



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 12 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES NANG'OLE EDUNG.....ACCUSED**

**JUDGMENT**

1. **JAMES NANG'OLE EDUNG** (“the accused”) herein has been charged with 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 20<sup>th</sup> day of January 2016 at River Malkano in Eskot location of Garbatulla sub – Location County within Isiolo County murdered SM (“the deceased”). The prosecution called six (6) witnesses to establish its case.

2. **PW1 Omari Abduba** stated that he had employed the deceased to herd his goats. On 21.1.2016 at 1.00AM he received a phone call from his employee Mutembei who informed him that the deceased had been killed. By 8.00AM he was at Garbatulla Police Station which was 40KMs away where he reported the matter. Accompanied by the police they went to the Eskot Township where they found Mutembei with members of the public who had apprehended the accused. They proceeded to the scene where they found the body of the deceased buried with his head and hip in the grave and his legs outside.

3. **PW2 No. 100762 CPL Sarah Nyambura Kinuthia** testified that on 21.1.2016 she accompanied the County Criminal Investigations officer, OCS together with other officers to the scene. One hundred (100) meters from the scene they met Mutembei (PW4) who led them to the accused who had been tied to a tree. He and the members of the public handed the accused to them. Upon interrogation he told them that they were grazing with the deceased. As they dug for water in the sand he thought the deceased was trying to scoop water from the hole he had dug when the soil buried him. The accused led them to the scene where they found the deceased buried from his head to the waist and the legs protruding. The accused assisted to exhume the body which was taken to the mortuary and the accused was taken to Garbatulla Police Station.

4. **PW3 Dr. Winnie Mutunga** produced the post mortem report which was conducted by Dr. Kilach on 25.1.2016 at 12.30 pm on the body of a male African aged 15 years. Dr Kilach observed that the body was rigid and had lividity. Externally the head, chest, neck and chest wall were swollen. There was darkening of the skin. There was frothing around the nose and the tongue was swollen. In the respiratory system there was increased lung volume which caused blunting of the heart. The cause of death was established to be asphyxiation for the body had been deprived of oxygen.

5. **PW4 Francis Mutembei** testified that in 2016 he was working for **PW1** as a herder herding goats for him. That on 20.1.2016 he remained at home as the deceased went to herd goats in the company of the accused person. In the evening at 6.00PM the goats returned without him. He waited for him up to 7.00PM but he did not return. He and his friends Stephen and Julius went out looking for him but did not find him. They went home and begun to ask other herdsmen who left together with him. The accused told them that there was a place where they were digging for water and it is possible that the deceased may have been trapped in the hole they had dug. The accused took them there but as they were heading there he started running ahead and they pursued him.

6. When they caught up with him they found the accused holding the deceased’s legs wanting to pull him out of the hole. They told him not to remove the body until the police came. The deceased’s body was buried halfway upside down in hole that did not have water. The hole was very small and if it is true that he entered the hole accidentally he could have released himself. They detained the accused for they suspected that he was the one who buried the deceased. PW4 made a phone call to PW1 who came in company of police officers the following day and the body was retrieved and taken to the mortuary as the accused person was arrested by the police.

7. PW4 testified that when they went to the accused person the first time to ask for the whereabouts of the deceased, the accused person did not tell them anything. That it is after they had failed in their search for the deceased that they went to the accused for the 2<sup>nd</sup> time and that is when he told them that the deceased could have been trapped in a hole. He said that they did not understand why the deceased could be

digging a well for water when there was water nearby.

8. **PW5 Inspector Christine Orina** stated that on 21.1.2016 she was at the police station with former DCIO when they received a report of a murder at Eskot Location. They went to the scene with other officers which was about 60 KMs away. At the *manyatta* they found elders had detained the accused. Upon interrogation by the DCIO he led them to the scene where they found the deceased was buried in the sand upside down up to the waist. The force that was used to pull the deceased from the hole made them believe that it is not sand which fell on him. The hole looked like it had been stepped on around. The hole which the deceased was buried was not too deep to make it impossible for him to get out if he fell accidentally. Photographs of the scene were taken, body of the deceased taken to the mortuary and accused detained. The accused told her that he was together with the deceased when they dug for water for the goats and that soil fell on the deceased as he was digging.

