



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 4 OF 2017**

**REPUBLIC..... PROSECUTION**

**VERSUS**

**DHAHABU KAHINDI KAINGU.....1<sup>ST</sup> ACCUSED**

**JOHN KAHINDI Alias JOGOO.....2<sup>ND</sup> ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for the state**

**Mr. Nyongesa advocate for the accused person**

**JUDGMENT**

The accused persons were indicted of the offence of murder contrary to Section 203 and 204 of the Penal Code. It is alleged in the charge sheet. That on diverse dates between 26.1.2017 and 28.1.2017 at Ndololo village, Baricho sub location. The accused jointly with others not before Court murdered **Karisa Ngumbao Mwambire**. Each of the accused denied committing the offence.

The prosecution in discharging the burden of proof of beyond reasonable doubt to prove the elements of the offence, summoned attendance of their seven (7) witnesses. The prosecution was represented by **Ms. Barbara Sombo**, while **Mr. Nyongesa** represented the accused on state brief under Article 50 (2) (h) of the Constitution.

In tandem with the provisions of Section 107 (1) of the Evidence Act. The prosecution quest at the trial was aimed at proving the following elements beyond reasonable doubt in order to secure a conviction.

*(a). That the deceased is dead.*

*(b). That the death was unlawfully caused.*

*(c). That there was existence or manifestation of malice aforethought.*

*(d). And finally, that the accused persons jointly executed the plan to murder the deceased and were both positively identified in consonant with the principles in Roria v R {1949} EACA 135.*

If that so, then the circumstances relied upon the Court on the standard of proof is as illuminated in the cases of **Miller v Minister of Pensions {1947} 2 ALL ER 372**, **Kioko v R {1983} KLR 289**, **Rex v Ismail Epukee {1934} 1 EACA 166**.

The prosecution case was largely dependant on circumstantial evidence of the witnesses. It was however pointed out that the first accused knew the circumstances under which the deceased met his death. This arose in the case of **Simon Musoke v R {1958} EA 715**, where the Court held that:

*“In a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. That is also necessary before deducing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other – co-existing circumstances which would destroy the inference.”*(See also Kipkereng Arap Koske v

As a result of these principles, I elect to determine the culpability of the accused persons based on whether the standard of proof has been discharged within the scope of **Miller case (supra)** by delving into each singular ingredient.

**(a). The death of the deceased**

The prosecution witnesses **(PW1) – Kahindi Ngumbao, (PW2), Emmanuel Thoya, (PW3) – Mwamure Kadzo Karisa, (PW4), APC Micah Thuo (PW5), (PW6) C.I.P. – Justus Kiboi and (PW7) – Dr. Fadhia Swaleh** confirm that the deceased died.

According to the postmortem report produced as **Exhibit 4**, the deceased was found to have sustained injuries to occipital region, around the neck and stab wounds at the femoral area of the body. According to the pathologist who performed the postmortem, the cause of death was Asphyxia, strangulation and haemorrhage.

From the evidence of **(PW1), (PW2), (PW3)** and **(PW4)**, that testified that the deceased initially had been reported as missing from the homestead. The report was made to the clan elder and the area chief which culminated on an inquiry being initiated to search and find the whereabouts of the deceased. It was on that inquiry the first accused offered credible information which led to the recovery of the deceased at the scene of the crime described by **(PW1), (PW2)** and **(PW3)** as some bush within the village.

In cross-examination, the witnesses told the Court that the scene of the crime they found the deceased body tied with a *lesso* coupled with some injuries. The evidence from the witnesses was credible that the deceased had been strangled combined with infliction of bodily harm.

The facts and the evidence is clear that causing of the death of the deceased was by an unlawful act of assault. The motive of the unlawful act as deduced from the prosecution case was the necessity of the fight which broke out between the 2<sup>nd</sup> accused and the deceased. It was alleged by **(PW1), (PW2), (PW3)** and **(PW7)** that the circumstantial inferred to the effect of a quarrel ensuing when the deceased found the 2<sup>nd</sup> accused having sexual intercourse with the first accused. It is a fact that the 1<sup>st</sup> accused happened to be the wife to the deceased. This angered the deceased and in confronting the 2<sup>nd</sup> accused, they faced it all in the bush resulting in the fatal strangulation by the 2<sup>nd</sup> accused.

The postmortem findings indicate the main cause of death was Asphyxia – meaning lack of oxygen due to strangulation. The 2<sup>nd</sup> accused person apparently was the main actor. He introduced the natural consequences of his unlawful acts with due respect from the circumstantial evidence.

