



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL CASE NO. 23 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MUTHUKUMI KILONZO.....ACCUSED

JUDGEMENT

1. **Muthukumi Kilonzo**, 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 3rd October, 2016 at Katooni Village, Maai Location, Mwingi East Sub-county, within Kitui County, he murdered Joseph Mutati Kilonzo.

2. The Accused herein, denied committing the offence and the prosecution called a total of seven witnesses to prove their case.

3. Purity Mumbi Mutati (PW1), a wife to the deceased, testified that the father to the deceased and her father-in-law had initially disowned the deceased claiming that he was not the biological father, but later he accepted him as his son. She added that, the brother to the deceased and the accused herein, was not pleased and stated that he would not accept the deceased as his brother.

4. She further testified that on 3rd October, 2016, the material date, her husband the deceased herein, went to Katoloni shopping centre at around 6:40 pm and that he heard screams emanating from Katoloni direction and decided to go and check what was happening and that on the way, he met Peter Mwasya Kibindu (PW6) who informed her that the deceased had been cut by the Accused person herein. She testified that she went together with Peter Kibindu and her mother in law to the scene where she found her husband injured with a cut on the head and that he was not talking. She added that, the deceased was lying down bleeding profusely with the brain matter exposed. She testified that the mother to the deceased took out a lessa and tied it on the head in an attempt to stop the bleeding. She added that, they called the Area Chief on phone and got a vehicle to rush the deceased to hospital, but the deceased succumbed to the injuries on the way and died.

5. Joseph Maaso (PW2), a Pastor at Kyuso and a brother in law to the deceased and son in law to the father of deceased, testified and told this court that he knew the deceased was not so welcomed at their home because he was suspected to have “majinis” or to be a sorcerer.

He talked of a family meeting on 2nd October, 2016, a day before the incident of murder, where the accused reportedly stated that, he had enough of problems caused by the deceased and would see how to sort it out. The witness stated that, he advised his father in law to allow Pastors to intervene in order to find a lasting solution. He also stated that he advised the deceased and his wife to stay away from home for some time. He added that, later he learnt about the incident and went to record his statement on what he knew.

6. Julius Kilonzo (PW3), the father to both the deceased and the Accused herein, testified and told this court that he had received information prior to the incident regarding his son (deceased) practicing witchcraft. He stated that, at the time he received the information, his son (deceased) was in Garissa doing business and that upon receiving the information, he called his son (deceased) home where he inquired about the allegations. He testified that, though his son denied the allegations, he warned him about such practices. He further stated that, at the time the accused also worked in Garissa as well, but stopped shortly thereafter, which was in the year 2012. Around 2014, the witness testified that the Accused began complaining of bad dreams and that he was being threatened and linked the bad dreams with his brother, the deceased herein.

7. The father went on, that in 2016, demarcation of land was going on in his area and that, he told the surveyor that he was not ready for the exercise as he had sons and had not decided the share of each son. He added that, the Accused was unhappy about that as he wanted to get his share and that he threatened that he was going to kill someone.

8. He testified that, on 12th September, 2016, his daughter died and they buried her amid a lot of issues being raised regarding her death. He testified that, he advised the deceased to leave the area though he complained of being hated. He added that, on 3rd October, 2016, the deceased was to return to Garissa and he had even borrowed some fare from him but around 7pm, he received a telephone call that his son had been injured at Katoloni Shopping Centre and that he rushed there to find the deceased bleeding profusely. He testified that he inquired what had happened from a neighbour who told him that the Accused had assaulted him. He testified that, he rang the Area Chief and made

arrangements to take his son to Mutuvya Hospital but he died on the way. He stated that, he went and reported at Mutunga Police Station and that later, his son (the Accused) herein, was arrested.

9. Kathina Kilonzo (PW4), the mother of both the deceased and the accused herein, also testified and told this court that she was home on the material day, when he received a call from Peter Kabindu (PW6), informing her that her sons, the deceased and the Accused were fighting and was looking for someone to separate them. The mother stated that she rushed to the scene to find her son (deceased) cut on head. She testified that, she removed her scarf and helped to tie the head which was bleeding profusely and told him to lie down. She added that, the Accused was not at the scene when she arrived, adding that, the two used to have a cordial relationship which turned sour after the deceased was accused of engaging in witchcraft. She testified that, when the allegations were made, they tried to settle the issue by involving a local Pastor who came and established that the allegations were lies and that the matter was resolved. She added that she accompanied the deceased as he was being taken to Hospital for treatment but on the way he passed on.

