



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 10 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MBENEKA KITILI KIOKO & 2 OTHERS.....ACCUSED

JUDGEMENT.

1. The accused persons, MBENEKA KITILI KIOKO alias VERONICA, SILA MUSAU and PAUL MUSAU are charged with murder contrary to Section 203 as read with Section 204 of that Penal Code Cap 63 of the Laws of Kenya. The particulars are that;

“On the 16th day of November 2014 of unknown time, at Ziwani, Kasemeni within Msambweni District Kwale County, the accused persons jointly murdered PATRICK MUSAU.

2. The accused persons were first arraigned in court on 9th November, 2015 whereby they were informed of the charge against them and remanded in custody to await mental examination by a psychiatrist and to be assigned counsel by the Deputy Registrar of the High Court.

3. The plea was taken on 17th April, 2015 and each accused person pleaded NOT GUILTY to the charge. Their trial began on 3rd December, 2015.

The prosecution called six (6) witnesses in support of their case and each accused person opted to give sworn statement in defence. They did not call any witnesses.

PROSECUTIONS EVIDENCE

4. PW1, ANNA NDINDA MUNYAO testified that she was married to one MUNYAO MUSAU, who was son to the deceased herein and was also deceased, having been murdered in mid April, 2012 on his way from Gogo where relief food was being distributed. She said that after her said husband's death, the deceased's family (i.e Mzee Musau's family) never had peace again. That her mother in law, Veronica Musau called a meeting of her children Paul Musau, Sila Musau and Kivinya Musau, at her (PW1's) home, from where she heard Mama Veronica (herein referred to as 1st accused person) tell them to finish the old man before he could finish them.

5. That these children agreed with their mother, the 1st accused person, and Paul (herein referred to as the 3rd accused person) said that he was going to grow “rasta” hair in preparation of finishing someone because their brother Munyao could not be killed and they remain quiet about it. That he kept saying this and indeed grew the “rasta hair” for about a year, which after he shaved, the old man (the deceased herein) died on 20th November, 2014.

6. P.W.1 went on to state that during the funeral, the 4th accused person's wife, one Nduale cried and told her one Roda and Christine that on the night the deceased was killed, her husband the 3rd accused person had come home late in the night with his clothes soaked in blood and two blood stained pangas. She said that Nduale told them that when she questioned the 3rd accused person on where he had come from on that night with blood stained clothes and pangas, he told her to remain quiet and threatened her if she talked about it. She said that he even forced her to wash the two pangas the following day and bury a panga. She recognized as her father-in-law's in the ground.

7. PW2, RODAH LUKAS KITUKU KIMEU is mother to PW1. She testified that on 16th November, 2014 she received a phone call from her son John with information that her daughter's father-in-law, Musyimi Munyao had been cut to death at his home. She went to the deceased's home and found his body having been taken to the mortuary at Msambweni Hospital.

8. PW2 told court that the deceased had been staying with his grandmother Nthenya as he had separated from his wife, Veronica, the 1st accused person, who they had children with. She also said that the 1st accused person had been staying with her son, Munyao and the deceased would say that his son had taken his wife away, in a manner to imply that the two had a sexual relationship.

