He identified the accused as his brother whom he had seen outside with other two people and the child.

13. In cross examination he said his brother was with a child when he gave him food. He insisted that the child he saw was a girl child. The child was left at the home alone when him and his brother left. He explained that it was only the two of them who lived with their father. While at their shamba the accused would leave and return. He did not look for his brother or the child when he did not find them at home. He said the accused had never brought a child there before. The accused never answered when he asked him where the child was.

14. He did not tell his dad about the child. He was not able to identify the hole digger and the other person because they had worn brown and black clothes respectively and they had covered themselves with their faces lowered. He said he lay on the grass on the 2<sup>nd</sup> slope as the people were on the slope. The accused found him in the house upon his return. He washed his hands and prepared ugali for them.

15. He did not go to school the next day as he was vomiting, diarrhoeing and he lacked sleep. He said he could not recall if he witnessed the killing or not.

16. **PW2 OKK** was at his home on 15<sup>th</sup> September 2019 when a boy (MM) brought him a piece of paper he had found hanging at his kiosk. He took it to his father who advised him to bring it to him, as the village elder. The document was by MM explaining what had happened which pained him a lot. He informed the administration and handed the letter to the police. The document had the accused's name.

17. **PW3 Dr. Lugogo Athman** produced the postmortem report (EXB1) on behalf of Dr. Alex Makau with the consent of the defence. The following were the findings:

- Bruises on the anterior aspect of the legs.
- Decomposing lungs no broken ribs.
- Open middle of the head.
- Blood clot inside of the head.
- There was penetration and the rectum was pulled out.
- Cause of death was head injury secondary to blunt force trauma. In cross examination he said the body was identified by parents.

18. **PW4 NO 46623 Sgt Paul Kiilu** is a scene of crimes officer gazettement No 10284 of 6<sup>th</sup> December 2006. He testified that him and P. C. Nyarori (*the investigating officer*) visited the scene and he took a total of 12 photos showing the plastic container, a rope, mosquito net, deceased's body (EXB2a-q) and his certificate EXB3.

19. **PW5 Rebecca King'oo** is a village elder from Nduu village of Kilungu location. She testified that she employed one Musyoki Mbuu to work on his land. On 11<sup>th</sup> September 2019 after a meeting of village elders at the chief's office and on her way back she found the said Musyoki Mbuu, Meshack and the accused eating at his house. On asking about the other two Musyoki told her they had been assisting him to work on the shamba and he had finished. She paid him Kshs 1,000/= and the three left.

20. Within minutes the accused returned and told her this "*mum, please help me with a jembe for digging at our place*".

She asked if they had no jembe at their home and he said they had none. She gave it to him and asked him to return once they were through. The accused told her he would bring her grass for cows in a sack. She informed him that would not be sufficient. She therefore asked him to take a rope and a cutting sickle for him to use. He took them and left never to return.

21. She identified her jembe, woolen rope and sickle as EXB 6, 7 & 8. On 15<sup>th</sup> September 2019 after she left church she heard people shouting that there was a child at Mulei's. Mulei is the accused's father. On reaching there she saw a container (EXB4) where the child's body was. The body was removed.

22. It was also her evidence that on an earlier date PW6 and another had come to her home and asked her to help them look for the child. She called the chief and informed him. The missing child is the one they found at Mulei's home. In cross examination she said she had planned to go to Mulei's for EXB 6, 7 & 8 on the Sunday they heard about the finding of the body.

23. **PW8 Kipnetich Bernard** a government analyst testified and explained his analysis of blood samples and the exhibits. A number of items had been presented to the laboratory. He found a blue T-shirt (A4) and a mattress (A9) to be lightly stained with blood. He further found the DNA profiles in these two items to match the DNA profile generated from the fingernail clippings (C1 & C2) of the deceased. Further he found the DNA profile from A9 to match the DNA profile from Fredrick Mbindyo (*accused*). It was his testimony that the DNA profile of the second suspect Peter Muchoki Pius was not found in any of the items. He produced the report as EXB9 and Exhibit Memo as EXB10.

24. **PW9 NO 231663 Chief Inspector Daniel Ogutu** is a forensic document examiner based at DCI, Headquarters Nairobi. He stated that on 3<sup>rd</sup> September 2020 their laboratory received an exhibit memo with documents from the DCI Makueni. The documents were:

- A3 – Questioned document.
- A2 - Specimen writing of Meshack Mulei.
- AC – Known writing of Meshack Mulei.

The request was for them to confirm whether the three (3) documents were authored by the same hand. Upon examination he found the documents to have been authored by different hands *i.e.* Meshack Mulei did not author A3. He produced his report (EXB11).

