



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 75 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ISAYA KITHAKA MURUNGI.....ACCUSED**

**JUDGEMENT**

1. **ISAIYA KITHAKA MURUNGI** has 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.

2. The particulars of the offence are that on 20/9/2014 at Athiru Gaiti Shopping Centre in Igembe South District within Meru County murdered JOSEPHAT M'UTHAKA. He pleaded not guilty and the prosecution called 8 witnesses to establish its case.

3. **PW1 RUTH WANJA** told the court that on 20/9/2014 at 1.00 am she was sleeping at the kiosk in her parent home when she heard people talking outside. One person said 'wewe mzee simama' and the person who was asked to stop responded 'ati nini?' Then she heard 2 gun shots. When she opened the door she heard one of the assailant insult the person they had shot and when she went out she found her brother in law facing downwards. When she raised him up and asked him his name he did not respond. She raised alarm and called her sister and by the time the neighbors came the deceased was bleeding profusely. When a vehicle came to take him to hospital he had already died. PW1 did not know who shot the deceased. **PW1** added that the accused person and the deceased were friends and had not differed. She said she did not recognize the voices of the assailants, she said she had known the accused since child hood and they had not differed.

4. **PW2 JEMIMA KAARE** testified and told the court that on 20/9/2014 she was sleeping in her house when she heard screams outside. She woke up and proceeded to the scene and found her husband on the ground bleeding. She said she found the deceased at PW1's kiosk and they looked for a vehicle to take him to hospital but by the time it came her husband had already died. She recalled that the deceased had a land dispute with his brothers Gitonga, Isiah and Samuel over a land dispute. She said the land in dispute is currently used by Samuel who planted trees. **PW2** said that Peter Mwithia (now deceased) informed her that the accused was with the deceased on the material night that he was killed. She said that the only dispute between the deceased and his brothers was over land as they claimed that he was not their brother.

5. In cross examination **PW2** said that the accused was not her husband's brother but clarified that the Isiah she was referring to as the brother of the deceased was not the accused in court. She said the brothers of the deceased were not in the scene of the murder or even during funeral arrangements.

6. **PW3 JOSEPH MEME** told the court that the deceased was his nephew and he is also the Area Manager. He recalled that on 20/9/2014 while he was sleeping he was woken up by gunshots followed by screams. He rushed to the scene and found the deceased lying in a pool of blood. He made a call to the Assistant Chief, who then called the police who came and collected the deceased's body. On 25/9/2014 he went to identify the body for postmortem. He said he did not see the accused at the scene on the material night

7. **PW4 ERICK MWENDA MITHEU** told the court that the deceased herein was his father. He recalled that on 21/9/2014 he had spent the previous night at his friends and in the morning he was called by Kithinji Carlos who informed him that his father had died. He switched off his phone and proceeded home where he found people had gathered and then he proceeded to the scene of the murder. Someone gave him his father's cell phone and he extracted the contacts that the deceased had called or received calls from and that he found that the accused was the last to call him. He was however not aware of any differences between the deceased and the accused. He said the deceased and the accused were friends and that he did not see the accused on 21<sup>st</sup> September 2014. He said among the people whose phones were found to have contacted his father it is only the accused who was arrested but he was not the only suspect. He said Nkando who was also a suspect was arrested and lynched by members of the public. He said that Kirimi Suri was also another suspect and that on the material night the suspect who shot his dad also broke into a shop.

8. **PW5 ERASTUS MWATHI M'IMARIA** told the court that the deceased was his brother and the accused is his sister's son. He attended the post mortem that established the cause of death as 2 gunshot wounds. He said the accused had no known dispute with the deceased.

9. **PW6 ROSEMARY NKIROTE KINYUA** told the court that she is the Assistant Chief of Bwetha Sub Location for 15 years. That on 21/9/2014 she received a phone call from Nyaga, Nyumba Kumi Chairman, who told her that the deceased had been killed. That he was shot dead near his gate. She made a phone call to CPL Galgalo and reported the matter. She also made a phone call to CPL Muthamia of Athiru Gaiti AP Camp near the scene of the murder and they proceeded to the scene in company of other officers and made a phone call to Maua Police Station and police officers went to the scene to collect the body. The following day she took a motor bike and proceeded to the scene where she collected 2 spent cartridges and handed them over to DCIO at Maua. On inquiry she learnt that the deceased was last seen with the accused who had gone underground.

10. She said she was not aware of any dispute between the accused and the deceased and in fact they were friends. The Assistant Chief said the accused had earlier murdered a person known as Nyaulanga and that he was charged and convicted but on appeal he was released

11. **PW7JOHN GIKUNDI** in his testimony told the court that he recalled that on 20/9/2014 in the evening he went to mama Kena's pub but there was a young man who was making a lot of noise so he left and went to another bar. At the next bar he saw 3 power saw dealers. At the next table sat Kithaka, Kaburu, Mugambi and Wangure. He joined them and heard the deceased giving instruction to the power saw dealers as he wanted them to split for him timber on Monday. That after the power saw dealers had left and the deceased remained with the accused, the accused asked the deceased to escort him up to Kiorona on their way home and they left together. After about 30 minutes of their leaving the owner of the pub received a phone call informing her that Kaburu had been killed one kilometer away from the bar. PW7 said that from the scene of the murder to accused person's home was 400 meters, he said he had known the accused and the deceased since childhood and that they were friends. He said he did not know if the accused and the deceased had any differences.

