



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE (MURDER) NO. 88 OF 2017

BETWEEN

REPUBLICPROSECUTOR

AND

JULIUS MWITI M'ITOMATHIU alias EZEKIEL MUGUNA..... ACCUSED

JUDGMENT

1) **JULIUS MWITI M'ITOMATHIU alias EZEKIEL MUGUNA (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 03rd October, 2017 at Thangathi village, in Tigania East Sub-County within Meru County murdered JOYCE KINYA

PROSECUTION CASE

2) Patrick Kimathi stated that on 03.10.2017, Accused who had sold ½ acre of land called and informed him that he had left two children but didn't say where he had left them. The following morning, as he was walking to his farm, he met one Julius Gitonga and as they were chatting a young girl called Karen informed Gitonga that there was a child crying in the house of Accused. That Gitonga and his wife proceeded to Accused's house and when they returned informed him that Accused's wife was lying dead in the house. That the matter was reported to the police who visited the scene and removed deceased's body to the morgue. Monica Karegi and Denis Gitie Mugambi who are mother and brother to **JOYCE KINYA** upon being informed on 03.10.2017 informed that she had been murdered went to Accused's house which was opened by one Ncurubi and therein lay deceased's body with evidence that she was killed gruesomely. Joseph Kainga an area manager and Cyprian Michubu, Thuuri assistant chief arrived at the scene on 03.10.2017 long after deceased died and didn't know how she died. According to the chief, it is Julius Gitonga that had the key to Accused's house where deceased's body was found. Accused was subsequently arrested in Nanyuki and handed over to CIP Ayub Makapila who caused him to be charged. Four photographs of the scene and a rungu were produced as PEXH. 1 to 5 respectively. On 09.10.2017, Dr. Mwangi conducted post mortem on deceased's body that was identified by Denis Gitie Mugambi. The face and neck were matted with dried blood, the scalp had 6 lacerations, measuring 4-5 cm long and 1 cm deep and the right auricle was lacerated at superior aspect. The doctor determined the cause of death intracerebral hemorrhage. The post mortem report was produced as **Exhibit 4**.

DEFENCE CASE

3) The accused gave a sworn statement and denied the offence. He stated that he left home on 23.09.2017 and was still away on 14.10.2017 when he was informed that his wife had been murdered.

Analysis and determination

4) **Section 203** and **204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

5) The offence of murder is complete when, “malice aforethought” is established if, pursuant to **section 206** of the **Penal Code** evidence proves any one or more of the following circumstances:

“(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.”

6) When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under **section 202 Penal Code** which is punishable under **section 205 Penal Code** by a term of imprisonment extending up to life.

ANALYSIS AND FINDINGS

7) I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

(a) The death of the deceased

8) The postmortem form **PEXH. 4** conducted by Dr. Mwangi reveals that the deceased died of depressed skull fracture on the occipital region with intracerebral hemorrhage secondary to 6 lacerations, measuring 4-5 cm long and 1 cm deep and the right auricle was lacerated at superior aspect.

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

9) I have considered PW1’s evidence with a lot of curiosity. Whereas he claimed that Accused called and informed him that he had left two children only for him to later learn that Accused’s wife had been murdered, he did not offer any explanation from where he got the key to the house that deceased’s wife was killed. The chief confirmed that it was PW1 that opened the said house and the investigators ought to have interrogated him further considering that he did not say that the keys were given to him by Accused. From the foregoing, even if Accused indeed called PW1, there is no evidence that Accused was at home on the material night.

10) Accused raised the defence of alibi that he was at Nanyuki between 23.09.2017 and until 14.10.2017 when he was arrested.

11) 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.

12) 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.

13) I have weighed the prosecution case *vis a vis* the defence of alibi raised by Accused and I have found that the alibi introduces into the mind of the court a doubt that is reasonable.

14) 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

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

16) 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 25TH DAY OF NOVEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present

For the Accused persons - N/A

For the State - Ms. Mwaniki