25. **PW10 NO 95350 P.C. Dennis Nyarori**, testified that on 15<sup>th</sup> September 2019 he accompanied the O.C.S. of Makueni police station to Kajutini of Kilungu to a murder scene where they found a crowd. The scene was at Mbindyo Mulei's home. They secured a 100 litre drum and its lid (EXB4a&b). On opening it they found the body of Mary Katuvi aged 6 years (deceased herein). The body was wrapped in a blue mosquito net (EXB5) and a lessso. They recovered a hand written note from the village elder. The note revealed the whereabouts of the child. The body was taken to the Makueni mortuary.

26. Already impounded was the accused and another (Peter Pius). Meshack Mulei had directed someone into writing a letter explaining the whereabouts of the child. The investigations did not link Peter Pius to the offence, but they linked the accused.

At the homestead the officers were shown where the deceased had been initially buried. The body was later transferred to the mortuary.

27. The witness further produced a jembe, woolen rope, sickle and mattress as EXB6, 7, 8 & 12 respectively. They also recovered clothes in a blue woolen bag from the accused's room. These were:

- Brown trouser EXB13
- Jeans shorts EXB14
- Checked white coat EXB 15
- Checked blue short EXB16
- Blue T-shirt – EXB17
- Grey T shirt – EXB18
- Navy blue trouser – EXB19
- Green boxer underpants – EXB20

Exhibits (EXB13-20) were forwarded to the government chemist for analysis.

28. In cross examination he said the accused's brother told them the note was written for him by Musyoka. The said Musyoka disappeared even from school hence the failure to get samples from him. He said there was no evidence linking one Peter Pius to the offence.

29. The accused in his unsworn defence stated that he was aged 16 years having been born on 10<sup>th</sup> September 2004. Prior to his arrest he was in standard 7 at Ndolo Primary School. He testified that on the dates indicated in the charge sheet *i.e* 8<sup>th</sup> – 15<sup>th</sup> September 2019 he was in school. He was arrested on a Sunday as he prepared his uniform for school. Also arrested with him was his 40-year-old friend Peter Musyoki Pius.

30. He denied killing the deceased. He said he found when his friend Peter had already killed the deceased when he came from the market. Peter asked him to assist him carry and bury the body. He did this on being threatened.

31. Two (2) – three (3) days later he was so disturbed that he confided in his kid brother Meshack all that had happened. Meshack then did a letter to the administration and he was arrested. The body was buried not far from home. The said Peter came and took a drum from their home and they went and removed the body and placed it in the drum. They placed it in their incomplete toilet.

32. After the close of the defence case Mr. Kihara learned counsel for the prosecution said he would not file any submissions. He relied on the evidence on record. M/s Ong'ong'a learned counsel for the accused filed written submissions on 19<sup>th</sup> January 2021.

33. It is her submission that the cause of death was indicated as blunt trauma to the head but there was no evidence before the court showing what caused the injuries.

34. She further submits that the prosecution had to adduce evidence to prove that the act by the accused was voluntary and wrongful and more importantly it was the accused who did such an act. Counsel urged the court not to rely on the uncorroborated evidence of PW1, since the person who wrote the letter was not called to confirm the things written in the document.

Counsel further submits that there is no evidence of the *acts reus* to connect the accused with the killing. That the accused as per his defence came to the scene after the deceased had been killed. That he was beaten by the 2<sup>nd</sup> suspect who was the one forcing him to do what he did. The 2<sup>nd</sup> suspect was however released by the investigating officer who did not properly investigate the matter.

35. For proof of mens rea learned counsel relies on the case of **Republic vs Mohammed Dadi Kokane & 7 others [2014] eKLR**, and submits that there was no evidence to show any intention to kill. There was also no proof of motive by the prosecution she submits. She makes mention of an ex-convict who was involved in the offence but he made sure he did not leave any DNA evidence behind. It was her contention that the only mistake the accused made was to befriend a man of bad influence. On realizing his mistake he shared with his brother.

36. She urges the court to find that the accused did not participate in the killing of the deceased, even if he was at the scene. See **Republic v Charles Mwaura & Anor [2016] eKLR** where the court stated:

*“... Although I have no doubt he was present at the scene of assault, the evidence connecting him to the offence does not meet the threshold of proof beyond reasonable doubt. His participation could well be peripheral as an employee of the 1<sup>st</sup> accused, although he denies the relationship. Neither PW1 nor PW2 testified to have witnessed him strike or beat the deceased person....*

*“I do not consider it safe in this case to found a conviction on his presence at the scene and participation in escorting the deceased to police and later to the hospital alongside the 1<sup>st</sup> accused, Njuguna and PW1. I will therefore acquit him at this stage under section 322(1) of the Criminal Procedure Code.”*

She urged the court to acquit the accused of the charge.

