



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL MURDER: NO 13 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL MURIITHI NJIRU.....1<sup>ST</sup> ACCUSED**

**LABAN MUCHIRA MURIITHI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT:**

1. The accuseds' person **Laban Muchira Muriithi** and **Daniel Muriithi Njiru** are charged offence of murder contrary section 203 as read with section 204 of the Penal code vide information filed in this court 30<sup>th</sup> April, 2012.
  2. The particulars of the charge are that on the 17<sup>th</sup> April, 2012 at unknown time at Kiamutugu trading centre in Kirinyaga District within central province jointly murdered **Benson Kiraka Muriuki**. The accused persons denied the charge and a plea of not guilty was entered against them.
- The facts of the case are that:**
- On the 17<sup>th</sup> April, 2012 the accused were spotted at Kiamutugu center at around 4p.m. the 1<sup>st</sup> accused was with the deceased. They were spotted by Stanley Muriithi Kiraka (PW2) who was the father of the deceased.
3. Later during the night Pw2 was called by one Gachoki who went to his home and told him that he had seen Laban the first accused with his son, and that his son appeared to have been injured as he was bleeding and was unable to wake up. Pw2 got surprised at that information as he had seen the deceased at around 4p.m, and he was okay, and was carrying macadamia from his farm.
  4. Pw2 called villagers and also called Kiraka who was his neighbor and four others' and proceeded to where the deceased was. At the scene he found the first accused who showed them where the deceased was. The first accused was carrying the clothes of the deceased that is a purple jacket.
  5. The first accused showed them where the deceased was lying near Kiamutugu town besides the road. His head was on the road, and the rest of the body was outside the road, and he was already dead.
  6. Pw2 went back and called the chief on a mobile phone. The chief told him to proceed to the Chief's camp. PW2 proceeded there and found an administration policeman who accompanied him back to the scene.
  7. The administration police officer called police officers from Kianyaga police station who went and took the body to Kibugi Funeral home.
  8. Later on 23<sup>rd</sup> April, 2012 a postmortem was conducted on the body of the deceased, by Doctor Francis Karomo. He found that the body had two cuts wounds on the back, on third and fifth ribs measuring four centimeters in length, and there were blood clots on the two lacerations. Internally the respiratory system had collapsed, the right lung had several lacerations at the back. There was massive bleeding in the chest cavity with broken third and eighth rib.
  9. The doctor concluded that the cause of death was cardiovascular arrest. Secondary to haemo pneumothorax ( because of the penetrating object on the thorax. There was air and bleeding) caused by a sharp object, ((penetrating chest injury) and he signed death certificate number; 0168309 on 23<sup>rd</sup> April, 2012 and also signed the post mortem which he produced as exhibit four.
  10. In his opinion the Doctor said the deceased could have been stabbed twice due to the nature of the injuries.