9. PW2 then attended the deceased's funeral on 24th November, 2014 where his daughter in-law by the name Nduale, a wife to Paul, the 3rd accused person, told them that Paul had come home late in the night with two pangas and his clothes heavily stained with blood. She said that Nduale said that when she questioned the 3rd accused person about this, he threatened to cut her head if she talked about the incident and asked her to wash the pangas. She said tht Nduale told them that she was saying this so as to have a piece of mind.
10. PW3, MUTHENYA MAIMBO MUTISYA told court that on 16th November, 2014 the deceased, Musau was murdered at his home in Ziwani. He explained that before his death, the deceased had many issues. That he never used to agree with his sons Munyao Musau, who he alleged was having an affair with his mother, Veronica, the 1st accused person and this had caused him to send her away from her matrimonial home to go and live with her said son. He also said that Munyao was murdered and his father, the deceased and one Kianga were arrested for interrogation by the police at Lunga Lunga on suspicion that he had been involved in the murder of his said son. As a result of this, the deceased's family disintegrated so that his three sons and five daughters bore a grudge against him. PW3 said that the deceased was staying with his ailing mother but after the death of their son, Munyao, the 1st accused person moved to stay at a market called Kasoko and never went back to her matrimonial home.
11. Further evidence from PW3 was that on 1st November, 2014, the 4th accused person, Paul went to his home while so bitter and told him openly that he wanted to kill his father and needed him to assist him do it. PW3 declined the request saying it would amount to breaking the law and the 3rd accused person left.
12. PW3 went on to state that after this, the deceased went to his home and he (PW3) asked him to be careful with his children because they were planning to kill him. That instead the deceased asked him to keep off the issue and said that his children could not kill him because he was their father. He even asked him not to disclose this to anyone else.
13. However, PW3 said that three days after this, the deceased went to his house early in the morning and told him that his son Paul (the 3rd accused person) had wanted to kill him on his way home by attacking him with a panga but had slept off. That the deceased took the panga but returned it to the 3rd accused person after the night.
14. And on 15th November, 2014, PW3 said that he was on his way home from Mzuri at about 1:00am when he heard noise from the deceased's house twice. He stopped and peeped to see what was happening. And after about five minutes, he saw Paul and Sila (hereinafter referred to as 3rd and 2nd accused persons) leaving their father's house with each carrying a panga in their hands. PW3 ran to his house while so shocked and the following morning went and reported the matter to the police.
15. According to PW3, although he did not tell the person who was making noise, he was able to see the two accused person using the gas lighter. He said that he saw the deceased's body and it had cuts on the neck, head and part of it was burnt.
16. PW4, KATAVI LOLUNGUU testified that on 16th November, 2014, he was called by the village chairman, SEIF MAIMBO and informed that their neighbor had been cut and wanted him to accompany him to the said neighbour's house as they call the police. PW4 told the chairman that he did not have a telephone and so he advised that they call the senior chairman but there was no response. They then went to search for him at the church where they found him together with one Mwai S/o Mackenzie. They all then proceeded to the home of the deceased where they found dogs feeding on his body which was lying under the sun.
17. That they called other neighbours who included one Kasee Kinyango and asked if they knew the old man. That Kasee told him that he had been called by another by the name Kagomba and informed of the old man's death. PW4 then wondered how the said Kagomba who lived in Mombasa had known of the deceased's death and he told him it was from the deceased's son Sila, who had also alleged that he had been informed by someone he did not know. The police were called from Lunga Lunga police station and they collected the body which they took to Msambweni hospital.
18. According to PW4, the deceased had been slaughtered on the neck, had his tongue and lower teeth removed together with the lower chin, his left eye was gorged out with cuts on both wrists and slight burns on both hands.
19. PW5, MUSEMBI MUTISO said that on 16th November, 2014 he was at Gituamba area in Lunga Lunga when he had received information from his neighbours that Mzee Musau had been murdered. He said that it was alleged that the deceased had gone to prepare charcoal in the forest. He then proceeded to the deceased's home where he inquired if there was a suspect in the family and was told that there was none.
20. On 8th January, 2015, he went to Musau's home. He said that as they were taking tea, Mzee Sila who he had met on the way to pick milk from a neighbour's home came there and asked him if they could talk. They then went behind Musau's house and Sila told him that there was an issue which had arisen back home and that people were bringing up issues which had already passed by and wanted him to accompany him to the police station to urge the police have the matter discussed at home.
21. PW5 said he learnt the issue was about the deceased's death and he told Sila that it was difficult to be referred home by the police on issues of death. He asked Sila to go and have a sitting at their home and then brief him on the plans.
22. On 13th January, 2015, Paul, the 2nd accused person also went to him and he repeated the same advice he had given to Sila, the 2nd accused person. And on 14th January, 2015, the 2nd accused person and his in-law, one Mutua went to his home and the 3rd accused person gave him Kshs10,000/= which was meant to be taken to Lunga Lunga police station so as to have the murder case referred back home. PW5 went and informed Sergeant Mua about it and handed over the Kshs10,000/= to him. Sergeant Mua recorded the serial numbers of each note on a paper and told him that this was the initial evidence. That he had taken him a bribe to have the case returned home. PW5 identified the paper on which the serial numbers of the notes he had been given by the 4th accused person were noted and the Kshs10,000/= in Kshs1,000/=

shilling notes as exhibits.

23. PW6, CHRISTINE JOHN KITONYI, testified that on 15th November, 2014 she, Faith and Kanini had gone to attend a meeting at a place called Kithambya where they condoled with a fellow member for the loss of her brother. She wanted them to talk to one Monica to join the group but the 1st accused person refused on the ground she had ruined the deceased's wife.

