



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 46 OF 2013**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**AMBROSE KATHARU M'ITUBIRI ALIAS M'MURAGA.....ACCUSED**

**SEBERIO KOBIA MUNORU ALIAS**

**ZEBERIO MUGAMBI KABUSERIA.....2ND ACCUSED**

**DOMINIC MUCHIRU MUNORU**

**ALIAS KOBIA MUNORU.....3RD ACCUSED**

**JUDGEMENT**

The accused persons Ambrose Katharu M'Itubiri alias M'Muraga Seberio Kobia Munoru alias Zeberio Mugambi Kabuseria and Dominic Muchiru Munoru alias Kobia Munoru were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that the accused persons on the night of 4<sup>th</sup> April 2013 at Chuka Location in Igembe South District within Meru County jointly with others not before the court murdered Erick Mwendu.

The prosecution's case was that PW2 was with the deceased guarding miraa in a farm on 4.4.2013 at night when 5 people attacked them and shot the deceased with an arrow on the chest and he died out of bleeding as arrow was lodged on his body.

PW2 said the incident took place at 11.00 p.m and that he was also cut on the hand. He said when the deceased was shot he carried him into the house and tried to lock but the assailants overpowered him and forcefully entered the house cut him on the left arm which he was using to block the panga that was being used to cut him.

He said he identified 5 people but only the accused persons were arrested. He said that out of the 2 suspects who were still at large one had since died. He said it was A1 who was armed with bow and arrows and that it is Kobia Dominic who cut him with C-line panga. PW2 said that when assailants left he raised alarm and the next day he went to his grand fathers place and reported what had happened. He said he also reported to chief and his uncle Michubu, made phone call to the deceased persons father – PW1 who came to scene with police and body of the deceased was taken to mortuary at Maua. PW2 said the assailants took solar battery and torch from the house at the time of the attack as well as panga and sufuria.

In cross examination, PW2 said that in April 2013 it was rainy and that they were using solar which they charged using electricity whenever the sun was not bright and he had charged it on 3<sup>rd</sup> April 2013. He said the battery was old. He said Phillip and Michubu were not arrested. He said on 4.4.2013 they were chewing miraa while guarding outside the house. He said he had not differed with the deceased. He said security light on top of the door lighted the table area. He denied having fought with deceased. He said there were no blood stains outside the house. He said he was the only one with deceased when he was shot. PW2 said he could not remember how A1 was dressed as he was in shock. He could also not remember how A2 and A3 were dressed.

PW3 Dr Njeru conducted autopsy as the body of the deceased and established cause of death as severe penetrating chest injury. He produced post mortem Report – Exp 1. The prosecution was unable to call any other witness apart from the deceased persons father PW1, PW2 who was the only one at scene of murder and Dr Njeru PW3.

When accused persons were placed on defence A2 witness Mr Kirimi Mbogo Advocate testified and said A2 was his employee and that on material night he had send him to his home in South Imenti in Igoji to supervising the felling of timber and could not therefore have

committed the offence in Igembe South several Kilometres away. He said the charging of A2 was politically motivated aimed at him as he aspired for elective post in an area where he was settled and he was seen as an outsider.

A2 in his testimony said that he was an employee of DW1 and that on the date murder was committed he was in Igoji working for DW1. He said he learnt about murder charge when he was arraigned in court. He said he was initially arrested and charged with offence of robbery with violence at Maua court and remanded at Kangeta Prison. He said he was discharged when witnesses didn't attend court.

He said he knew the deceased but had no grudge against him and he was not in the group that murdered him. He said when he went back home and learnt of deceased death he was said because he was a young man. He said that he was fabricated by people who claim his employer had grabbed land.

A1 also gave sworn testimony and claimed that on 4.4.2013 he was in Tharaka Nithi and was not at scene of crime in Igembe South.

A3 also gave sworn testimony and denied having committed offence. He said he was at his uncle's place on 4.4.2013. He said that uncle to the deceased had a grudge with him because he and his mother stopped the father from selling land to deceased uncle and he attributed his arrest to the grudge.