10. Loice Mumbe John (PW5), on her part, testified that, on the material date, she was doing business at the market where she had a shop. She stated, at around 7:15pm, the deceased went to her shop and because she asked him to light a torch to help her light a lamp and that after doing so, the deceased sat outside the shop and before long, she heard a screeching sound outside where the deceased was sitting. She added that, the sound was similar to that of a panga cutting something. She added that, when she opened the door to find out what it was, she saw the deceased lying down facing upward. She also said that, she saw one Munyathi an aunt to the deceased and heard someone calling Peter informing him to call the uncle of the deceased. She added that, she did not know who cut the deceased.

11. Peter Muasya Kabindu (PW6) on his part, testified that, he was on his way to the shopping centre at Katooni village on 3.10.2016 at around 6:30pm, when he heard noise before reaching the shops. He stated that, on reaching the centre, he found the deceased having been injured and bleeding profusely, sitting at the shop of one, Mumbe John. He further testified that, on seeing that, he rushed to inform his relatives and on his way, he met the mother to the deceased and he turned back and took her to where the deceased had been assaulted. He added that, the father to the deceased and the wife to the deceased later came to the scene and that they reported the incident to Police before taking the deceased to hospital, but didn't make it as he died on the way to hospital.

12. Joel Wambua Musembi (PW7), the Assistant Chief Kithumula sub-location told this court, he was at Kithumula Shopping Centre at the material time when he got a call from Julius Kilonzo (PW3) informing him that his son (deceased herein) had been cut with a panga by the accused herein. He stated that, he rushed to the scene and found Joseph (deceased) bleeding profusely on the head. He added that, he rang the Police and arranged for a motor vehicle to take the injured person to the hospital and that later, he received a call from the father to the deceased that his son had died on the way to hospital.

13. When placed on his defence, the Accused denied on oath that he committed the offence. He told this court that on the material date, (3.10.2016), he was at his uncle's house where he had gone to attend a funeral. He testified that, he was called by his father on 4th October, 2016 and told to remain where he was which according to him was his grandfather's home adding that, that is where he was arrested. He testified that, he was with his uncle when his father called and that the father even had a conversation with the uncle who then urged him to remain and wait for his father. He testified that, the sub-chief (PW4) accompanied by Area Chief one, Jeremiah Muthusi went and found him at his uncle's place and was told of an incident at Katooni. He added that, he was escorted to Katooni where he learnt that his brother (the deceased) herein, has been attacked. He denied being connected with the offence and insisted on alibi as his defence. He further denied having differences with his late brother though he conceded that there was a family meeting that was called on 2nd October, 2016 by his father where he involved a Pastor to resolve their differences.

14. In his written submissions through learned Counsel, A.M. Kilonzi & Co. Advocate, the Accused persons contends that, the prosecution's case has failed to prove that he was the one who committed the crime. He submits that, the evidence of PW1, PW2 and PW3 all pointed to the PW6, as the person who informed them of the incident, but when PW6 was called he failed to directly link him with the murder because he also stated that, he found the deceased injured and did not witness the assault.

15. The defence further submits the circumstantial evidence does not meet the threshold to convict the accused herein. He relies on the decision of **Simon Musoke versus Republic [1950] EA at Page 118**, where the court held that, before drawing the inference of guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken the inference.

16. The Accused contends that, his defence of alibi weakens any inference that could be drawn to link him with the offence and avers that, the evidence of PW3 supports his alibi. He further contends that, his father also corroborated his alibi because he testified that he called the uncle to the Accused and confirmed that he was at his grandfather's place.

17. This court has considered both the Prosecution's Case and the defence. This is a case of murder where the Prosecution are required to prove the fact of death and two crucial elements of *actus reus* and *mens rea*. **Section 203 of the Penal Code** provides;

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

18. From the above provisions, there are 3 elements which the prosecution should establish and prove beyond doubt to sustain a charge of murder. The 3 elements are: -

(i) *Fact of death of the deceased and the cause.*

(ii) *That the accused committed the unlawful act which caused the death of the deceased.*

(iii) *That the unlawful act was actuated by malice (mens rea).*

19. The fact of death and its cause

The Prosecution's cause in respect to this element, is solely reliant on the testimonies of PW1, 3,4,5,6 and 7. The evidence when considered in totality only establishes the fact that the deceased was badly injured and taken to hospital. The Prosecution's case fails short because there was not medical evidence tendered to show the cause of death and the nature of injuries suffered. There was no medical evidence to confirm the death in the first place. There is no evidence laid before me to show whether or not the post mortem was conducted or not therefore, placing this court in a difficult position in so far as establishing the fact of death and establishing its cause. The Court of Appeal when faced with a similar situation in *Chengo Nickson Kalama versus Republic [2015] eKLR* observed as follows;

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt...”