9. **PW6 No.2 231972 Chief Inspector Francis Mwichia** the arresting as well as investigating officer told the court that on 21.1.2016 when the incident was reported by **PW1** he together with **PW5, PW2** and other officers went to Eskot area where they found a group of people had apprehended the accused who had been beaten and had cuts on his hands. When they questioned him he told them he was with the deceased and that he left him at the river. He led them to where he had left the deceased who had been buried half way in sand with legs facing up. They tried to remove the body and accused confirmed that he is the one who buried the deceased after a dispute while they were herding. They did not have a scene of crime personnel so he used his phone to take photographs of the scene which he produced. After removing the body they took it to the mortuary and subsequently charged the accused with the offence of murder.

10. At the close of the prosecution's case the accused gave a sworn statement. **DW1 James Nang'ole Edung** testified that he and the deceased were employed as herdsmen together. He recalled that on 20.1.2016 they staying in one homestead. Each of them untethered their goats to go and herd. At about 8.00PM he met the deceased. He was the first to reach the stream where **DW1** got water to drink. The deceased arrived and started digging the sand for water. They dug but there was no water coming out even having dug a deep hole. He told the deceased that they should go home as there was no sign of water but the deceased insisted on going on. On his way home he heard people calling out the name of the deceased. Co-herders saw him and asked if he had seen Musyoka and he told them where he had left the deceased digging for water. He led them to the stream and found sand had slid on the deceased. They guarded the scene until the next day when police came. It was a sand slide that trapped the deceased in the hole he was digging. That it was not he who caused the death of the deceased. He is implicated because he led people to the scene. That he had no reason of killing him. Whenever a herder was thirsty they would dig in the sand for clean water. They dug daily because goats could trample on them and covering of the well takes 10 minutes. They dug for water for about 30 minutes but there was no water. The deceased had injuries on the waist.

11. At the close of defence case the accused persons advocate filed written submissions. The accused submitted that none of the prosecution witnesses saw the accused bury or push the deceased in the pit. Thus, their testimonies are largely based on assumption and suspicion due to the fact that he was last seen with the deceased before embarking on the digging expedition. Their testimonies are not credible as it is pegged on suspicion and assumption. The deceased died as a result of lack of oxygen due to accidentally falling while digging to extract water. Hence the prosecution has failed to prove their case beyond reasonable doubt. He relied on the following authorities **R vs Sawe (2002) eKLR** and **Anthony Ndegwa v R (2014) eKLR**.

12. From the evidence adduced by the prosecution witnesses and from the evidence of the accused as well as the submissions filed on behalf of the accused person, the issue for determination is whether the prosecution has proved beyond reasonable doubt that the deceased died as a result of an unlawful action or omission committed by the accused person and that the unlawful action was actuated with malice aforethought.

13. The offence of murder 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.”***

From the definition four ingredients of the offence arise which the prosecution must prove beyond reasonable doubt in order to prove the charge. They are:

***1. The fact of the death of the deceased.***

***2. The cause of death.***

***3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***

***4. Proof that the said unlawful act or omission was committed with malice aforethought.***

14. The first two ingredients that the prosecution sought to prove were fact and cause of death. According to the evidence presented in court is that the deceased was found buried upside down from his head up to his waist while his legs were protruding. According to the **PW4** and **PW5** is that the hole the deceased was found buried in was not too deep that the deceased could not get out of if he had accidentally entered in or if sand fell on him. **PW5** stated that the hole around looked like it had been stepped on around. According to **PW3** is that the cause of death is asphyxiation for the body had been deprived of oxygen. This is consistent with the position the deceased was found in. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved.

