



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL (MURDER) CASE NO. 65 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENSON NZUKI MUSAU.....ACCUSED**

**JUDGEMENT**

1. **Benson Nzuki Musau**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

**On 16<sup>th</sup> October, 2014 at Makulumu Village, Miu Location in Mwala Sub-County, within Machakos County murdered Victor Ngunga Makau.**

2. The prosecution summoned a total of 9 (nine) witnesses in support of its case while the defence called only the accused.

**Evidence during Trial**

**Prosecution Case**

3. **PW 1 Duncan Makau Ngunga**, the father to the deceased testified that on 16/10/2014 at about 6.00p.m he went to his mother's home and his brother's wife Victoria Kanini Muendo came and told him that his son Victor Ngunga Makau had taken her Kshs 1000/=, and who advised her to have the boy arrested. After a short while Victoria Kanini came back with his wife Benedetta Makau and reported that Victor was at his uncles' place. They left and PW 1 went to sleep.

4. He went on to testify that he was woken up by his younger son who informed him that he was needed by the ambulance personnel He declined and went back to sleep, and woke up the next morning and took a key to his employer and returned home at 9:00am. Upon returning, he found the Assistant Chief Mary Nzioka who informed him that they had to wait for the Chief. Upon entering the house, he found his son Victor lying down covered by a piece of cloth (lesso) dead. The police came from Masii Police Station and they took Benson Nzioka, Victoria Kanini and Benedetta Makau to the police station. The body of Victor was taken to the Mortuary on 19<sup>th</sup> October, 2014.

5. Upon cross examination, he confirmed that Benedetta- (Pw2) was his wife and the mother of the deceased and further testified that the incident happened at his father's homestead while he was at his home. He did not know what transpired and where it happened as he was only told about it later. He confirmed further that he did not observe the body of the deceased until he reached the mortuary.

6. **PW.2, Benedetta Kamene Makau** testified that she was a cook at Mukoso Secondary School and mother to the deceased. That on the day of the incident she left her place of work at 7:30 pm and she met Victoria Kanini, her co-wife who told her that her son, Victor Ngunga had taken her money. They both went to notify her husband (Duncan Makau) and she sought permission to go and find the deceased. They found the deceased at his uncle's place in Kizazani Village and they returned with him. Upon returning they went to Victoria's home where the deceased accepted that he had taken Victoria's money. PW 2 went ahead to confirm that Victoria and herself both slapped the deceased thrice on the cheeks with their bare hands. It was then that the deceased asked for forgiveness. Further Benson Nzuki Musau (accused) hit the deceased with a walking stick on the shoulder and that the deceased fell down and the accused stepped on his abdomen until he started vomiting. She testified that she was the one who called the ambulance and the medical practitioner upon arrival pronounced Victor dead and that body was carried the following day by the police and taken to Machakos mortuary.

7. **PW.3, Victoria Kanini Muendo**, confirmed both in examination in chief and during cross examination that the deceased had been hit using a rubber whip and pushed by the accused. She went on to say that the rubber whip was in her house. Further she clarified that the lighting was sufficient since they were using a lantern lamp, and they could therefore see clearly what was going on.

8. **PW 4- Pauline Ndetto** the Chief and the **PW 5- Mary Mwithani Nzioka** the Assistant Chief confirmed that they had found the deceased dead at the home of Victoria- (Pw3.). PW.5 stated that she had been told that the deceased had a headache and died as a result but upon conducting investigations she found that the accused was responsible for his death.

9. **PW-6-Ngunga Masika**, grandfather to the deceased, testified that he was asked to go and get a burial permit from the Assistant Chief but later on the burial permit was retained and the assistant chief went to his homestead with police officers who took the body of the deceased and arrested Kanini, Kamene and Nzuki. Upon cross-examination he confirmed that he did not know what exactly transpired as he learnt of the details later and he was therefore not concealing information about the death of the deceased when he went to obtain the burial permit. Upon re-examination, he clarified that his brothers made the decision that he was to go and obtain the burial permit.

10. **PW.7- Cpl Njange Charles No 97086144**, of the Administration Police, confirmed to court that upon arrival at the scene of the crime, he found a black tyre whip besides the body of the deceased. He took the whip and marked it as Prosecution exhibit no 1 and he also saw foam in the mouth of the deceased. The accused persons were at the scene of the crime and they admitted to him that they had beaten the deceased because he had stolen money. He arrested them and took them to the police station.

