



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 36 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MOSES GITONGA KANUNGURI.....1ST ACCUSED

BENJAMIN KIRIMI KANUNGURI.....2ND ACCUSED

JUDGMENT

1. **MOSES GITONGA KANUNGURI** and **BENJAMIN KIRIMI KANUNGURI** have been charged with the offence of murder contrary to Section 203 as read together with **Section 204** of the **Penal Code Cap 63 of the Laws of Kenya**. The particulars of the offence are that on 11/4/2015 at Kongoitiame Village Kabachi Location in Igembe North Sub county within Meru County murdered **JOSEPHAT M'UTHAKA**. They pleaded not guilty and the prosecution called 6 witnesses to establish its case.

2. **PW1 JACKSON MEME** who sells retail goods told the court that on 11/4/2015 was at his shop when he heard screams coming from his home. He closed the shop and went to investigate and found his father, the deceased lying on the ground outside. He was bleeding from the neck and had injuries on the forehead. Surrounding him were his sisters children who when asked what happened said that they had found him like that. He reported the matter to the police and a vehicle came at 5.00am to take the deceased to hospital.

3. **PW2 PK** told the court that on 11/4/2015 he received a phone call from his mother, sister to the deceased who informed him that there had been a fight between the deceased and the accused persons who are his sons. He decided to go to the deceased home in the evening and on the way he had screams coming from his home. On the way he met PW4 who told him that the deceased was fighting with the accused persons and that is why he had escaped. He said that they were using a jembe handle to fight. When they arrived at the deceased home they found the deceased on the ground with a cut on the head and an injury on the right side with bleeding from the mouth. The accused persons had escaped and only came back after PW1 went to report the police. The dispute between the deceased and the accused persons was on land as the deceased was a drunkard and was selling family land.

4. **PW3 CPL JOSEPH KOMEN** in his testimony said that I.P John Kamau was the initial investigating officer. he recalled that on 11/4/2015 at around 12.05pm a report was made by the deceased who alleged he was assaulted by the accused persons herein. He was issued with a P3 form and referred to a hospital. On the same day the deceased was attacked by the accused persons at around 7.45 pm. PW4 sensing that the accused persons were threatening to kill the accused ran to a nearby canteen and when he returned he found his father lying dead. After the matter was reported by PW1 they arrived on the scene and found the deceased had died. They then took the body Meru level 5 mortuary. Upon investigations it was established that there were persistent quarrels between the deceased and his sons over land. The accused persons were then arrested and charged.

5. **PW4 LC** son to the deceased currently attached to NYS told the court that on 11/4/2015 he was a student at [particulars withheld] secondary school in form 4. In the evening of the said date he went home at around 7.00pm and found people wailing on inquiry he learnt that his father had died. He got shocked and went to sleep at his friends place. The following day they went and recorded their statements. PW4 indicated that he did not tell the police that he found the accused beating the deceased with a Jembe handle.

6. **PW5 LK** testified that he recall that on 11/4/2015 at around 9.00 pm he received a phone call from his sister G who told him that the deceased was sick. He looked for a motorbike and when he was unable to get one he told his sister that he would go in the morning. The next day he found his father had died and his body taken by the police. The accused persons never had a dispute with the deceased.

7. **PW6 DR JAMES KIHUMBA** presented the post mortem report conducted by Dr. Mohammed Noor. The general observations was that the body was of good nutrition and average physique with height of 175 cm. externally the head had a cut on the right temporal region. There were bruises on the right parietal region and the head could move freely detecting that there was spinal injury. On internal examination there were bruises and cut on the head neck and hand. There was also dislocation of the cervical vertebra. In conclusion the cause of death was due to severe injuries due to blunt trauma and spinal cord injury.

8. **DW1 MGK** told the court that on 11/4/2015 at 8.00 am he went to see his father, the deceased. there was a plan that money was to be raised for his college fees. The deceased was to go to maua and he told DW1 to inform his uncles about the fundraising. DW1 then went to his uncle who lived 7km away and found his children at home and his uncle was in the farm. He remained there up to 9.00 pm. DW1 went back home that night and found his father had been beaten to death and in the morning they were arrested. All his brothers were arrested and some of them released.

9. **DW2 BK** recalled that on 10/4/2015 he differed with his wife PG at about 10.00am. He beat her up and when he returned home he found that she had left with everything. His father then sent him to call her but he informed him that she had left. The deceased told him that if he had chased his wife away then he should not sleep in her house. He decided to go to his in laws home and when he did he tried to plead with his wife but she insisted that her father ought to be present if she was to go with him. He slept at his in laws and on 11th they sent for his father in law. On 12 he returned home and found that his father had died and learnt that it was K who said his mother had told him that they had killed their father. However he was not at home between the 10th and 12th.

10. **DW3 PAULINA MUKATHE** told the court that she is the mother to the 1st accused person. On 10/4/2015 the deceased had a case in Maua court and left to go there at 7.00 am. DW1 left to go and tell his uncles about the fundraiser for his school fees. The deceased came home at around 8.00pm and fell down and died as he had been beaten. He did not tell her who had beaten him but she saw him fall. She was however with her co-wife and did not see DW1 on that material day.

11. The accused persons are facing a charge of murder as 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.”

12. From the definition, four ingredients of the offence arise which the prosecution must prove beyond any reasonable doubt. These are:-

a) The fact of the death of the deceased.

b) The cause of death.

c) 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

d) Proof that the said unlawful act or omission was committed with malice aforethought.

13. On the first and second ingredients of the offence of murder the Prosecution witnesses and the Accused persons confirmed that indeed it was Josphat M'Uthaka who died and PW6 presented the post mortem report Ex-P1 that confirmed that the deceased person herein due to severe head injury following blunt trauma and Spinal Cord injury.

