



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT MERU**

**CRIMINAL CASE NO.11 OF 2016**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**DOUGLAS MUTIGA MURIUKI.....1ST ACCUSED**

**STEPHEN MURIUKI BAIBAYA.....2ND ACCUSED**

**JUDGEMENT**

1. Douglas Mutiga Muriuki and Stephen Muriuki Baibaya are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code.
2. Particulars are that Douglas Mutiga Muriuki and Stephen Muriuki Baibaya on the 28<sup>th</sup> day of January 2016 at Turingiri Sublocation Tigania East Subcounty within Meru County murdered Peter Mutheu M. Ethali
3. PW1 Dr Mohamed Abdi Kadir Guyo a Medical Officer of Health at Isiolo County Referral Hospital produced a Postmortem Report prepared by Dr. David Sabai on 30.1.2016. The deceased had a fracture on the scalp, the left arm had a deep cut on the posterior aspect of elbow. A deep cut wound on the upper 1/3 of the Tibia bone approximately 9 cm. The lower 1/3 of tibia had a cut wound of approximately 5 cm. The Doctor formed opinion cause of death was cardiopulmonary arrest due to severe haemorrhage due to multiple cuts that resulted to shock.
4. PW2 – APC Alfred Gitonga Munji got call from Assistant chief Joshua Ngarichia of Turinguri Location that there was an old man who was being beaten near Precious Academy. PW2 and CPL Julius Ngunga rushed to the scene on a Motor bike. They found members of public who informed them the victim had been rushed to hospital by Assistant Chief and the 2 suspects had escaped. They were shown direction of escape and they pursued the 2 suspects towards Kipuri primary school.
5. That when they passed Kipuru primary school they saw 2 people who were armed with pangas and rungu ahead of them but the older man on seeing them escaped into maize plantation and they arrested A1. That A1 was armed with blood stained panga. A1 was escorted to Isiolo Hospital where CPL Osman Abdi from Muthara came and collected him. PW2 said the members of public who identified A1 to them didn't record statement. PW2 said that A1 had blood stains on his clothes. PW2 said the deceased told Assistant Chief that his phone and money had been stolen by accused person. PW2 said A1 and the suspect who escaped were walking on the road and were not in the shamba.
6. PW3- Assistant Chief of Turingoi sublocation said it is accused persons who cut and killed the deceased. PW3 said he spoke to the deceased who told him it is accused persons who had cut him. PW3 said the deceased had multiple injuries on chest, head and legs. PW3 said the deceased persons land borders that of accused persons. It is PW3 who made phone call to Administration police from Mataentu and he took victim to hospital but he died while undergoing treatment. Assistant Chief said accused persons and deceased had boundary dispute which Njuri Ncheke had presided over. PW3 said he had no land dispute with accused persons and had not known about land Case No. 100 of 2010 between accused and the deceased. He said A2 was arrested in 2011 for defying court order by continuing to use/occupy some parcels of land which the county had taken over.
7. He said that his name was not in the investigations diary where A2 made a report at Isiolo Police Station on 23.8.2011. PW3 said he saw accused persons run from scene and that he knew them physically. He said that deceased told him and Kirema that accused persons had attacked him.
8. PW4 CPL Ngunga Julius of Matabithi AP post said he received a phone call from Assistant Chief –PW3 that someone was being assaulted near Precious Academy. In company of PW2 they proceeded to the scene. At the scene they found the victim had been rushed to Isiolo County hospital and suspects had escaped. They were shown direction the suspects had taken and they pursued them. That at Kibiru Primary School he saw 2 people ahead of them and on seeing them one escaped while they apprehended A1 who they found him with blood stained panga. PW2 and PW4 said A1 told them he committed the offence in defence of his father. A1 was escorted to Isiolo County Hospital from where police from Muthara collected him. A blood stained panga was handed over to CPL Osman. He said A1 had blood

stained panga and his clothes also had blood stains.