### **Analysis and determination**

37. The charge facing the accused is that of murder which is defined under section 203 of the penal code as:

*“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.*

38. Malice aforethought is defined under section 206 of the penal code as:

*“(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 intent to commit a felony;*

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

39. From the above definitions it is clear that for a charge of murder to be proved the following must be established:

(i) The fact and cause of death.

(ii) That the unlawful act of commission or omission causing the death was by the accused (actus reus).

(iii) The unlawful act was accompanied by malice aforethought.

#### **(i) The fact and cause of death.**

40. There is no dispute from the evidence adduced that indeed the deceased died. Her body was found in a drum (EXB4a&b) at the home of Mulei who is the accused's father. The body was identified by her parents (PW6 & Anor). PW3 Dr. Lugogo produced the postmortem

report (EXB1) by Dr. Alex Makau with the consent of the defence. The cause of death was head injury secondary to blunt force trauma. I am therefore satisfied that the fact and cause of death were established.

**(ii) Whether the unlawful act of commission or omission causing the death was by the accused (actus reus).**

41. The evidence of PW1 was on what he saw on the night of 8<sup>th</sup> September 2019 7.00 pm This is the same day that the deceased disappeared as per the evidence of PW5 and PW6. PW1 did not say he saw the accused killing the child. His evidence was that he saw the accused tying the child before it was placed in the hole that was being dug. The accused himself has explained how he assisted his so called friend Peter Musyoki Pius to carry the dead child and bury it. Later they again removed the body and placed it in a drum and this is where the body was found.

42. PW7 who is a village elder is the owner of the jembe, wooden rope and sickle (EXB6, 7 & 8) and she clearly explained how she had on 11<sup>th</sup> September 2019 given them to the accused for purposes of digging and cutting grass for her cows. This evidence was never rebutted not even in cross examination. It therefore stands.

43. From the totality of the evidence this incident took several phases i.e the killing of the deceased; burial in a hole; removal from the hole and the dumping in the drum. All the latter actions were meant to conceal the killers of the deceased. The accused has been shown to have participated in the concealment. This is clear from the evidence of PW1, PW7 and the accused himself.

44. The government analyst's report also links him to the crime since the DNA profile from the blood on his mattress (EXB12) and T-shirt (EXB17) matched the DNA profile generated from the finger nails clippings of the deceased. The DNA profile from EXB12 matched that of the accused.

45. He may not have participated in the killing itself as there is no clear evidence on this. What is clear is that he participated in the attempt to dispose of the body.

The Black's Law dictionary 10<sup>th</sup> Edition pg. 17 defines an accessory as follow:

***“Criminal law. Someone who aids or contributes in the commission or concealment of a crime.”***

And accessory after the fact is defined as follows:

***“An accessory who was not at the scene of the crime but knows that a crime has been committed and who helps the offender try to escape arrest or punishment.***

***.... Most penal statutes establish the following four requirements (1) someone else committed a felony before the accessory acted (2) the accessory is not guilty as a principal (3) the accessory personally helped the principal try to avoid the consequences of the felony; and (4) the accessory helped despite having actual or imputed knowledge about the principal's guilty (sic). An accessory after the fact may be prosecuted for obstructing justice.***

***.....At common law, an accessory after the fact is one who knowing that a felony has been committed by another, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment. To be guilty as an accessory after the fact one must have known that a completed felony was committed, and that the person aided was the guilty party. The mere presence of the defendant at the scene of the crime will not preclude a conviction as an accessory after the fact, where the evidence shows the defendant became involved in the crime after its commission.”***

46. Accessory after the fact is defined under section 396(1) of the penal code as follows:

***“(1) A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”***

47. The role played by the accused in this matter clearly fits in the definition of an accessory after the fact. He was not merely found at the scene but was actively involved in disposing of the body to protect those who killed the deceased. He claims to have shared what he did with PW1 which is not true. Had that been the position his counsel could have cross examined PW1 on the same. PW1 was clear in his evidence that after witnessing all this he became restless etc. It's PW1 and not the accused who confided in their cousin's son Musyoka who let the administration know through the document in the report (EXB9) that was later hang at a shop. His defence on that does not assist him.

48. Upon considering all the evidence on record I find that the charge of murder was not proved but what has been proved is him being an accessory after the fact of murder contrary to section 222 of the penal code which provides:

***“Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.”***

49. The offence under section 222 of the penal code is a lesser offence to murder contrary to section 203 of the penal code. I therefore reduce the charge of murder to one of an accessory after the fact of murder contrary to section 222 of the penal code and convict him accordingly.

Signed and dated this 19<sup>th</sup> day of May 2021 at Milimani Nairobi by:

H. I. ONG'UDI

JUDGE

Delivered this 29<sup>th</sup> day of June 2021 in open court at Makueni by:

GEORGE DULU

JUDGE