24. PW7, NO. 71770 A.C ISAAC MURUIKI told court that he was the investigating officer in the case at Lunga Lunga police station. He said that on 16th November, 2014, S. Muwa, the in-charge then instructed him to take over investigations in a case of the murder of one Musau Mutisya which had been reported. He was accompanied to the scene at Ziwani village by the O.C.S, Lunga Lunga where they found the body of the deceased lying on a mat outside the house which was said to be his. He observed that the body had deep panga cuts on the head and shoulders and it appeared to have been scalded by hot water. They collected the body and took it to Msambweni hospital mortuary.

25. After this, PW7 said that they commenced investigations which revealed that the deceased had a bad relationship with his former wife and his two children to the extent that the village chairman, one Maimbo Mutisya (PW3) told them that one of the sons had approached and informed him that he wanted to eliminate his father. PW6 said that he also learnt that prior to the deceased's death, three of the accused persons had had a private meeting where they had discussed on how they would kill him and how they would raise money for this. It was the evidence of PW6 that a few days after this meeting, the deceased was found lying dead outside his house.

26. PW6 further testified that PW3 also informed him that on the day the deceased was found dead, he had been on his way home from a place called Mzuri when he heard someone scream twice as he passed by the deceased's home. That PW5 stopped to observe what would be happening and he saw two people he identified as Paul and Sila, the 4th and 3rd accused persons walking away while holding pangas and he is the one who reported the matter to the police station. Later, the accused person were arrested and charged with the offence of murder.

27. PW6 also testified that he attended the post mortem examination on the deceased's body and with consent of all counsel for the accused person, produced the post mortem report with the doctor's findings on the post mortem examination which were marked as Exhibit P3.

28. PW7 further testified that the deceased had separated from his wife, that 2nd accused person and she had remained bitter with him to the extent of arranging to eliminate him. He then said that Sergeant Muwa had informed him that the 3rd accused person had sent the village chairman with Kshs10,000/= to make police leave them alone and he produced the Kshs10,000/= and inventory as Exhibit 1(c) to 1(f) and P2.

29. The accused persons were all placed on defence and each one of them gave sworn statements in defence. They called no witnesses. The 1st accused person, MBENEKA KITILI KIOKO told court that she was married to the deceased in January, 1980 and had nine (9) children. She then said that they separated in 2002 when the deceased told her that he wanted to stay alone and she moved out and went to stay with her late son Munyao Musau. The 1st accused said that she later bought a plot at Makeneni Kasokova in 2006 for Kshs4,000/= and she build a hotel and shop on it with the assistance of her late husband (the deceased in this case). She said that the deceased was a carpenter and he also assisted her in making seats and beds.

30. According to the 1st accused person, the deceased husband used to cater for all the children's needs as their father. She then narrated the events on 16th November, 2014 upto when she learnt of her husband's death and was arrested together with her two sons for the same. She denied that she murdered the deceased. She also denied that the deceased murdered their son Munyao and said she did not know who murdered her children.

31. She further denied that Paul, the 3rd accused person confessed to killing the deceased and denied that they had a meeting in which they planned to murder the deceased. She denied that she had complained that one Monicah was breaking her home. She denied that the 3rd accused had removed case to bribe the police.

32. The 2nd accused person, SILA MUSAU testified that the deceased was his father and that the 1st accused was his mother. He said that he and his father, the deceased used to assist one another and would build houses and plough land together. He denied ever disagreeing with his father, who lived far from him. He then narrated what transpired from 15th November, 2014 to 16th November, 2014 until he learnt of his father's death. He also gave an account of the events that led to their arrest and denied ever being involved in his father's murder for he had no reason to do this. He further denied ever trying to bribe the police so they could drop the case as he could not raise such an amount of cash as a charcoal maker.

33. The 3rd accused person, PAUL MUSAU gave an account of how he learnt of his father, the deceased's death. He even said that his wife was called and there was an attempt to make him record a false statement against him but she refused. He said he has a piece of land from his father and they had no grudge against each other. He said he attended his father's funeral and was not named as having been involved in his death then. He denied ever contributing any cash towards the bribing of the police.

34. At this point, the issue for determination is whether the prosecution has proved its case against the accused persons beyond reasonable doubt for the murder of the deceased. Section 203 of the Penal Code defines the offence of murder as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

35. To establish the offence of murder, three critical ingredients require to be proved from its definition. They are:

(a) The fact as well as cause of death of the deceased.

(b) The accused person committed the unlawful act that led to the death of the deceased.

