



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA**

**AT MERU**

**CRIMINAL CASE NO.19 OF 2018 CONSOLIDATED WITH 23 OF 2019**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JACKSON MWONGERA.....1ST ACCUSED**

**EDWARD MATHETA M'KUIA.....2ND ACCUSED**

**JUDGEMENT**

1. Jackson Mwangera and Edward Matheta M'Kuia were jointly charged with the offence of murder contrary to section 204 of the penal code.
2. Particulars were that accused persons on the 4<sup>th</sup> day of February 2018 at Antu Bathea village, Antuambui location in Igembe North Sub-county within Meru County jointly with another not before court murdered Ntongai Matheka.
3. The prosecution called 5 witnesses to support the charge against accused persons. PW1 a 1<sup>st</sup> cousin to A2 testified that on 5<sup>th</sup> February 2018 at 8.00 am he was on the way to go and check on his miraa farm when he overheard PW4 the son to A2 tell another child while they were on the way to school that his father A2 had killed Ntongai at night and buried him. When he reported to Assistant chief, the Assistant chief didn't take keen interest.
4. On 9<sup>th</sup> February 2018 he reported to OCS Laare police station who instructed him to look for the child. On 12.2.2018 PW1 managed to trace PW4 and went with him to the OCS and in turn PW4 led the OCS, PW1, DCIO and OCPD to where his elder brother had been buried secretly. PW1 said the area looked like it had been ploughed and could not be identified as a grave. The OCS left 6 people to guard the grave site and on 13.2.2018 the body of the deceased was exhumed and taken to mortuary for preservation.
5. PW1 testified that by the time PW4 led police to the concealed grave site A2 had gone underground after realizing investigations into the death of his son was going on. According to PW1 when the body of the deceased was exhumed he was found to have been buried in a sitting position and covered with 6 blankets. According to what PW1 heard being said by PW4 A2 was with his son Christopher when they killed the deceased and that it is A1 who dug the grave where the deceased was buried. PW1 and Lazaro, A2's son identified the body for post mortem – Ex P1.
6. PW1 said that the deceased had no mental sickness. PW1 said A2 was traced at his in-laws place and arrested.
7. PW2 accompanied PW1 to home of A2 and PW4 showed them the concealed grave where his elder brother had been buried the previous night. PW2 testified that PW4 told them that the deceased was hit on the head with a spade and he died. PW2 recorded a statement with police on 12.2.2018 and also witnessed the body of the deceased being exhumed on 13.2.2018. PW1 and PW2 testified that they are neighbours to A2.
8. According to PW2, A2, A1 and A2's son known as Toba committed the murder. PW2 said A2 was his uncle and his home is about 10-15 minutes walk. PW2 testified the deceased had injuries on the head and that he was buried in a very small grave with hands and legs folded and lying on its side.
9. PW2 also testified that the deceased was not mad. PW2 said PW4 was with PW1 when they went to his home and informed him what had transpired.
10. PW3 Dr. Sammy Githu Wachira produced Postmortem Report prepared by Dr. Kariuki in respect of the body of the deceased herein.

