



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

WILSON WASWA MUGATI.....1ST ACCUSED

KOLA BENSON MUKOYANI.....2ND ACCUSED

J U D G M E N T

The accused **Wilson Waswa Mugati** (1st Accused) and **Kola Benson Mukoyani** (2nd Accused) are jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that on the night of 28th day of June 2016 at Ndivisi Division, Lukusi Location within Bungoma County murdered **KEVIN MUKOYANI MULATI**.

The accused took plea to the charge on 21st July, 2016 before Hon. Lady Justice Ali Aroni, J where they pleaded not guilty. Having commenced on 25th July, 2017 before Aroni, j who heard five (5) Prosecution Witnesses. The Judge was thereafter transferred. On 25th July, 2018, this matter came before this court for hearing. The provision of Section 200 Criminal Procedure Coe were explained to accused who elected that the hearing proceed from where it had reached and did not wish to recall any of the witnesses who had testified.

The case for the prosecution is that on 28th June, 2017 PW 3 Joseph Mulati the father of the deceased Kevin Mukoyani Mulati and 1st Accused Wilson Waswa Mulati was at his home at about 8 p.m. when 1st accused came to him and asked the witnesses phone to call Kevin the deceased. He gave him the phone and 1st accused called deceased who told him he was on his way home. The 1st Accused then left for his house which they share with the deceased. After 1st accused had left 2nd accused Benson came look for 1st accused. He told 2nd accused that 1st accused had left.

The next day he was woken up and told that there was a body on the road. He went there and found that the person lying down was his son the deceased. He suspected the 1st and 2nd accused. He went to the house where 1st accused and deceased slept and observed there was blood stains in the house. He went back to the road and found 1st accused had now come. He inquired from him what had happened to deceased but said he did not know. Police came and checked the house where 1st accused and deceased sleep and confirmed the blood-stains. They also recovered 1st accused shirt 21 metres away from the house which was blood-stained. They then arrested the 1st accused.

PW 10 FNO. 54360 Sgt Julius Kivuva attached to DCI Webuye was on 29th June, 2016 at 8.00 a.m, he was instructed by Chief Inspector Nyangeresi to proceed to a scene of murder. He proceeded to the scene with colleagues and at the scene found the body of deceased lying on a road facing upwards. He saw the deceased had cuts on right side of the head. Besides the body he saw a metal bar connected with stones an item used for weight lifting. The father of the deceased led them to the house 1st accused and deceased sleep and noticed blood-stains on the floor of the house. They were led to a hedge of the farm where they saw a sweater, vest and jeans trouser which were blood-stained and alleged to belong to 1st accused. They found the administration police had arrested three suspects. A post-mortem was done and blood sample of the deceased and 1st accused and the clothes recovered were forwarded to Government analyst.

PW 9 Elizabeth Waithera Oyiengo the Government analyst received items indicated as that of the accused: -

- White vest
- Pair of black jeans trousers
- White brown checked shirt

- Blood in a bottle

She also received the following items indicated as belonging to the deceased: -

- Grey Brown sweater
- Blood sample in a bottle.

She conducted DNA analysis and found that the 1st accused's is related to the deceased. The blood of the deceased, however did not generate DNA for the reason that it may have been contaminated. She, however, confirmed that the blood found in the shirt and clothes belonging to 1st accused, belonged to a sibling of the 1st accused.

PW 8 No. 233424 Chief Inspector John Nyangaresi recorded a statement under inquiry from 1st accused, on 9th June, 2016. He informed 1st accused of his right who agreed to voluntarily give his statement. This witness sought to produce the statement but counsel for 1st accused. Mr. Wamalwa objected on the ground that the 1st accused never signed any statement and that the signature on the statement was forged. Having raised the objection this court directed that there be a trial within a trial on the one issue raised that the signature on the statement did not belong to the 1st accused and was a forgery.

The court directed the accused known signatures and the signature in the statement be forwarded to a handwriting expert for comparison. **PW 11 John Mulude** produced the handwriting expert report prepared by IP Vincent Chelongo a document examiner which confirmed that the specimen signature of the 1st accused and the signature on the statement under inquiry were made by the same person. He produced the report as exhibit 7 a and annexure b. With this confirmation the statement under inquiry was admitted in evidence as Exhibit 2.

The accused on being put on their defence elected to give sworn evidence and did not call witnesses. 1st Accused Wilson Waswa Multi testified that **PW 3 Joseph Mulati** was his father and deceased Kevin who his brother. On 26th June, 2016 he travelled from Nairobi to his home as there was a dispute. On 28th June, 2016 a meeting was held to settle a dispute between the deceased and one Richard Saaka their cousin. He then remained with the deceased the whole day and in the evening the deceased called him to accompany the deceased to a funeral. They went together to the funeral at Nitakuya village 1 ½ KM from their home. At 10 p.m., the deceased met his girlfriend and accused, deceased and his girlfriend came home. He left him with the girlfriend and went back to the funeral up to 4 a.m. when he came home. He then heard screams and was informed the deceased had been found on the road. He went there and was arrested.