DW5 said that DW1 instructed him to take A2 to his home in Maua on 1.4.2013 using motorbike. He said that A2 went back to Kianda on 15.4.2013. He said from Tonya to Maua on motorbike is about one hour ride.

DW6 testified that A3 is his nephew and he had visited him on 3.4.2013 and stayed with him in Thangatha upto 15.4.2013. A2 produced charge sheet where he was charged with offence of robbery with violence.

From evidence on record for the prosecution and defence the issues for determination are:-

1. That the prosecution has proved death of the deceased.
2. That death was caused by an unlawful act or omission
3. That the unlawful act and/or omission was caused by the accused persons who were actuated by malice aforethought.

The evidence of PW1, PW2 and PW3 confirms that deceased died. PW2 said he was with the deceased when he was shot by an arrow on 4.4.2013 at 11.00 p.m.

While they were guarding miraa and also chewing miraa at a farm. The deceased died as a result of an attack and as such it has been proved that the death was not accidental. It was intentional. The arrow was directed at a vital organ – his lungs and he bled into chest cavity and died.

Whether it is accused persons who committed the murder, we have the sole evidence of PW2 who said that he had a hearing problem. He said they didn't see when the attackers ambushed them but when the deceased was shot and he fell down he managed to get him into the house and when he tried to close the door the attackers forced themselves into the house and cut him and left him for the dead.

He said the security light bulb hanging outside the door enabled him see 5 attackers who forced their way into the house. The court has to consider whether in the circumstances of the attach where PW2 said he was shocked and it was night he could properly identify the attacker without possibility of mistaken identity.

The court of appeal at Nyeri in the case of **James Chege Wanja & Another vs Republic [2014]eKLR** while dealing with an issue of identification under difficult circumstances held as follows:-

**“On intensity of the torch light and the lantern it is our considered view that the judges did not interrogate and evaluate the intensity of the light from the torch and the lantern lamp that PW1, PW2 & PW3 alluded to. The time of the alleged offence was 3.30 am. No evidence was adduced to show where PW3 was positioned in relation to the lantern which she said was on how much light it produced and whether it was behind or before her when the assailants entered her house....”**

In the case of **James Omondi Onyango vs Republic [2014]eKLR** – the court of appeal had occasion to consider a possibility of a mistaken identity by persons who claim to know each other as village mates or neighbours. In such a case the fact that the name of the perpetrator is not given to the police when report is made tends to weaken the evidence of identification.

Further in the case of **Wamunga vs Republic (1989) KLR 424**, the court of appeal while dealing with complexities of an identification of an assailant state as follows:-

**“ It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”**

In the instant case it is alleged that attack was at 11.00 pm in the night, PW2 the sole witness and the deceased were relaxing and chewing miraa in the open when they were suddenly attacked. When deceased was shot with an arrow, PW2 said he carried the deceased into the

house and tried to close the door but the assailants pushed the door and forcefully started cutting him and he fell under the bed. He admitted the solar battery that was used to light security bulb outside the house was old. He said he had charged the battery on 3.4.2013. The investigating officer didn't attend court to answer questions. On intensity of light from solar battery that had been charged one day prior to the offence.

PW2 didn't explain how he managed to get the hanging bulb into the house if he rushed into the house after the deceased was shot at and was struggling to close the door so that assailants don't enter.

PW2 didn't also say how long he took to have been able to recognise the assailants. He admits he was in shock. Could he have been able to think straight under such shock?

In consideration of the evidence of the accused persons that they were not at scene of the murder on the material day and in consideration that offence was committed under the cover of darkness and considering that the only evidence linking accused persons to the offence is that of a single witness this court is afraid that using the same to find that accused persons guilty is dangerous and can't safely make it a basis of a conviction.

The accused persons are therefore acquitted under S. 215 C.P.C and are to be released forthwith unless lawfully detained.

**HON A. ONG'INJO**

**JUDGE**

**24.1.2019**

**Before Adwera J**

Kinoti – C/A

Mr Mutegi advocate for accused persons – N/A

A1- Present in person

A2- present in person

A3- present in person.

**Court**

**Judgement delivered, dated and signed in court on the 24<sup>th</sup> Day of January 2019.02.06**

**HON A. ONG'INJO**

**JUDGE**