9. PW5 CPL Osman Abdi was at Muthara Police Patrol Base on 28.1.2016 when he got phone call from the OCPD who instructed him to proceed to Turingori sublocation where Assistant chief had reported serious assault. That he contacted Assistant Chief and learnt the victim had been taken to hospital but passed on while undergoing treatment. PW5, visited scene of attack and on return to hospital PW2 and PW4 handed over A1 whom they apprehended. He said a panga was also handed over to him. He said the panga had blood stains. He said he escorted A1 to station and kept panga as exhibit.

10. PW5 conducted investigations by recording statements and arranging for Post mortem before arraigning A1 to court. PW5 said the dispute between accused person and the deceased was boundary dispute. PW5 testified that A2 surrendered himself on 3<sup>rd</sup> February 2016 at DCI offices at Imenti North after evading police from 28.1.2016.

11. In cross examination the investigating officer said he booked report which was made to him through phone call. He said A1 was arrested in Mweronde area near Kibiru Primary school but he didn't establish distance from scene of murder to where A1 was arrested.

12. PW5 said when he visited scene he didn't get any other witnesses. He said they had a manhunt for A2 but he went underground as the home was deserted. He said that it was after arrest he learnt A2 was a public servant. He said A2 was tracked all over Meru County using his phone and not in Buuri where he claimed he was working. PW5 said that when A2 realized police were zeroing on him, he went and surrendered at North Imenti DCI offices.

13. He said the boundary dispute between accused person and the deceased was over unregistered land. He said he got information about boundary dispute from Assistant chief but he didn't establish if Assistant chief had a grudge with the accused persons. He said the blood stains on the panga was not subjected to DNA analysis and he didn't lift finger prints from the panga. He said it is Assistant chief and Kirema who recorded statements. He said that A2 ought to have surrendered to police on same day Assistant Chief saw him run from scene of murder. He said A1 had attempted to wash blood stains from murder weapon panga and it could not be possible to lift finger prints from wet objects.

14. When placed on defence A1 said he was a second year student at Garissa KMTC and said that on the material day he went to their farm to harvest green grams and on the way he greeted Mzee Muika Nero was on a tree scaring away birds which were eating his sorghum. That at 2.00 pm Mzee Mwika called him and when he approached him he saw 2 motorbikes with 2 police officers and chief known as Kalichia.

15. That Mzee Mwika told him the people were looking for him and one officer approached him and asked for Kshs 30,000/= and a phone that they had robbed from Muthee and he told the officers he had been in the farm harvesting green grams the whole day and he was not aware of what they were talking about.

16. That the officer who was armed slapped him and he fell down. That his belt was removed and used to tie his hands and he was ordered to board the motorbike. He said he sat between the chief and the rider. He said nothing was recovered from him. A1 said they proceeded to the hospital where he was made to enter the ward and he was shown some one who was bleeding and he was told he is the one who beat him but he denied. That he was taken to Gundune Police Station where he was charged. He said he didn't know the person he saw bleeding in ward. He said he was working in the farm in Mwerondu village.

17. A2 testified on 28.1.2016 he was at his place of work in Buuri subcounty and that on 30.1.2016 he travelled to Nakuru to attend funeral of a relative. That on 31.1.2016 while at Rongai in Nakuru he got information from his wife that there are people who had attacked them and torched their house. He said that it was Assistant Chief Nkarichia who led the people who set the house on fire. That after burial on 1.2.2016 he took a vehicle back to Meru and arrived at 4.00 am. That he asked for permission from his boss to be away from work following what had happened at his home. He said the police refused to assist the wife and daughter who had reported at Muthara Police station. That he proceeded to county commanders office in Meru and reported the matter and he was told to return on 3.2.2016.

18. That on 3.2.2016 the County commander referred him to CID offices to investigate. That PW5 went to CID offices and he was instructed to investigate the arson case. That A2 was instructed to accompany PW5 to Muthara so that his report could be investigated.

19. That at Muthara Mr Osman PW5 started asking him about murder that took place on 28.1.2016 at Turingui area and he told him he was not aware. He said the issue of arson was not addressed as his finger prints were taken and he was charged. He said he stayed in remand for 6 months and on release they managed to arrest Humphrey Mutwiri who was charged with the offence of arson. A2 said that the only documents he had to show he was on duty are the public health certificate and receipts.