(c) That at the time the unlawful act or omission was committed the accused had malice afterthought.

36. The second ingredient constitutes the “*actus mis*” or action of the offence of murder while the third ingredient constitutes the “*mens rea*” as the guilty mind required to prove the offence of murder.

37. For the fact of death, it was the testimony of all the prosecutions witnesses that the deceased died on 16th November, 2014. PW1 & PW2 testified that they attended the deceased’s burial. PW3, PW4 & PW7 visited the scene and saw the deceased’s body lying dead outside his house at Ziwani village. PW6 said she heard of the deceased’s death. The accused person, who are wife and sons to the deceased confirmed that the deceased died and they arranged and attended his funeral.

38. On the questions of cause of deceased’s death, PW1 & PW2 said they were told tht the deceased had been cut to death. PW3 said he saw the body of the deceased and it had cuts on the neck and head which were partly burnt. PW4 said that when they got to the deceased’s home, they found dogs feeding on his body which was lying at the door of his house. He said that he observed the body and saw the deceased had been slaughtered on the neck, his lower teeth, tongue and lower chin had been removed, his left eye cut and gorged out with cuts on both wrists and slight burns on both hands. PW5 said he was informed that the deceased had been murdered. This was the same narration by PW6. PW7, the investigating officer who visited the scene, collected the deceased’s body to take to the mortuary and investigate the matter, said that he saw the body had deep cuts on the head and shoulders and it appeared scalded by hot water. The post mortem report (Exhibit p3) had conclusive findings from the doctor who performed post mortem examination on the deceased’s body saying that the cause of deceased death was acute cerebral hemorrhage from the severe head injury.

Again, the evidence as to the cause of the deceased’s death was not rebutted or controverted by the defence in any way. Therefore, the fact that the deceased’s death and cause of it were proved by the prosecution beyond reasonable doubt.

39. The next issue required to be proved by the prosecution is whether the accused persons caused the deceased’s death, and if they did, whether they did it with malice afterthought.

The accused persons are charged with the offence of murder of the deceased PATRICK MUSAU MUSYIMI. To support this charge, the prosecution called evidence of seven (7) witnesses.

PW1, ANNAH NDIWA MUNYAO, a wife to the late Munyao, a son to both 1st accused person and deceased told court that the 1st accused person called for a meeting of her children Paul Musau (3rd accused person) Sila Musau (the 2nd accused person) and Kivinya Musau at her (PW1’s) home. She said she heard the 1st accused person telling her said sons to look for money so they finish the old man (the deceased) before he could finish them. That Paul (3rd accused person) said that he would grow rasta later so he could finish someone because their brother Munyao (her husband) could not be killed and they remain quiet.

40. She then testified that the deceased was then found dead on 20th November, 2014. When cross examined by counsel for the 1st accused person, PW1 said that Nduale, the wife to the 3rd accused person was also there and she had heard this conversation.

41. It is worth noting that this evidence by the PW1 was not corroborated by any other witness and even the 3rd accused person’s wife, Nduale was never called as a witness to corroborate her evidence. PW1 also stated that during the deceased’s funeral/burial, Nduale cried and told her, her mother Roda (PW2) and one Christine (PW6) that her heart was not at peace. That she disclosed that on the night the deceased died, her husband Paul had come home with clothes which were stained with blood and two pangas which were also blood stained. That when Nduale inquired where he had been from at that time of the night with the blood stained clothes and pangas, one of which she recognized as belonging to the deceased, PW1 said that she told them that the 3rd accused person had asked her to keep quiet, threatened and forced her to wash the clothes and bury the father in-law’s panga in the ground.

42. This evidence was repeated by PW2, Rodah, who is mother to PW1 who said she was also at the deceased’s burial. PW6 testified but did not mention this. It is again worth noting that the said Nduale was not called as a witness to confirm what PW1 and PW2 said she had been told with the other mourners. It is not explained why Nduale was not called as a witness or whether or not she recorded a statement. The evidence by PW1 and PW2 on what Nduale told them can best be treated as hearsay and unless corroborated by the original witness, it has not probative value.

43. There was then the evidence of PW3, who said that the 3rd accused person had approached him with a lot of bitterness towards his father, the deceased and asked him to assist in killing his father, a request he declined. He said he informed the deceased about it but he dismissed the same. PW3 then said that the deceased went to him after a few days and told him he had almost been cut by the 3rd accused person on his way from the forest. He finally said that on the night the deceased died, he heard noises from the deceased’s house as he walked to his home form Mzuri at 1:00am and had seen the 2nd and 3rd accused person walking away from this house while armed with pangas.