11. **PW8- CIP Joseph Muguna**, DCIO Mwala Sub- County testified that he visited the scene of crime on 17.10.14 and saw the dead body of the deceased, and also recovered the whip that was used by the accused. Further he confirmed that the body of the deceased was taken from the scene by the police and a post-mortem was conducted thereafter. He produced the whip in court and also identified the post mortem report.

12. **PW9- Dr. Waithera Githendu, a pathologist at Machakos Level 5 Hospital** stated that she performed an autopsy on the body of **Victor Ngunga Makau** on 24.10.14 and confirmed that the deceased had died as a result of multiple fractures; he had a fracture on the head which bled. She also clarified that the cause of death was head injury due to blunt force. Upon cross examination she affirmed what she had earlier stated in examination in chief and also testified that it was possible for a person to die due to a violent fall. She produced the post mortem report as **EXH.2**.

### **The Defence Case**

13. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. The accused stated that on 16.10.14 he was herding cows and he did not see the deceased that day and did not accompany the mother of the deceased in search of him. He did not attack the deceased with a walking stick and that he did not visit the home of the deceased during the alleged beating. He was only called by Kamene and Kanini at about 11 pm to escort the deceased to an ambulance and he later retired to bed. It was his evidence that he came to learn of the death of the deceased on 17.10.14 during his arrest and further testified that he was arrested together with Pw2 and Pw3 and taken to Masii Police station but the said Pw2 and Pw3 were released and he does not know why they were released. It was his evidence that he was only woken up to assist take the deceased to the ambulance and that he would like to be acquitted because Kanini and Kamene are the killers and not him. During cross-examination, he confirmed that he was woken up at 11 pm and the deceased was unconscious. He also had no knowledge that the deceased had stolen money. He denied kicking the deceased and testified that the deceased hit himself on a wall injuring his head. He also denied hitting the deceased with a stick but that Kanini and Kamene were responsible.

### **Submissions**

14. The prosecution that the death of the deceased and the cause are not disputed. Counsel submitted that according to the testimony of Pw2, she met Pw3 and her co-wife who told her that the deceased had stolen money thus they notified Pw1 and they found the deceased at his uncles place and returned with him. According to Pw2, the deceased accepted that he had taken the money wherein Pw2 and Pw3 slapped the deceased and then the accused who was their houseboy hit the deceased with a walking stick on his shoulders and stepped on his abdomen until he started vomiting. Pw3 also witnessed the accused assaulting the deceased and Pw9 confirmed the cause of death as blunt force trauma and invited court to make a finding that the accused was properly identified as the one who assaulted the deceased and the assault led to injuries that led to his death. With regard to malice aforethought, counsel submitted that within the meaning of section 206(a) of the Penal Code, the accused had the intention of inflicting injuries on the deceased that led to his death and the prosecution has discharged its burden of proving their case beyond reasonable doubt against the accused person thus prayed that the accused be found guilty of the offence of murder and sentenced accordingly.

15. Learned Counsel Mike Muema for the accused submitted that the prosecution has failed to prove its case against the accused. He submitted that the prosecution has relied on the contradictory evidence of Pw2 to fix the accused and there is no forensic evidence to connect the accused with the death of the deceased. For example, the deceased is said to have been whipped and then through contradictory evidence it was alleged that the accused hit the deceased with a walking stick. He further submitted that the alibi of the accused remained unchallenged. Counsel submitted that the only person who would be aggrieved with the conduct of the deceased was the mother and aunt and the accused is being framed. Further, he submitted that the cause of death is as a result of blunt trauma with head injury and it is probable that the deceased was pushed by his parents thus he hit his head and they ganged up to frame the shamba boy because he was an outsider. Counsel submitted that the evidence of Pw2 should not be believed because she duped Pw6 into making a report that the deceased died of natural causes in order to obtain a burial permit from the chief while well knowing the deceased did not die of natural causes.

### **Analysis and Findings**

16. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:-

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

**(a) The death of the deceased**

17. The evidence on the death of the deceased has been proved by the PW1, 2, 3, 4, 5, 6, 7 and 8 who saw deceased's body that was lifeless and by the postmortem form EXH. 2 produced by PW9 that confirms that deceased *died of blunt force trauma with head injury*.