2nd accused Benson Mukayoni Kola testified that both 1st accused and the deceased are his cousins. He testified that on 27th June, 2016 at between 12 p.m. – 1 p.m. he went to the home of 1st accused and met him. He stayed with 1st accused at his home upto 5 p.m. when he left. He went to his home and slept. On the next day, he was informed of the death of the deceased.

Mr. Wamalwa for 1st accused filed written submission. He submitted that it is not in dispute that the deceased died. He submitted that no prosecution witnesses saw 1st accused commit the offence and that having denied being the owner of the blood-stained shirt recovered, there is no evidence that he is the one who caused the death of the deceased by unlawful act or omission. He submitted that the statement under inquiry was denied by the 1st accused.

M/s Wakoli for 2nd accused submitted that none of the prosecution witnesses testified as having been 2nd accused inflicting injuries on the deceased. Counsel submitted that the prosecution did not lead any evidence to link the 2nd accused to the killing of the deceased and there is, therefore, no basis for the court to convict the 2nd accused.

The accused are charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code provides: -

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

That the deceased died as a result of injuries sustained is not disputed. Indeed even the accused admit the fact which was confirmed by the production of the post-mortem report exhibit 1. The question is whether accused are the ones either alone or jointly who inflicted the injuries.

PW 3 Joseph Mulati the father of the deceased and 1st accused testified that the 1st accused and deceased were staying in the same house. On the material night 1st accused used the father's mobile phone to call deceased who told 1st accused that he was coming home. The next day, deceased was found dead on the road with injuries. On checking he saw blood stains in the house where 1st accused and deceased were staying. He also found next to the house the clothes of the 1st accused which were blood-stained. 1st accused was arrested and on 9th June, 2016 recorded a statement under inquiry exhibit 7. In the statement the 1st accused explained.

“ I do recall very well on the 28th day of June, 2016 at 11.00 p.m. I was sleeping in the house of my elder brother Fred Mulati who is a teacher at Eldoret when my another brother Kevin Katamu Mulati (deceased) came forced the door of the house entered inside and started beating me, I struggled with him to defend myself, I came across a slasher, which I used and cut him to the right ear and he fell down in the house.

Since he was bleeding I removed him from the house and took him and left him on the road. I returned to the house, where I sat down on the chair, I never informed anybody about the matter. Today the 29th June, 2016 at about 6.00 a.m. My sister Hellen Mulati who was going to school found him dead on the road where I had left him and she informed my mother Alice Wanyona,

when she arrived at the scene she started screaming, which attracted their neighbours who gathered there and since I also went to the scene, the crowd became furious and were almost wanted to attack me, APs from Lukusi.”

I am aware that this is a statement under inquiry and not a confession. The 1st accused in this statement explains in detail how the deceased sustained the injuries and how he took his body to the road where it was discovered the next day. This statement connects well to the evidence of the father (PW 3) who stated that he saw blood-stains in the house where accused and deceased stayed. He also confirmed that the blood stained shirt belonged to the 1st accused. This is the shirt which was confirmed to have blood stains of a sibling of the accused.

In relation to 2nd Accused, Benson Kola Mukoyani the only evidence linking him is that he went to the home of 1st accused at 8 p.m. looking for 1st accused. None of the witnesses gave any other evidence to connect him. Though there was suspicion that he may have committed the offence together with 1st accused. I find no evidence adduced to support it. Suspicion alone, however strong it is cannot be a basis of a conviction in a criminal trial.

In ***Sawe Vs Republic*** the Court of Appeal stated: -

***“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.*”**

Consequently, upon considering the evidence, I find the prosecution has not proved its case in respect of 2nd accused Kola Benson Mukoyani of the offence of Murder Contrary to Section 203 as read with Section 204 of the penal Code and acquit him under Section 215 of Criminal Procedure Code. I direct 2nd Accused **Kola Benson Mukoyani** be released unless otherwise lawfully detained.

In respect of 1st accused **Wilson Waswa Mulati**, I am satisfied that the accused was with the deceased in same house. The deceased was found dead having injuries; that his clothes were blood-stains by blood of a sibling; and that in the statement under inquiry, he explained how the deceased sustained the injuries.

I find the prosecution has proved the offence of murder against him. I, therefore, find 1st accused **Wilson Waswa Mulati** guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY JULY, 2021.

S N RIECHI

JUDGE