20. In this matter, while there's sufficient evidence showing that the deceased was taken to hospital, when he was found badly injured, there is no further medical evidence from the hospital where he was taken, to show that the body was received and as I have observed there was no post mortem report to show that autopsy was conducted to establish the cause of death. The fact of death and its cause has not been established beyond doubt.

21. **(ii) Actus Reus or who caused the death of the deceased**

The prosecution's case on this element is also shaky because, it relies on circumstantial evidence because there is no witness who saw the Accused commit the heinous act. There is evidence that the Accused person had differences with the deceased over witchcraft claims. The evidence of PW1, PW2 and PW4 testified on that fact but the question posed is whether the Accused was so incensed about his late brother's real or perceived practices to the point of killing him? I have considered the evidence tendered by PW1, PW3 and PW4 and all of them stated that they were informed by PW6 that the Accused had attacked the deceased with a panga and cut him on the head. However, when PW6 took the witness stand he refuted the claims and stated that, he also did not know who injured the deceased person.

22. The absence of a direct link of the Accused to the murder of his brother left the prosecution's hanging on a thread of circumstantial evidence. The thread however is weak and that is why perhaps the prosecution made a last ditch effort to attempt to sneak in a "charge and cautionary of the accused statement" annexed to the written submissions filed which I found to be belated and forlorn. The prosecution at submissions stage, had no window to adduce new evidence without leave of this cause and after they had long closed their case. The prosecution's case was left hanging on weak circumstantial evidence and the Court of Appeal in *Musili Tulo Versus Republic [2014] eKLR* the court listed 3 requirements that must be met before a court can rely on circumstantial evidence to render a conviction. The court held as follows: -

“...It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements: -

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

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.

Those principles were set out in case of GMI v. Republic [2013] eKLR, which echoes the locus classicus case of Republic Versus Kipkering Arap Koske & Anor, 16 EACA 135.

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Simon Musoke versus Republic [1958] EA 715 citing with approval Teper versus Republic [1952] AL 480, thus:

.... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference....”

A similar position obtains in the case of *Mwangi & Anor. Versus Republic [2004] eKLR*, where the Court of Appeal also held;

“...In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on and other reasonable hypothesis except the hypothesis that the accused is guilty of the charge...”

23. It is evident from the evidence of PW1 and PW4 that, while the Accused and deceased had a strained relationship owing to witchcraft allegations, the father to the deceased (PW3) also had reservations about his son going by the evidence of PW1 and PW4. That evidence negates the inference that it was only the Accused who was incensed by the allegation of witchcraft and connected with the deceased person whether real or wrongly. In *Sawe versus Republic [2003] eKLR*, the Court of Appeal had this to say: -

“.....In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remain with the prosecution. It is a burden, which never shifts to the party accused.”

24. In light of the above authorities and the facts laid before me, it is clear that, the prosecution’s case is unsustainable because the element of *actus reus* has not been proved.

25. (iii) Malice aforethought.

In the absence of the element of *actus reus*, the element of mens rea cannot stand for obvious reasons. The element of fact of death, and *actus reus* having not been established and connected with the Accused, the element of men’s rea even if it had been proved cannot sustain the charge of murder on its own.

The long and short of this is that, this court finds that the prosecution’s case has fallen short. The Police and the investigating officer should have done better in terms of investigations and the prosecution also did a shoddy job of not presenting sufficient evidence to prove the 3 crucial elements stated above to sustain the charge against the Accused. It is a fact that, a life has been lost but due to bungled investigation and prosecution, this court is left with no option but find that the evidence against the Accused cannot sustain the charge of murder. This court hereby, returns verdict of not guilty against the Accused and he shall forthwith, be set free unless lawfully held.

Dated, Signed and Delivered at Kitui this 26th day of July, 2021.

HON. JUSTICE R.K. LIMO

JUDGE