11. According to the doctor the deceased had missing upper and lower incisor and canines and there were soil particles in the trachea upto bifurcation – meaning the person had been buried – meaning the person had been buried alive and while trying to breath soil got into trachea. The doctor also observed fractured pterion bone next to the ear with widened temporary suture. There was also clotted blood inside skull cavity.
12. The doctors opinion was that death was caused by cardiopulmonary arrest due to blunt head injury with asphyxiation due to inhalation of soil. The doctor who produced PM Report said that there must have been blunt force trauma before the deceased was buried.
13. PW4 said the deceased who was his brother died in their house at 6.00 am. According to PW4 the deceased used to have chest sickness and A2 used to buy for him medicine. PW4 denied seeing his brother being beaten at night. PW4 admitted that he showed PW1 where the deceased was buried. PW4 also admitted he saw his father A2 , A1 and his brother Toba carry body of deceased and buried behind the house.
14. PW4 also testified that the deceased used to sleep in a house alone because he was mad and a drunkard but he was never taken to hospital. PW4 confirmed that PW1 and PW2 accompanied him to the police station where he recorded a statement. PW4 said he didn't attend the burial of the deceased and didn't know if chef attended.
15. PW5 Chief Inspector Josepha Mukangai was Deputy DCI Igembe North Subcounty when he was instructed by DCI to join the OCS Laare Police station and visit murder scene in Kaelo. He said they were led by PW4 to where the deceased had been buried. He said there were flies at the site identified by PW4 and they left it being guarded.
16. An order to exhume the body was obtained from Maua police station – Exp2 and 3 and the body exhumed from 3 metre deep grave. He said the body of male was found covered with blanket and soil and it was taken to mortuar where post mortem was done on 16.2.2018.
17. According to PW5, A1 was hired to dig grave at night and the deceased was buried. PW5 said that it was after the body was buried a 2<sup>nd</sup> time that A2 surface and he was arrested by members of the public.
18. PW5 testified that when he interrogated PW4 he said A2 hit the deceased with a spade on the head and that A2 told him not to tell anyone what had transpired.
19. When placed on defence A1 said that A2 who used to hire him found him at Likununu secondary school constructing classrooms and hired him to go and dig for him a grave so he could bury his son who had died. He said he arrived A2's home at 3.00 pm and found Christopher Kimathi and 5 other people digging a grave. He said A2 was present and the body of the deceased was in the house where he used to sleep and it was naked. He said that the deceased was a mad man and it was normal for him to be naked. He said there was no visible injury on the deceased body. He said he helped dig the grave upto 5 feet and A2 Christopher and Kimathi brought the body and it was buried. He said the body was covered with a blanket. He said that PW1 paid some elders and when they found him at a construction site they arrested him and took him to police station. A1 said PW4 Daniel Matheta was at home when the brother was buried.
20. He said in cross examination that the grave in which the deceased was buried was 4.5 feet deep. He denied that the deceased was buried while seated. He said he didn't see burial permit for the deceased and the chief, Assistant chief and sub area were not present during the burial. A1 alleged that A2 told him the deceased died at night and was buried the following day. He denied that deceased was buried alive. He said there was no pastor to conduct burial as deceased never used to go to church. A1 said he knew PW1 but he had not differed with him. He didn't have a problem with evidence of any of the witnesses.
21. A2 testified that his 2<sup>nd</sup> born son the deceased herein started smoking bhang and died. He said the deceased used to reside in the kitchen and was very destructive. He said PW4 and Jakina woke him up at 6.30 am and told him, that they suspected Ntongai had died. That he proceeded to the kitchen and found the deceased lying on the floor and was not breathing. A2 claimed he went to reported to Assitant Chief and it is when he was at Chiefs office he heard PW1 make a phone call to chief and chief left him in the office. He wanted for chief but he didn't return to the office. That he returned home at 12.30 pm and reported the death to his 2 neighbours Mbiti's wife, Ntikioru and Mbiria and they accompanied him and advised him to bury the body. That A1, Christopher and Kimathi helped dig the grave and the deceased was buried. A2 said he is the one who hired A1 to help dig grave and his 4 children were present during burial. He said the deceased was buried at 4.00 pm. He said the body was wrapped in a blanket and buried he said the body was buried on its side and not back. He said that Sub area told him to take something small to chief and tell him he had buried his son so the issue could end. He said the Assistant chief didn't give him burial permit. He said he didn't kill his son and that deceased was not buried alive. He said the deceased was mad and he used to take him to Ntuati hospital.
22. In cross examination A2 said that the deceased was mad and that he burnt his treatment documents. A2 said that unlike the funeral for his wife who died over 12 years ago and member of parliament, pastor, chief, Assistant chief and more than 50 people attended, the deceased funeral was not attended by chief, Assistant chief and sub area and that he didn't even obtain burial permit.
23. A2 said the deceased didn't have fractured skull. He said PW4 was present when the deceased was buried. He said he is the one together with his 4 children who accessed the kitchen where the deceased slept. A2 had indicated that the Assistant Chief was to be his witness but on 18.2.2020 the witness didn't attend and Mr Igweta Advocate for A2 closed defence case.
24. From the evidence adduced by the prosecution and the defence the issues for determination are whether the prosecution has proved the ingredients of the offence of murder against the accused persons namely:-