14. It was then up to the prosecution to prove beyond reasonable doubt that the accused was behind the death of the deceased herein. In Republic v Ismail Hussein Ibrahim [2018] eKLR it was held that;

“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

15. It was the prosecution's case that PW1 who operates a retail shop near their home was at the shop at 8.00 PM when he heard screams emanating from his fathers home. When he rushed to the home he found his sister's children and his siblings and also found his father lying on the ground and was bleeding from the neck. That he had an injury on the forehead and the backside of the neck. PW1 says he didn't witness the murder but that A1 and A2 had fought over miraa and land on 10th April 2015. PW1 said that it was children and adults who were screaming at the home but did not give the names of the people who were screaming. She said the accused persons are his elder brothers.

16. PW2 the nephew of the deceased said his mother had send him to go and find out why his uncle the deceased had been assaulted by the accused persons. That when he was approaching the home on 11th April 2015 at about 7.45 pm, he heard screams and he met PW4 LC who told him that his father was fighting with A1 and A2 and that is why he had escaped. That PW4 told him that the accused persons were using jembe handles to fight the father. That in company of PW4 they returned home but did not find the accused persons, they only found the

deceased lying down with a cut on the head and an injury on the mouth which was bleeding. He said that it is only when they arrived home that people who had escaped came back and PW1 who found him at home went to report to the police. PW2 said that the dispute between the accused person and the deceased was over land as he was a drunkard and he was selling land against the wishes of the accused persons. He said the deceased was always quarrelsome with all members of the family. PW2 said he had a touch which enabled him to see the injuries on the deceased person.

17. PW4 who testified on 19th February 2019 about 4 years after the offence had been committed, and after several efforts were made to trace and avail him in court denied having seen the accused persons assault his father and he denied that he told the police that his brothers beat the deceased using jembe handles. He said that in 2015 he was 20 years old. He confirms having heard screams within the homestead and denied having entered the homestead. When questioned why he took so long to attend court PW4 said he had joined NYS in [particulars withheld] and his superiors did not allow him to come to court.

18. The fact that PW4 recorded a statement to the effect that A1 and A2 beat his father using jembe handles and the fact that PW2 testified and said that he met PW4 and they went back home confirms that it is the accused persons who inflicted the injuries that led to their father's death. On the material day the deceased person had reported to the police that the accused persons had assaulted him and he was issued with a P3 form but when he returned on the 2 suspects accomplished their mission of killing him before the P3 form was filled and action taken against them.

19. A1 MG in his defence said that he was with the deceased at 8.00 am on 11th April 2015 and that the deceased left him at home to go to court after which he went to his uncle's home 7 km away and only returned home after midnight and therefore he had nothing to do with his father's death. A1 mother DW3 however said that the deceased went to court on 10th April 2015 at 7.00 am and returned home at 8.00 pm. From the evidence of PW1, PW2, PW4 and PW5 the deceased was killed before 7.45 pm and it is not possible that he could have come home later than the time he was killed at his own home.

20. Although A1 claims that he was with his mother and father at 8.00 am, DW3 said that the A1 went to the house at 11.00 am after coming from his uncles place. She said that the deceased came back home and fell on the doorstep which had stones and injured his forehead but PW1 and PW2 said that when they went to the deceased person's home, everyone had escaped. If it is true that the injuries suffered by the deceased was not inflicted by the accused persons, DW3 who is his wife should have recorded a statement. She contradicted A1 claim that he returned home at midnight when she said that A1 returned at 10.00pm. She lied to the court when she said she didn't know PK PW2 when the evidence adduced showed very well that he was a nephew to the deceased who was her husband.

21. A2 claimed that he had gone to his inlaws place on 10th April to get his wife and that he returned home on 12th April 2015 and found his father had died. There is however, clear evidence that on 11th April 2015 the deceased reported that the accused persons had assaulted him. According to PW3 Corporal Joseph Komen, the report of Assault was made at 12.05 PM against the accused persons and it cannot be possible that the deceased who is alleged to have send A2 to go after his wife could have reported an assault case against him when he was at his in-laws place.

22. A2 claimed that he differed PW2 when he failed to pay for miraa worth Ksh. 7000/= which according to him was bad miraa. This issue was however not raised by PW2 in his evidence in chief and PW2 did not say that he had a grudge with A2. It is therefore an afterthought for accused 2 to claim that there was a grudge between him and PW2.

23. A1 claimed that his brothers Leonard, Lawi and Jackson were released after they paid the Police Ksh. 20,000 each however, this is also an issue that was never raised by PW1, PW4 and PW5 during their testimonies in chief. PW1, PW4 and PW5 said that the accused persons are their elder brothers and therefore if they were being released on account of giving money to the police then A1 and A2 would be in a better position to have the money more than the younger brothers.

24. The defence by the accused persons is riddled with a lot of lies and afterthought and cannot challenge the credible evidence of the prosecution. This court finds that the evidence adduced by the prosecution in support of the charge of murder against the accused persons has been proved beyond all reasonable doubt. The accused persons are found guilty and are convicted under section 322 (2) of the Criminal Procedure code.

HON A. ONG'INJO

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 27TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti

Accused 1:-Present in person

Accused 2:- Present in person

State: Ms Mbithe for state

Mr Igweta Advocate holding brief for Mr Wamache Advocate for accused

HON A. ONG'INJO

JUDGE

Ms Mbithe for state

I pray for a date for Records and Victim Impact Statement .

Order: Mention 1.4.2020 for Mitigation, Records & Victim Impact Statement.

HON A. ONG'INJO

JUDGE