11. The first accused who was at the scene ran away from the scene when he saw people had gathered at the scene.
12. The first accused was arrested the following day by the members of the public who wanted to lynch him but he was rescued by the Area Assistant Chief, who later handed him over to the OCS Kianyaga Police station.
13. The same day the Area Chief Benson Muchira Karia (Pw3) sent for the 2<sup>nd</sup> accused who was alleged to have been with the first accused the previous night.
14. The 2<sup>nd</sup> accused was escorted to the Chief's camp and was handed over to the police at Kianyaga Police station. The police commenced investigations, and found that the two (2) accuseds' were the last persons to be seen with the deceased on the material day they were then charged with this offence.
15. The accused were put on their defence and gave their evidence on oath. The first accused told the court that they had known the deceased from when he was a young child and they were friends and used to drink together and later the deceased met him at home peeling macadamia nuts. The deceased then went saying that he also had macadamia nuts he was working on.
16. Later the deceased went and met him and they proceeded to Kiamutugu to go and sell the macadamia nuts. They parted and the deceased went to look for DAP fertilizer while still at the town he met one Samuel Muriithi Njue and they had a discussion and then proceeded to Wanyagia's Bar. They were joined by the deceased at around 6.30p.m.
17. The deceased then left and first accused was left with Muriithi and stayed up to 8p.m when it started raining and there was a power black out. They went outside and it continued raining and they decided not to wait for it to subside.
18. On the way home he saw somebody lying down on the road ahead of him. He decided to go back as he did not know his intention. A Motor-bike came and he followed it, and when he reached where the person was lying down he flashed lights on him and he recognized it was the deceased. He called him but he could not answer, he held his hands and realized that he was lifeless.
19. The deceased had blocked the road. Gachoki who was riding the motor-bike asked him what happened and he told him that he was with the deceased some hours before and he did not know what had happened to him. Gachoki assisted him and they kept the deceased on the side of the road, and they departed. He gave Gachoki the phone number of Kiraka's father but it could not go through. Gachoki decided to go and inform the families of the deceased. Then people came and he feared as he was standing there alone, and so he decided to go home.
20. On the way he met with the father of the deceased and other neighbors and he took them where the body of the deceased was. He then went home.
21. In the morning he was told he was required at the Police station to go and record a statement, people went to him and he told them what happened. The Chief went to his house and took him to Kiamatugu A. P. Post and after a short while Muriithi was brought to the chief's camp by his brother on a motor-bike and they were escorted to Kianyaga Police station.
22. The father of the deceased had picked the sweater which was near where the deceased was lying. The sweater belonged to Kithaka, he then went home with the OCS and he carried the clothes which he had worn the previous night. He was taken back to the police station and then charged. He told the court that he did not murder the deceased.
23. The 2<sup>nd</sup> accused Daniel Muriithi Njiru gave a sworn statement of defence, he told the court that he knew the deceased and that he had known him for five years.
24. On the material day in the afternoon he left home at about 3p.m. and went to Kiamutugu town where he remained upto 5p.m. where he met the 1<sup>st</sup> accused and they proceeded to a bar. While at the bar which is called Wanyagia Bar the deceased met them there but he did not stay for long as he said he had matters he had not finished. They stayed at the bar and started raining. They later left the bar and he proceeded to his home. He reached home at 9p.m, and did not leave until the next morning when the cousin of Kiraka by name Evan went and told him that they had come from Chief office as Kiraka was murdered the previous night.
25. Evan told him that he was required at the Chief's office. He told his brother Mugo to take him to the Chief's office as he had a motorbike. At the Chief's office he met the 1<sup>st</sup> accused and the two of them were escorted to Kianyaga Police station and recorded a statement. He told the court that Kiraka was his friend. He told the court that the charge against him is not true.
26. The prosecution called 8 witnesses in support of their case. The accused are charged with the offence of murder and the issue for determination is whether the accuseds' person is the one who caused the death of the deceased with malice aforethought.
27. A summary of the evidence which was tendered by the prosecution is as follows;

PW1; Stanley Muriuki Kiraka is the deceased's father, and Pw2 Stephen Munene Kiraka is the deceased's brother.

Their testimony is that they were called and informed that the deceased had been killed. They proceeded to the scene and found

the 1<sup>st</sup> accused who helped them and took them to where the deceased body was.

28. Pw1 however, testified that the 1<sup>st</sup> accused had a purple pullover which he identified in court as MFI 1 but was never produced in Court as an Exhibit.

29. PW1 testified that during the day at around 4p.m, he had seen the deceased in the company of the two accused. But he did not know how the deceased met his death.

30. Pw3 Simon Gachoki Njeru who was the 1<sup>st</sup> person who saw the deceased and he testified that he was on the way to take his wife to hospital when he found the deceased on the middle of the road, and the first accused was trying to pull him off the road.

31. In cross-examination PW3 stated categorically that; he found the 1<sup>st</sup> accused trying to help the deceased, he never saw him attacking him and he told the court that he did not see any blood, weapon or Injury on the 1<sup>st</sup> accused.

32. He testified that 1<sup>st</sup> accused did not flee when he saw them and in fact co-operated and did not leave with anything belonging to the deceased. He further told the court that it was a rainy night and everyone's clothes were muddy.

33. PW5 Benson Muchira Karia was the Chief Ngariama Location and he told the court that he rescued the accused from the members of the public who wanted to lynch them. He also testified that he had received the report that the deceased had been killed on the material night and advised the reportee to report at Kiamutugu A. P Post.

34. PW6 Doctor Joseph Thuo a consultant Psychiatrist who testified that he examined the accused persons and confirmed that they were fit to stand trial and produced their respective reports in court.

35. PW7 was the Doctor who performed the post mortem and confirmed that the body of the deceased had stab wounds at the back which had penetrated to his lungs and resulted to his death.

36. Pw8 Corporal Kimeu Kioko Mutunga the investigating officer who produced the statement of the investigating officer who passed on during the pendency of the trial.

37. The foregoing is the summary of the evidence which was adduced by the prosecution.

38. The essential ingredients of the offence of murder which the prosecution is required to prove beyond any reasonable doubt are that;

1. **The death of the deceased.**
2. **That the death of the deceased was unlawfully caused.**
3. **That the accused who caused the death had malice aforethought.**
4. **Prove that the accused is the one who caused the death of the accused.**
- 5.