12. **PW8 DR KARIUKI MICHAEL** the medical superintendent at Nyambene Sub District Hospital produced the Post Mortem Report which he conducted on the body of Charles Mitheu M'Imaria alias Kaburu on 25/9/2014. Externally the forehead had 2 x 2 cm bruises. On the right chest below the nipple there was a bullet entry wound which exited through the left armpit and further entered the left arm and exited through the left arm. There was a second bullet wound that entered through the left lower back and exited through the left chest below the left nipple. Internally his respiratory system ruptured the left diaphragm that severed the left lung lower lobe with haemothorax. There were fractured ribs nos.5,7,8 and 9 on left anterior wall with severed left lung upper lobe with fractured rib no 5 beside the sterner.

13. On cardiovascular system there was severe pericardium, there was haemopericardium in the heart The stomach wall was bruised, the spleen was bruised at the medial tip and the peritoneum was injured with haemopericardium of about 50ml. As a result of the examination he concluded that death of the deceased was caused by cardio pulmonary arrest due to penetrating chest injury caused by a gunshot with resultant to heart, lung damage and internal bleeding.

14. In cross-examination the doctor said that the gunshot was close range probably less than 5 meters and being that he was shot from behind it is possible that he was running from the assailant. He said that the weapon was high velocity gun like AK-47

15. **DW1 ISAIHAH KITHAKA MURUNGI** told the court that he recalled that on 20/9/2014 he was at his 3<sup>rd</sup> wife's home where he spent the night. When he woke up he went to Kabutu on a motorbike to look for a miraa farm where he could pick miraa the following day. He managed to get a farm and then he returned home at around 1.00pm. He found his wife Charity Muthoni at home and after he took a bath he had lunch and thereafter at around 3 pm he went to Athiru Market to watch European football and when the game ended he went to a nearby bar. At 7.30 other customers including the deceased came. He was with 3 other people who split timber. They sat at his table and talked about work. Later the 3 individuals left and he remained with the deceased and the bar owner. They continued drinking and at 10.00pm Wangare told them that she wanted to close the bar. Together with Kaburu and Mugambi they left together as they were going in the same route. When they reached the junction the deceased told him that he wouldn't escort him as he wanted to go to his 1<sup>st</sup> wife home so that they could arrange food for the workers who would split timber the next day. Kaburu and Mugambi went to Kwetha sub-location where they were residing as he proceeded to Thuria Sub Location He therefore left the deceased with Mugambi the wasn't the last to be seen with the deceased.

16. **DW1** stated further that when he went home he slept as he was drunk. The next day he proceeded to Kaburito where he had leased a miraa farm. His casual workers worked until 1.00pm when he went to look for lunch. At a nearby hotel he heard that Kwetha had been attacked by robbers and 3 people injured and one of them had been shot and taken to hospital. That he went back to the farm and continued picking miraa up to 4.00 p.m when they went to Kabuitu Market to pay the workers and also to hire a vehicle to take the Miraa to Maua. That he returned home at 9.00 p.m and that his wife informed him that Kaburu had been shot and he died at night. On 22/9/2014 he went to see the deceased wife and told her that they were together the day before and he made his contributions towards the funeral arrangement. That on 23<sup>rd</sup> September 2014 when he went to sell his miraa he was arrested by Administration Police Officers. The accused said the deceased was his childhood friend and he had no reason to kill him. He said that no weapon was recovered from him and that the deceased was not killed near his home which is 30 minutes' walk from the scene.

17. From the evidence on record for the prosecution and the defense this court is to determine whether the Prosecution has proved beyond reasonable doubt that the deceased herein died as a result of an unlawful act and/or omission on the part of the accused actuated with malice aforethought as defined under **Section 203** of the **Penal Code** defines that offence as follows:-

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

Also in **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR**, the court held of murder that: -

**“This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-**

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

**2. The cause of such 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.”**

18. The fact that the deceased died is not in dispute as the prosecution witnesses as well as the accused confirm that fact. On the cause of death PW8, Dr.Kariuki Michael produced the Post Mortem Report in which the cause of death was concluded to be cardio pulmonary arrest due to penetrating chest injury caused by a gunshot. Additionally, PW3 identified the body of the deceased for purposes of examination by PW8.

19. On whether the accused caused the death of the deceased, the accused in his testimony did not deny that he was with the deceased drinking in a local bar before his death and they left for home together. However, when they reached the junction he left the deceased with one Mugambi and he proceeded home.

20. Although the prosecution called several witnesses in support of its case they were unable to place the accused person at the scene of the murder. PW7 John Gikundi testified that the accused and the deceased left the bar in company of Mugambi but the said Mugambi never recorded a statement and was not called to testify.PW1 who was at her kiosk at about 1.00 a.m. heard people talking outside and then heard 2 gunshots. She said she could not identify the voices of the people she heard talk before the gunshots were fired. The accused person was known to her as neighbor but she did not say if the voices she recognized was that of the accused. All the prosecution witnesses said that the accused and the deceased were childhood friends and there was no known difference between them that could have made the accused to kill the deceased.

21. What emerged from the wife of the deceased PW2 Jemimah Kaare is that the murder could have been as a result of a land dispute between the deceased and his brothers Gitonga, Isiah and Samuel and not the accused person herein.

22. In conclusion this court finds that the evidence adduced by the prosecution is not sufficient to find the accused person guilty of the offence of murder. Accordingly, I find the accused not guilty and he is acquitted under Section 322(1) of the Criminal Procedure Code.

**HON. A. ONG'INJO**

**JUDGE**

**JUDGMENT DATED AND DELIVERED AT NAIROBI VIA SKYPE THIS 28<sup>TH</sup> DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15<sup>TH</sup> MARCH 2020 AND SUBSEQUENTLY ON 7<sup>TH</sup> APRIL 2020 DUE TO COVID-19 PANDEMIC.**

**HON.A. ONG'INJO**

**JUDGE**