I find no credible and cogent evidence that this was a joint venture designed by the two accused persons to prosecute the unlawful act against the deceased. There are no features to the effect of a manifestation that the two accused persons carried out the unlawful acts of assault causing grievous harm of unleashing the fatal injuries as a joint enterprise. This means the evidence availed on the death of the deceased and the unlawful dangerous act can only be attributable to the 2<sup>nd</sup> accused beyond reasonable doubt. The 1<sup>st</sup> accused presence at the scene was to the extent of offering intimacy to the 2<sup>nd</sup> accused notwithstanding that she was married to the deceased. It is against that background of fact her *lesso* might have been used as a manipulated weapon to strangle the deceased. It is inevitable to conclude that the *lesso* as traditionally used is part of the cloth wear for women/or wives. The 1<sup>st</sup> accused must have used it as such on that material day, in addition may be as makeshift bed for them during her love-making episode with the 2<sup>nd</sup> accused.

This means that they were not really acting in concert in so far as the crime of murder is concerned. As it is, I found these two elements proved beyond reasonable doubt against the 2<sup>nd</sup> accused by the prosecution.

The next issue to consider is whether the 2<sup>nd</sup> accused had the necessary malice aforethought to commit the offence of murder. The answer to me from the cumulative evidence of the seven witnesses and in accordance with Section 206 of the Penal Code there is no escape on that ingredient. By use of manipulated *lesso* to strangle the deceased, accused is deemed to have intended to cause death or grievous harm which led to the death of the deceased.

The 2<sup>nd</sup> accused person for the purpose of this murder charge cannot claim refuge of Section 207 as read conjunctionally with Section 208 of the Penal Code. Provocation herein as defined means and includes any wrongful act or insult of such a nature as to be likely, when done offered to an ordinary person, or in the presence of an ordinary person to another person, who is under his immediate care, or to whom he stands in conjugal, parental, or fraternal relation, or in relation of master and servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

In the instant case, the accused person's partaking of the forbidden and ring fenced fruit of the deceased with the 1<sup>st</sup> accused cannot rely on the defence of provocation.

At the outset, it is of course the deceased who was provoked and from the stand point of protecting the 1<sup>st</sup> accused he suffered a double tragedy. The marriage union implies that man as he came from the hand of his creator was endowed with the capacity to enjoy the world into which he has been ushered, including to a considerable degree exclusivity of conjugal rights from his wife or wives. This fitting attachment is never a shared resource by any other man or kindred.

As far as the 2<sup>nd</sup> accused is concerned, he committed this unlawful murder with malice aforethought. The postmortem put in evidence showed that the deceased was strangled and had also suffered injuries in the occipital region. The death caused was due to Asphyxia and haemorrhage. There was no other intention but to kill the deceased.

On the reliability of identification evidence in accordance with the **Turnbull guidelines (Turnbull v R {1977} QB 224)** there is supporting circumstantial evidence to squarely place the 2<sup>nd</sup> accused at the scene of the crime. The brief defence offered by the 2<sup>nd</sup> accused failed to contravene his culpability and responsibility for the crime. The standard of proof as stated in **Miller case** has been discharged beyond reasonable doubt against the 2<sup>nd</sup> accused person.

I conclude by finding him guilty of the offence of murder contrary to Section 203 and 204 of the Penal Code. As a consequence, I accordingly convict him of the offence.

Having therefore considered such relevant evidence and material which the prosecution produced before Court, I am satisfied that, the threshold of proof fell short of the required standard against the 1<sup>st</sup> accused. She shall therefore benefit on this specific question of a case not proved beyond reasonable doubt. It follows that the charge against her be dismissed to accord her the right to be set free unless otherwise lawfully held. The parties to proceed with pre-sentencing hearing against the 2<sup>nd</sup> accused.

### **Sentencing Verdict**

Briefly, the convict has been found guilty of murder contrary to Section 203 as punishable in terms of Section 204 of the Penal Code. The offence traditionally attracts a death penalty.

However, following the Supreme Court decision in **Francis Muruatetu v R {2017} eKLR** the mandatory death sentence for the offence was ruled to be unconstitutional. With that decision, the death penalty remains to be a maximum sentence for the offence of murder, leaving the trial Courts to explore other alternatives of sentences dependent on the facts of the specific case. With regard to this case, I take into account the mitigation and aggravating factors in the making of the decision.

In addition, the record reflects that the convict has been in custody for four (4) years and eight (8) months. In terms of Section 333 (2) of the Criminal Procedure Code that period is to be credited to the overall sentencing scheme.

In doing so, I sentence the convict to twenty-four (24) years imprisonment.

Orders accordingly.

14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for the state
2. Accused persons