20. A2 in cross examination said that he was transferred to Buuri Subcounty in November 2015 and that he worked in December 2015 and January 2016 where he visited various premises but the only time that he used and issued medical examination certificate was on 28.1.2016. He said the certificate didn't give time when it was issued and it didn't have stamp. He said the original certificate had a stamp.

21. He said he was arrested on 3.2.2016 and that after 28.1.2016 he didn't issue any other certificate. He said that Menany Sacco Matatus ply between Meru and Nakuru as well as Nanyuki.

22. He said the person who died in Rongai M'Mbui James was his uncle. He said that one of his brothers also attended the burial. He said he didn't carry the funeral programme and that he didn't have duplicate copies of receipts issued to people issued with certificates. He said duplicates were taken to Nairobi. He said that from Buuri to scene of murder is around 100km. He said he didn't know why he was framed but that there was an arson case against Humphrey Mutwiri but he didn't know particulars. He said it is not true A1 was trying to protect him from the deceased. He said he didn't know if A1 was arrested while armed with a panga. He said he learnt on 31.1.2016 that his house had been set on fire and his son arrested.

23. PW3 Alfred Kathurima Public Health Officer at Kibirichia ward testified that A2 was his colleague who was posted to Kibirichia in November 2015 but took leave. He testified that on 28.1.2016 he reported on duty and found A2 and he instructed him to go and address/abate nuisance that had been complained about in Murinya market.
24. That he gave A2 certificate Book to go with to the field. He said A2 issued certificate No. 1644040 to a food handler on 28.1.2016. he said that he met A2 at Kibirichia market between 10.00 and 10.30 am . He said when A2 reported in Kibirichia in December 2016 he took 30 days leave and resumed duty on the 3<sup>rd</sup> week of January 2016 and that is reason why his name does not appear as having issued certificate. He produced the original certificate – Ex D1. He said when they parted ways in the evening A2 went to his rental house in Kibirichia market.
25. That on 29.1.2016 PW said he was with A2 in the office preparing monthly reports. That at 9.00 pm A2 called to inform him he was to travel to Nakuru as he had lost a relative and he gave him permission to attend the funeral.
26. That on 1.2.2016 A2 called to ask for permission to go home as his house had been torched. That on 2<sup>nd</sup> & 3<sup>rd</sup> Feb 2016 he tried to reach A2 in vain. That on 4.2.2016 he got information A2 had been arrested.
27. DW3 confirmed that the Medical certificate of health issued to Patrick Mwongela was in different hand writings.
28. He said he didn't have call data to prove that a trader at Kiriinya called asking him to go and abate a nuisance. He said A2 went to Murinya and Ntugi Market to perform public health duties but he didn't accompany him. He said he didn't ask name of A2's relative who had died. He said he could not remember when A2 resumed duties after release on bond. He said A2 travelled to Nakuru on 29.1.2016 at night and came back on 1.2.2016. he said he could not remember whether 30.1.2016 was a weekend or a working day.
29. In re-examination he said A2 had worked for less than one week. When he assigned him duty to go to Ntugi Market.
30. PW4 testified on account of A1 and said that A1 is a son to his neighbor Barbara. He said that on 28/1/2016 he was in his farm chasing birds from the millet/sorghum he had planted.
31. That at 2.00 pm he saw 2 motor bikes one of which was carrying the chief and another was carrying 2 police officers who were in uniform and were armed. That the 2 motorbikes went to A2's home but the gate was locked. He said he was aware A1 was in the farm harvesting green grams as he saw him go there at 6.00 am. He said A1's farm is across the road from his farm. That when Assistant chief asked for the owners of the home he told them that the owner of the home was a public servant in Buuri. He said the Assistant chief and the 2 officers said they wanted A2 to go and identify some goats that had been recovered.
32. DW4 said he offered to call A1. That when A1 came one officer told him they waned Kshs. 30,000/= and a phone which they had stolen from Mutheu and A1 said he knew nothing about the allegations. That the Police Officers stopped A1 and he fell down and they started kicking him.
33. That A1's belt was used to tie his hands and he was asked if the panga they were carrying is the one he used to commit. That A1 was carried on a motorbike towards Isiolo as he went back to his farm to look after his sorghum/millet. He said the police officers arrested A1 at 2.00 pm. DW4 said A1 didn't leave the farm between 6.00 am and 2.00pm on the material day. He said there is a road between his farm and accused persons farm.
34. Accused persons counsel filed written submissions upon close of defence case. The defence submitted that no one from the family of the deceased testified as having identified his body and it is not known whose murder was on trial. It was also submitted that PW1 and PW3 didn't tell the court who identified A1 to them and the motorbike rider who carried them upto where they arrested A1 didn't record a statement and didn't testify. It was also submitted that PW1 and PW3 testimony contradicted each other and same cannot be qualified as credible and sufficient to safely convict the accused persons.
35. In regard to PW3's testimony the defence questioned why no member of the deceased family came to testify. It was also questioned why No member of Njuri Ncheke who PW3 alleged presided over boundary dispute between accused persons and the deceased were not called to testify.
36. It was submitted that the prosecution failed to establish motive and ingredient of malice aforethought. The defence urged the court to find that owing to previous antagonism between A2 and PW2, PW2 evidence ought to be treated with caution as there is possibility he framed accused persons to settle personal scores. In regard to PW5's evidence- CPL Osman Abdi defence submitted that he relied on evidence of Assistant Chief and didn't conduct investigations to establish motive of the murder and he didn't interview accused persons and record their statements. He was not able to tell the distances between scene of crime to point where A1 was arrested. He didn't interview any possible witnesses at scene of crime; didn't take panga for forensic examination and didn't preserve panga in tamper proof bags.
37. It was submitted that A1's defence was believable and he should be acquitted. It was also submitted that no doubt was cast on A2's testimony even upon rigorous cross examination. The defence questioned why prosecution witnesses, PW2, PW3 and PW4 converged at Isiolo hospital with A1 instead of taking him to the police station. He urged the court to look at it keenly and give a proper interpretation to the effect that they met to frame A1 for offence he never committed. It was submitted further that the Assistant chief and PW3 and PW4 had refused to call independent members of public to testify because of malice and evil plan to manipulate evidence due to existing grudge between Assistant chief and A2's family.
38. On dying declaration, it was submitted that the person who called and informed Assistant Chief that the deceased was being beaten was better placed to corroborate PW2's allegations that the deceased told him it was the accused persons who had beatedn him.

