



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 61 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTWIRI KUBAI.....1STACCUSED

ERIC KINYUA alias JAPHET MUTWIRI alias MURANGIRI.....2ND ACCUSED

JUDGEMENT

1. **JAMES MUTWIRI KUBAI, JOTHAM MUTWIRI M'ITIMITU** and **ERIC KINYUA alias JAPHET MUTWIRI alias MURANGIRI**("the accused") herein have been charged with murder contrary to *Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya*.

2. The particulars of the offence are that on the 5th day of August, 2015 at Mutuati Market, Kabachi Location in Igembe North Sub – County within Meru County jointly with another not before court murdered **PETRO MWONGERA** ("the deceased"). The prosecution called five (5) witnesses to establish their case.

3. **PW1 Richard Michubu**, brother to the deceased, stated that he works at a butchery in Mutuati. He recalled that on 5/08/2015 at midnight he received a call from Michael who informed him that his brother had been carried by three (3) people who placed him near Sweet Heart Bar next to a culvert. He proceeded to where he was and found people hovering around the scene. The deceased was dead lying on his back and had been stabbed on the chest. He went and reported the matter at Mutuati Police Station. The following day he together with the police tracked the trail of blood with the police up to Douglas' bar where the deceased was stabbed. They found the bar locked but there were blood stains covering the sodas.

4. **PW2 Joshua Karuti** told the court that on 05/08/2015 he went to Douglas's bar. Jotham Mutwiri, the 1st accused and Murangiri (who is now deceased) came and found the deceased chewing miraa and drinking water. They started shoving him. He was 10 meters from where the deceased had sat. PW2 stated that Mutwiri, who is not before the court, produced a knife while the 1st accused held the deceased on the shoulder while pushing him and Murangiri then restrained the deceased with his chest from behind. Jotham Mutwiri then stabbed the deceased with the knife on the chest. When he saw this he ran away and stood about 100 meters.

5. After about three minutes the three came out carrying the deceased while Douglas the owner of the bar shone the way for them up to the tarmac where they placed the body next to an electricity pole. He thought that they were taking the deceased to hospital so he decided to go home. This was around 11 PM. The following day he heard that the deceased had passed on.

6. **PW3 Dr. Winnie Mutunga** produced the Post Mortem Report EXP1 that was filled by Dr. Paul Wambugu on 13th August 2015 after examining the body of Petro Mwongera the deceased herein and established that the cause of death was massive hemorrhage secondary to stab wound on the chest.

7. **PW4. Douglas Thuraniira Kanampiu** stated that operates a bar and also carries and sells miraa. He told the court that on the material day he was sleeping since he had a headache. At 11.00PM Peter Jenji who was working for him came and informed him that the deceased had been stabbed by Murangiri. He told the OCS that it is Jenji who knew what had happened. Three weeks before the incident the deceased had given him his phone as security for he owned him Kshs. 300/-.

8. **PW5 No. 170586 P. C Brian Nzioka** on 5/08/2015 **PW1** reported the incident at Mutuati Police Station at 0100 hrs. The OCS together with other officers went to the scene and found the body lying on the tarmac road while the legs were off the road. It was established that the body had a stab wound on the upper right shoulder and two stabs on the ribs on the left chest near the heart. Photographs were taken and the body was collected and taken Meru Level 5 Hospital Mortuary.

9. Before post mortem was conducted the 1st accused was arrested. Later Jotham Mutwiri was arrested but absconded after being released on bond. The 2nd accused was mistakenly identified as the 3rd suspect Alex Murangiri who was shot dead. He was not involved in the matter. He then recorded statement from Michael Kinyua and relatives of the deceased. He learnt that one Irene Kaare had an affair with the accused person and deceased who were friends.

10. **PW6 Peter Jenji** testified that he was operating his kiosk and on 5/08/2015 when the deceased came and ordered for a glass of tea at about 9.00PM. A lady came and the two left his kiosk and went towards a bar in the market. After thirty (30) minutes he had people screaming and saying that someone had been stabbed and had fallen on the tarmac. They were saying that it was the deceased who had been stabbed. At about midnight is when the police came and collected the body. He does not know who killed the deceased.

11. At the close of the prosecution's case, the 2nd accused was acquitted under **Section 210** on 19/06/2019 for he was not known to the witnesses and not involved in the incident. PW5 stated that the 2nd accused was mistakenly identified as the 3rd suspect was shot dead in 2018.

12. As for the 1st accused he was put on his defence where he gave a sworn testimony and called one witness. **DW1 James Mutwiri** told the court that on 5/8/2015 at 6.00 PM he went to work as he was a *boda boda* rider. At 8.00PM he closed work for he was not feeling well and by 9.00PM he was at home with his wife and child aged twelve (12) years old and he never left. He said that he was not at the scene of the crime and did not carry the body of the deceased as alleged. The next day he went to Mutuati and at about 9.30 am he was arrested.