Section 203 of the Penal code defines the ingredients of the offence of Murder as follows;

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

Under Section 206 of the Penal Code malice aforethought is defined 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 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 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”*

39. From the evidence tendered in this case there was no eye witness account of how the deceased met his unfortunate death.
40. The only evidence was that adduced first by PW1 who is the deceased's father and testified that; he had seen the deceased with the two accused however, this is a fact which is not dispute. Since the accused persons in their defence have confirmed that they met the deceased on the material day at Wanyagia Bar at Kiamutugu town. That according to the two accused the deceased left them at the bar and he went away, and this defence was not controverted.
41. The only other evidence was adduced by PW3 Simon Gachoki Njeru who testified that he saw the accused at the scene where the deceased was lying on the middle of the road and the accused Laban Muchira Muriithi was trying to pull him off the road, and he testified that the 1<sup>st</sup> accused was trying to assist the deceased by removing him from the road and the 1<sup>st</sup> accused was not armed, he did not flee from the scene and assisted the deceased. This was evidence from a prosecution witness and this evidence does not seem to implicate the 1<sup>st</sup> accused in the death of the deceased in any way.
42. The evidence tendered by the prosecution was not sufficient and did not prove that the accused had any intention to cause the death of the deceased.
43. The fact that the 1<sup>st</sup> accused was at the scene of the murder is circumstantial evidence, and for the evidence to be relied on to support the charge of murder, the evidence must only lead to one conclusion, that of guilt of the accused.

In the case of Republic –versus- Kipkering Arap Koske & another (1949)EACA page 35 the Court of Appeal of East Africa stated as follows:

*“ in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable explanation upon another reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”*

44. This case lays down the law on circumstantial evidence in criminal cases.
45. In order to justify a conviction based wholly on circumstantial evidence the inculpatory must not only be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the influence of guilty. See the case of; Wilson Wanjala Mukendeshwo -versus - Republic ( 2002) eKLR.
46. It is trite that in Criminal cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt as a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places the burden on the accused to explain matters which are peculiarly within his own personal knowledge. See Section 111 of Evidence Act Laws of Kenya which provides:

*“ 1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:*

*Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:*

*Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.*

*2. Nothing in this section shall-*

*(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person is charged.*

*(b) impose on the prosecution the burden of proving that the circumstances or facts described in sub-section (1) of this section do not exist, or*

*(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”*

47. In this case the 1<sup>st</sup> accused explained his presence at the scene where the deceased was found in his defence which was given on oath. A fact which was corroborated by a prosecution witness.

48. I find that the 1<sup>st</sup> accused could not have caused the death and remain at the scene and therefore his explanation that he found the deceased on the road and since he was his friend he decided to assist him is a plausible defence.

49. Furthermore from the statement of the Investigating officer P.C. Elias Kipchirchir which was produced as exhibit. 5 with consent of the defence he had stated that the deceased had fought and stab wounds, he suspected the accuseds and had their blood samples taken and recovered the clothes that they were wearing on the material night.

50. He also collected a sample of blood stain soil from the scene, they were analyzed at the Government chemist and a report from the Government analyst stated that the soil samples were examined and found not to be chemically similar in comparison. The report is Exhibit. 6. This rules out the possibility of that the two accused were at the scene of the murder.

51. From the foregoing I find that the evidence tendered by the prosecution is Insufficient and mostly based on suspicion. The only reason why the accused were charged was:

**1. They had been seen with the deceased drinking earlier that day.**

**2. The 1<sup>st</sup> accused was found at the scene of the murder.**

52. The defence of the accuseds' persons that the deceased left them in the bar was not rebutted.

53. The circumstantial evidence is not weighty and does not meet the threshold required to rely on it to convict.

54. The Prosecution failed to prove any motive or malice that the accused would have had to cause the death of the deceased.

Although medical evidence proves that the cause of death was as a result of an assault or an attack on the deceased by stabbing him on the back using a sharp object, the prosecution has failed to prove with cogent evidence that the accused are the ones who caused the injuries on the deceased and ultimately causing his death are the ones who inflicted the injuries on the deceased which caused his death.

55. There is no cogent evidence to prove the charge of murder against the two accused.

56. I have considered the submissions by the prosecution which are quite sound. However, the prosecution has failed to discharge the burden of proof that the accused are the ones who of malice aforethought caused the death of the deceased.

57. In conclusion, I find that the charge has not been proved beyond any reasonable doubt and the accused persons are entitled to an acquittal.

58. I therefore acquit the accused at this stage **Under Section: 322 (1) of the Criminal Procedure Code.**

**Dated at Kerugoya this 29<sup>th</sup> day of May 2020**

**L. W. GITARI**

**JUDGE**