39. It was submitted that PW2 gave the names of 3 people namely Mithika, Maore and Kiremia as having heard the deceased say it was accused persons who beat him but they didn't testify. While relying on the holding of Lord Denning in Miller vs Minister of Pensions [1947] 2 ALL ER 372 the defence submitted that accused has no duty to prove anything on the allegations of a criminal nature filed by the state. That the burden rests on the prosecution throughout the trial save where there are admissions by the accused person.

40. In regard to ingredients of the offence of murder the defence submitted that the ingredients of malice aforethought was not established by the prosecution since the panga didn't undergo forensic examination to establish in whose hands it was.

41. The failure of prosecution to call certain witnesses also made defence cast aspersions on the prosecution case. The defence relied on the case of *Bukenya and others vs Uganda* [1972] EA 549 in which it was held that the prosecution was duty bound to avail all witnesses necessary to establish the truth even if their evidence maybe inconsistent and that the court had a duty to call any person whose evidence appears essential to the just decision of the case and that where essential witnesses are not called the court is entitled to draw the inference that had they been called, it would have been adverse to the prosecution case.

42. It was submitted that failure to call crucial witnesses affected the prosecution's case grossly. The court was urged to draw an adverse inference against the prosecution for not availing testimony of the crucial witnesses. It was submitted further that the death declaration introduced by PW2 was untenable and has no bearing on the accused person as it was not qualified and/or did it meet the threshold for admission and should be disregarded.