13. **DW2 Alice Muthoni**, wife to the accused, confirmed that on the material day the accused was at home at 8.00PM and never left until the next day. They were at home together with their son.

14. The accused persons counsel filed final written submissions but at the time of writing this judgement the prosecution had not filed their submissions. The accused submitted that the prosecution had failed to prove their case beyond reasonable doubt because he was not identified as the assailant.

15. From the evidence adduced by the prosecution witnesses and from the evidence of the accused person and his witnesses the issue for determination is whether the prosecution has been proved the four ingredients of the offence of murder as defined under **Section 203 of the Penal Code** namely:

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.***

16. The first two ingredients that the prosecution sought to prove were fact and cause of death. **PW1** stated that when he was informed of the incident he went to the scene where he found the deceased lying dead on the road bleeding due to the stab wound. This was confirmed by **PW5** the investigating officer as well as PW2 who was present when the deceased was stabbed at PW4's bar. The body was taken to Meru Level 5 General Hospital where post mortem was conducted by Dr. Paul Wambugu on 13th August 2015 and Dr. Winnie Mutunga PW3 produced the post mortem report.

17. From the post mortem report the cause of death was concluded to be massive hemorrhage secondary to stab wound on the chest. It is apparent that the act and/or omission that led to the cause of death of the deceased was unlawful and that the same was actuated with malice aforethought.

18. According to PW2 the 3 assailants entered the bar and walked straight to where the deceased was seated chewing miraa and they accosted him with the 1st accused James Mutwiri Kubai holding him with the assistance of Jotham Mutwiri M'Itimitu while Murangiri stabbed him on the left side of the chest. The deceased was put in such a situation that he could not defend himself against the 3 assailants and it is obvious that the assailants intended to cause grievous harm to him that led to his death.

19. The accused person in his defence claimed that he was not at the scene of the murder and his wife DW2 also testified and said that the accused went home at 8.00pm and did not leave until the following day. This alibi was however not raised during the investigation of the murder or even with the prosecution witnesses particularly PW2 who was at the bar at the time that the deceased was stabbed and who said that accused was one of the 3 people who attacked the deceased.

20. PW2 as well as PW4 the owner of the bar where the deceased was stabbed said that there was security light at the bar as well as the shops at the market and that there was a flood light at the market which made it possible for him to identify the assailants. PW2 said that he was less than 10 meters away from where the deceased was seated and from where the accused and his companions attacked the deceased.

21. In consideration of the proximity between PW2 and the deceased coupled with the light in the bar and the fact that there was nothing obstructing PW2 from seeing the assailants makes this court believe his evidence. PW 2 said he had never differed with James Mutwiri the accused herein and the accused person in his evidence did not say that he had differed with PW2 who saw him committing the offence. The accused also confirmed that he had never differed with PW1 the brother of the deceased and in fact he used to carry him on his bodaboda.

22. The accused alluded to some land dispute with people whom he said were using PW1 to fix him but he did not give the names of those peoples or even the particulars of the land in dispute. He also did not raise any issue concerning land dispute with PW1 or any other prosecution witness. I therefore find that his defense is a sham and an afterthought and the same cannot be regarded.

23. The evidence of PW2 that the deceased was stabbed in the bar was corroborated by the evidence of PW6 who testified that the deceased passed by his kiosk at 9.00 p.m and took tea after which he proceeded to PW4's bar in company of a lady and at after about 30 minutes he had people screaming and said Petro had been stabbed and had fallen on the tarmac. In the evidence of PW4, he appeared evasive and tried to conceal the fact that the murder was committed in his bar although PW2 said that in fact after the deceased had been stabbed he led the way for the assailants to dump the body along the tarmac road as he lit the way. PW4 claimed that it was PW6 who knew what happened to the deceased and that he was not at the scene whereas PW6 said that the deceased went to PW4 bar and shortly thereafter he was stabbed.

24. In conclusion the prosecution's evidence points directly to the accused person herein James Mutwiri Kubai as having formed a common purpose to cause grievous harm to the deceased and therefore I find him guilty of the offence of murder and is consequently convicted under Section 322(1) of the Criminal Procedure Code

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED THROUGH MICROSOFT TEAM AT MERU ON THIS 30TH DAY OF JULY 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE

In the presence of:-

Accused 1- Present in person

Mr Kinoti – Court Assistant

Ms Mbithe for state

HON.ANNE ADWERA ONG'INJO

JUDGE