15. The third element that the prosecution needed to prove is that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, that is *actus reus*, that resulted in his death.

16. **PW4** stated that on 20/1/2016 the deceased went out to herd but the goats came back home without him. He waited for him but he did not

show up. So he together with his friends went out to look for him. When they first asked the accused the whereabouts of the deceased, he did not tell them anything but when they failed to trace the deceased and inquired from the accused a 2<sup>nd</sup> time, he told them that they were digging for water with the deceased and it is possible that the deceased may have been trapped in the hole he dug.

17. No one witnessed the accused kill the deceased but he together with the deceased left together to the park to graze goats and when he returned alone without the deceased, his fellow herdsmen inquired the whereabouts of the deceased but he didn't tell them anything.

18. From the evidence adduced the accused was the last person to be seen with the deceased. According to the doctrine of 'last seen' Lesiit J in the case of **Republic v E K K [2018] eKLR** made reference to the following cases:

***"43. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the 'last seen alive with' doctrine held:***

***"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."***

***44. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:***

***"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."***

***45. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:***

***"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."***

19. Since the accused was the last to be seen with the deceased he needed to provide an explanation. He explained that he was with the deceased at the stream digging in the sand for water. They did so for a while but they did not get anything. He decided to go home but the deceased proceeded to dig. That it was a sand slide that trapped the deceased in the hole he was digging. When the accused finally opened up to PW4 and the other herdsmen he told them that the deceased may have been trapped while digging in the sand for water.

20. **PW2, PW4** and **PW5** testified that the hole the deceased was found buried in was not too deep that the deceased could not get out of it if he had accidentally entered in or if sand fell on him. **PW5** testified that they needed a lot of force to remove the body which made them believe that it was not sand which fell on him. Moreover, **PW5** stated that the hole around looked like it had been stepped on around. According to **PW2** is that there was no sign sand had been scooped from the hole and neither did it have water. **PW6** who was the investigating officer told the court that the accused confirmed that he was the one who buried the deceased after a dispute while they were in the grazing field.

21. The accused was the last person with the deceased thus he bears the full responsibility for his death based on the doctrine of last seen. He is placed with the responsibility of giving an explanation. The defence given by the accused person that the deceased was trapped when sand slid while he was digging for water is not satisfactory considering the overwhelming circumstantial evidence adduced by the prosecution. Consequently, I find that prosecution proved that the deceased met his death as a result of an unlawful act on the part of the accused.

22. Did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines malice aforethought as follows:-

**"Malice aforethought shall be deemed to be established by evidence proving 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) .....

23. The deceased was found buried upside down upto the waist with the legs protruding and from the evidence of PW2, PW4, PW5 and PW6 the force used to pull out the body of the deceased from the hole where it was buried showed that the sand around the body had been stamped to ensure that he could not survive. PW5 specifically said that the hole where the deceased had been buried looked like it had been stepped on. The observation of the witnesses for the prosecution clearly demonstrates that the accused had the intention to cause the death of or to do grievous harm to the deceased. Thus, I am satisfied that the prosecution has proved that the accused had malice aforethought.

24. Accordingly, I find that the prosecution has proved the accused person guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code beyond reasonable doubt and he is convicted under Section 322 of the Criminal Procedure Code.**

**HON A. ONG'INJO**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 30<sup>TH</sup> DAY OF JANUARY 2020.**

**In the presence of :**

C/A: Kinoti

Accused : Present in person

State: Mr Namiti Advocate for state

Mr Muthomi K holding brief for Nyenyire Advocate for accused.

**HON A. ONG'INJO**

**JUDGE**

**Mr Namiti**

I don't have accused persons past records.

**Order**

Mention 20.2.2020 for Mitigation, Victim Impact statement and sentencing. Accused Remanded in Custody.

**HON A. ONG'INJO**

**JUDGE**