43. The defence relied on the authorities of *P. V. Badhakreshara vs State* (AIR 1989 SC of Karnataka) and *Republic Vs Andrew* [1987] AC 281 where Lord Ackner laid down principles on admissibility of the evidence of a dying Declaration. Reference is also made to the case of *Nram vs State* AIE [1988] SC 912 and *Choge vs Republic* [1985] KLR where it was held:-

i. :.....There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

44. The defence also relied on the holding of the Court of Appeal of East Africa in *Republic vs Muyonya bin Musume* (1939) 52 Calcutta 981. 7<sup>th</sup> Edition on Evidence by Field as well as *Republic vs Olulu S/O Eloku* [1938] 5 Ea Ca 39 to emphasize the need to be cautious when relying on dying declaration which is uncorroborated to find a conviction. The defence urged the court to find merit in accused persons' defence and acquit them as the prosecution had not proved beyond all reasonable doubt that they committed the offence.

45. Prosecution didn't file written submissions but relied on evidence on record.

46. Having considered the evidence on record for the prosecution and accused persons as well as the written submissions by the defence, the issues for determination are whether the prosecution has proved beyond all reasonable doubt that there was death that the death was caused by unlawful act and/or omissions; that the unlawful act and/or omission was committed by the accused persons who were actuated by malice aforethought.

47. The defence in submissions questioned whether it had been proved that Peter Muthee M'Ethali is the one whose murder the accused persons are being tried because no family member testified as having identified the body for postmortem. In exhibit P1 – postmortem Report it is shown the brother and sister in law of the deceased identified the body and their names, identity card numbers are indicated and they appended their signatures to confirm they objected to dissection of the body of the deceased.

48. PW2 – the Assistant chief of Turingui sublocation also confirmed that the person who died and whose body was subject of postmortem. In ExP1 was Peter Muthee M'Ethali. That he and another person took him from scene to hospital where he died on the same day while undergoing treatment.

49. From the evidence of the prosecution witnesses, the deceased did not die a natural death. From the injuries observed on conducting postmortem the deceased died due to cardiorespiratory arrest due to severe haemorrhage as a result of multiple cuts on the body that resulted into shock. The cuts were observed on the head, upper and lower limbs. These were unlawful acts actuated with malice aforethought meant to ensure the victim suffered grievous bodily harm or even death.

50. Whether it is the accused persons who committed the unlawful act that led to the death of the deceased, PW2 said that when he was called by an unknown member of public to the scene he arrived and saw the accused persons run from the scene. That he made a phone call to officers at Matabithi AP post to pursue the suspects.

51. PW3 also said that the deceased told him it was the accused persons who were the ones who attacked him and stole from him Ksh 30,000/,-, ATM card and mobile phone.

52. PW2 and PW4 said that when they pursued the 2 suspects who had been described to them, they saw them ahead and one of them escaped into maize plantation while they apprehended A1 who was armed with a blood stained panga and escorted him to Isiolo hospital where the victim had been taken for treatment. Indeed A1 confirmed that when he was escorted to Isiolo hospital he was shown a man whom he was told he had assaulted but he denied ever knowing the man.

53. The Assistant Chief however said that the accused persons and the deceased had land boundary dispute over parcels of land that are situated within his sublocation and that was reason for the conflict and/or murder. The Assistant chief said that the Njuri Ncheke elders had presided over the land dispute but he didn't know the outcome.

54. Although accused persons denied knowing the deceased the Assistant Chief PW3 said the accused and the deceased resided in same sublocation neighbouring Turingui sublocation. The accused persons confirmed knowing PW3 the assistant chief. PW3 could therefore not have been lying to say that accused persons and the deceased knew each other.

55. PW2 and PW4 said they didn't know the deceased nor the accused persons and the conspiracy theory alleged by the accused persons to frame them for the offence of murder cannot hold. PW2 and PW4 said the panga recovered from the 1<sup>st</sup> accused had blood stains. PW5 confirmed that when the panga recovered from A1 was handed over to him it had blood stains and that it appeared the suspect had attempted to wash it.

56. A1 raised an alibi saying that he was in the farm from 6.00 am on the material day harvesting green grams but PW2 and PW4 said A1 and another who escaped into maize plantation were on the road when they caught up with them. PW2 and PW4 were never questioned about the presence of DW4 Mzee Muika and it is the considered opinion of this court that this particular witness was an afterthought. A1 and DW4 claimed that PW3 was with the Administration police officers in a bid to advance the allegations that he framed them because of a grudge that occurred in 2011 but the evidence on record by PW2, PW3, PW4 and PW5 is that they found PW3 at the hospital – where he had rushed the deceased after he found he had been assaulted and multiple cuts inflicted all over his body.