44. PW3 said he is the one who reported the matter to the Lunga Lunga police station. Again, this evidence of pw3, apart from lack of corroboration, raises some questions. The issue of one planning or threatening to kill another is a serious one and one wonders why PW3, who has even been referred to as a village elder did not find it fit to report the matter to the chief of police for action.

45. Also, having identified the 2nd and 3rd accused person as being the people who he send away out of the deceased’s house on the night he was murdered and reported the incident to the police station in the morning, the question becomes, why weren’t the said accused persons arrested immediately, even for interrogation? It will be noted that the accused persons were arrested in February, the following year, 2015, a time lapse of about 3 months.

46. PW3, further mentioned that he used a light from a gas light to see. It came out during cross examination that he did not mention this in his statement to the police. The intensity of this light and its exact position was not explained to enable this court determine whether it was bright enough to enable one see and identify another person at that time of the night.

47. PW4 evidence was that he was only informed that someone had been killed in their village. He neither saw the person who killed the deceased nor witnessed the incident. In cross examination he also confirmed that people in the village had different information about the incident.

48. PW5 told court that he was approached by Sila, the 2nd accused person had requested that he accompanies him to the police station to urge the police to allow for the issue of the deceased's death to be discussed at home. That he asked him to go and have a sitting with the family and discuss the issue. PW5 then said that on 13th January, 2015, Paul, the 3rd accused person went to his place at Gitwamba and told him that Sila had told him about having the murder case removed from the police station. PW5 said he told him that it was difficult to remove a murder case from the police but they should sit as a family and again themselves, then tell him. And on 14th January, 2015, Paul and his in-law Mutua went to see him at his home where Paul gave him Kshs10,000/= to take to the police station for the murder case to be referred back home.

49. PW5 went to Lunga Lunga police station where he saw Sergeant Muia, explained to him how he had been given Kshs10,000/= to give to him to remove the case. That Sergeant Muwa recorded the serial numbers of each note on paper and told him that this was the initial evidence in this case since it was a bribe to interfere with the murder case. This was serious evidence which might have been corroborated either by the prosecution calling Mutua, the 3rd accused persons in-law or Sergeant Mua to confirm that indeed PW5 was given Kshs10,000/= by the 3rd accused person to influence the investigations into this case. Also, the said cash was handled in a manner that did not show it was subject of investigations so that no finger prints was taken. Recording the serial numbers on a paper and keeping it as exhibit is not sufficient evidence to confirm it had been given by the 3rd accused person as a bribe. The said serial numbers were not exclusive to certain places or persons. The other witnesses, PW6 & PW7, equally did not witness or have any direct evidence to link the accused persons to the murder of the deceased.

50. All in all, none of the prosecution witnesses adduced direct or circumstantial evidence that would link the accused person on any of them with the murder of the deceased. The evidence by the prosecution witnesses is all hearsay and based on suspicion and speculation, which have no place in a criminal trial. The witnesses adduced evidence of the deceased and the 1st accused person having been estranged and the strained relationships the deceased had with his family. And clearly it is because of this that they believed the accused persons killed the deceased... the motive.

51. In their respective defences, accused persons denied the claim that they murdered the deceased. The 1st accused person, in denying having planned to or been involved in the murder of the deceased, told court that their separation was the deceased's choice because he wished to stay alone. She said that he always provided for the nine children they had.

52. The 2nd accused person said that he had lived with his father, the deceased for many years and would assist each other. The 3rd accused person said that he was living on a piece of land from his father, the deceased, who he said had paid his school fees and was saddened by his death.

53. From their defence statements, the accused persons also confirm that the deceased died as a result of being killed but deny they were involved. In a criminal trial, the burden of proof lies upon the prosecution to prove their case beyond reasonable doubt. And having found that the prosecution had failed to do so from the evidence they have tendered in this case, it is not in this court's place to test the credibility by the accused person's statements in defence.

54. The prosecution having failed to prove that the accused persons caused the death of the deceased, the issue of malice afterthought does not arise.

As a result I find that the prosecution has failed to discharge their burden of establishing the guilt of the accused persons beyond any reasonable doubt. I find they are not guilty of the offence of the murder of the deceased and acquit them accordingly.

Judgment DELIVERED, DATED and SIGNED this 22nd day of January, 2019.

D. CHEPKWONY

JUDGE.