**(b) Proof that accused committed the unlawful act which caused the death of the deceased**

18. Accused has denied that he committed the unlawful act which caused the death of the deceased. He has raised an alibi, and from the evidence, the death appeared to have been a combined effort of all the relatives and I wonder why they were not also charged. From the foregoing; I find that the Prosecution has not been able to prove beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence. The evidence against the accused is rather weak so as to say with certainty that the accused committed the act

**(c) Proof that accused had malice afterthought**

19. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under Section 203 of the Penal Code. The ingredients of murder were explained in the case of ROBA GALMA WARIO VS REPUBLIC [2015] eKLR where the court held that;

**“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

20. Malice aforethought was defined in the following cases;

(a) NZUKI VS REPUBLIC [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intention to cause death

- Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

The Accused raised the issue of alibi saying that he was herding cows on 16.10.14 and, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was at the scene of crime at the material day and time. In other words the prosecution must disprove the defence of alibi and it must discharge this burden beyond reasonable doubt as was stated in the case of Kiarie Vs Republic [1984] KLR where the Court of Appeal held:

**“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons”.**

21. The counsel has also raised the issue of contradictions in evidence as well as put the character of Pw2 in issue because of her manipulation in order to obtain a burial permit.

22. With regard to contradictions, the court of appeal has in two separate cases considered how a court should deal with inconsistencies in evidence. In the case Joseph Maina Mwangi – Vrs – Republic Crim. Appeal No. 73 of 1993 the learned Judges of appeal held:

**In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”**

In the case Philip Nzaka Watu V Republic [2016] EKLR the court of Appeal stated:

*“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.*

In Dickson Elia Nsamba Shapwata & Another V. The Republic, Cr. App No. 92 of 2007 the court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

*“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”*

23. In this case the accused’s counsel points out that the contradictions between the evidence of Pw2 and Pw3 cast doubt on the involvement of the accused in the death of the deceased. Pw2 testified that the accused hit the deceased with a walking stick on his shoulders and stepped on his abdomen until he started vomiting. Pw3 testified that the accused hit the deceased with a rubber whip and pushed him against the wall. The contradictions go to the root of the case and indeed one wonders if the accused was involved in giving the fatal blow alone or at all. Character of a witness may affect the credibility of the evidence. The reliability of the evidence of Pw2 together with the contradictions in the evidence leave no eye-witness to the fact of who specifically assaulted the deceased.

24. I have considered the injuries occasioned to the deceased. The post mortem report indicated that the deceased was beaten by several persons and from the evidence on record, one cannot say that it was solely the accused who occasioned the injuries, neither can one say that the accused was involved in giving the fatal blow. Evidence that accused assaulted the deceased is not corroborated for I have doubts on the evidence of Pw2. I am not persuaded by the evidence that the prosecution witnesses have presented. Pw2 and Pw3 seem to be hiding the fact that the assault was a combined effort and indeed as pointed by the counsel for the accused, the persons who were angry with the deceased are the persons who alleged that he stole money from them and it is definitely not from the accused.

25. From the foregoing, the defence and the evidence on record raised a reasonable doubt the benefit of which ought to go to the accused. In Paul v Republic [1976-80] 1KLR 1622 at 1624, the Court stated as follows:

*“In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt; see Simon Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480,489, was quoted [1958] E.A. at page 719):*

*‘It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’*

PW 2 in her evidence went ahead to confirm that Victoria and herself both slapped the deceased thrice on the cheeks with their bare hands. The accused in his evidence stated that he had no reason to attack the deceased for he was not even there thus any imputation of malice aforethought cannot be made. The prosecution has not managed to shake the alibi of the accused and in any event from the evidence the persons who would have any hard feelings towards the deceased to want to harm him would be Pw2 and Pw3, who allege that the deceased stole their money and actually admit having slapped him and this created a nexus between them and the death of the deceased. The fact that the said Pw2 and Pw3 were arrested together with the accused and later released and no reason given for their release even raises eyebrows as to why the said Pw2 and Pw3 were not charged.

26. In my considered view, the prosecution evidence is effectively dislodged by the defence offered by the accused. The prosecution has not been able to shake the alibi of the accused. I am therefore not satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code. Further it is probable that the accused was made to be the fall guy as he was an outsider to the family. Earlier the family of the deceased had arranged to obtain a permit for burial and when the area Chief got wind of the matter, the family had no choice but to offer the accused who was their herdsboy as the sacrificial lamb. There is indeed doubt as to accused’s involvement and the benefit of doubt should be given to him.

### **Determination**

27. Consequently, I have come to the conclusion that the state has not proven its case beyond reasonable doubt. Accused is found **NOT GUILTY** of the offence of murder and he is accordingly acquitted of the charge and is hereby set free unless otherwise lawfully held.

**Dated and Delivered at Machakos this 31<sup>st</sup> day of January, 2019.**

**D.K. KEMEI**

**JUDGE**