57. PW3 said in his evidence that he had no dispute with the accused persons and the report made by A2 at Isiolo Police Station on 23.8.2011 was not in respect of him. PW3 was not questioned whether he accompanied PW2 and PW4 to arrest suspects and the evidence of A1 and DW4 in that respect cant be true and the same is disregarded.

58. In respect to A2's defence of alibi, he said he is a senior public health officer and that on the material day he was on duty at Buuri Subcounty Hospital where his boss DW3 assigned him duty to go and abate some nuisance at Murinya trading centre. He said that at Murinya market he also issued food certificate to one Patrick Mwongera who been examined EXD1 (a) and (b).

59. He said thereafter he proceeded to Kibirichia market where he met with DW3. He said he also went through Ntugi Market on his way to Kibirichia and he also issued Medical certificate to one Musa Mwirigi – ExD 2(a) and (b). A2 said he joined DW3 at Kibirichia market at 10.15 am and at 4.00 pm he went back to his rental house. He said he also went to work on 29.1.2016 and that on 30.1.2016 he proceeded to Rongai in Nakuru where his relative had died. The documents produced by DW3 to show A2 was on duty were challenged by the prosecutions for reasons it appears they were purposely made to exonerate A2 from the offence he committed on 28.1.2016.

60. According to A2 and DW3, A2 upon reporting at Buuri Subcounty in late November 2015 proceeded for 30 days annual leave and that as at 28.1.2016 he had worked for hardly one week and that is why he had used the medical certificate booklet only once. The leave application form and approval for A2 was not availed to confirm exactly when he resumed duties if at all. He didn't produce the Daily Attendance register to prove he was on duty.

61. According to A2 he was working the whole of January 2016 but his boss DW3 said that as at 28.1.2016 A2 had worked just for about one week after he resumed duties from leave. Production of leave application and approval should have given the court an accurate confirmation of when he was on duty.

62. A2 also claimed that on 29.1.2016 at night he called DW3 to ask for permission to be away for burial of his relative in Rongai Nakuru County. A2 said he left for Nakuru on 30.1.2016 which was a Saturday and he produced a bus ticket to that effect. DW3 said A2 didn't tell him name of the relative or even how they were related and A2 didn't produce evidence of any of his relatives who lived in Nakuru county or even one who died. He said one of his brothers whose name he didn't give also attended the burial but the same didn't attend to confirm his allegations.

63. A1, second born son of A2 was arrested on 28.1.2016 when A2 was allegedly on duty and A2 claims that it is 31.1.2016 he learnt his son had been arrested and his house set on fire. It is inconceivable that a senior Public Health Officer working in a station within same county as his rural home could have failed to know that his child had been arrested during this error of mobile telephone and yet he learnt of death on unknown relative through phone and travelled immediately to go for burial?. It is unfortunate that A2 a public servant/Responsible citizen could struggle so much to come up with an alibi to remove himself from scene of the crime when indeed he committed such heinous offence. The evidence he has availed on alibi would not be necessary if he was innocent as he would want this court to believe. A2 claimed he travelled back to Meru on 1.2.2016 arrived at 4.00 am but didn't produce evidence that Menya Sacco Matatu shuttles travel at night. The 2 receipts produced by A2 don't bear registration numbers of matatus he allegedly boarded.

64. A2 made same serious allegations about PW5 failing to investigate report of arson committed by people who were led to his home by PW3 Assistant chief but in cross examination PW3 and PW5 were not questioned about arson on A2's house.

65. The upshot of the above analysis is that this court finds that the prosecution has proved beyond all reasonable doubt that accused persons committed the murder of the deceased herein Peter Muthee M'Ethali. A1 and A2 are found guilty and are accordingly convicted.

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

**DATED AND DELIVERED THROUGH MICROSOFT TEAM AT MERU ON THIS 30<sup>TH</sup> DAY OF JULY 2020.**

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

Mr Ashaba Advocate for accused

Ms Mbithe for state

A1- present in person

A2- Present in person

Mr Kinoti: Court Assistant

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**