- i. Fact of death

- ii. Cause of death

iii. Whether cause of death was as a result of an unlawful act and or omission

iv. Whether the unlawful act was actuated with malice aforethought

v. Whether the unlawful act that led to the death of the deceased was committed by the accused persons.

25. The fact that Ntongai Matheta died is not indispute. Both the prosecution and defence evidence confirms this fact.

26. As to cause of death Dr Kariuki in post-mortem Report dated 12<sup>th</sup> February 2018 and produced by Dr Sammy Githu Wachira as ExP1 – observed that the deceased had soil particles in the trachea a sign that the deceased was buried alive and while trying to breath inhaled soil into the trachea.

27. He also observed fractured left Pterion and the clotted blood inside the skull cavity. Dr. Kariuki formed the opinion that cause of death was cardi-pulmonary arrest due to blunt head injury with asphyxiation due to inhalation o soil. According to Dr Wachira the blunt face trauma must have been occasioned before the deceased was buried.

28. A1 and A2 admit having buried the deceased when they allegedly found he had died in the kitchen where he used to sleep. There is therefore no dispute that they were involved in the burial of the deceased before he died after he had suffered blunt force trauma to his head. It was by sheer luck that PW1 overheard PW4 telling his fellow pupil while on the way to school that his father and brother had killed the deceased at night and together with A1 buried him in a shallow grave. When PW1 overhead what PW4 was telling his fellow pupil and yet he was immediate neighbor and relative and he had not known of the death he went and informed PW2 and together PW4 went and showed them location of grave which was concealed by ploughing.

29. PW5 was accompanied by PW1, PW2, PW4 and other officers to scene and PW4 again identified the grave site. When an order was obtained to exhume the body the deceased was found to have been buried in a shallow grave in a seated position after being wrapped in several blankets. There is no doubt the accused persons conspired to kill the deceased and keep the matter a secret. A2 said in his testimony that sub area advised him to take something small to Assistant chief so he could let matter rest. If it was true the deceased died a ntural death, there is no reason why PW1 and PW2 who are immediate neighbours and relatives were not informed. A2 alleges he 1<sup>st</sup> went to report to chief who didn't tell im anything. He didn't report to the village elder (Sub area) the nearest National Government representative. The neighbours he allegedly and informed didn't record statements and didn't come to testify in his defence.

30. A2 didn't explain why he flee from his village to his inlaws place when investigations into the murder of his son and exhumation took place. A2's 2 sons who were present when the murder took place are also still on the run. A1 said he came from Lukununu village and didn't explain what was special about him digging a grave that A2 called him to Antu Bathea village at night if it was not because he was paid to conceal the murder of the deceased.

31. If he was innocent participant at the alleged burial he ought to have questioned why the burial was taking place at night, why the Sub area, Assistant chief, chief and other neighbours even PW1 who was known to him was not present. I do not find that A1 ordered and abetted the murder of the deceased and therefore I do find that he A1 together with A2 jointly with others not before court murdered the deceased Ntongai Matheka. They are guilty as charged and are therefore convicted under S.322 CPC.

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

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

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

Mr Igweta Advocate for accused

Accused 1: Present in person

Accused 2: Present in person

Ms Mbithe for state

Mr Kinoti: Court Assistant

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**