



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 17 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JONATHAN MWANGANGI MWINZI.....1ST ACCUSED

KITENG'U MUKITI.....2ND ACCUSED

JUDGEMENT

1. The two accused persons Jonathan Mwangangi Mwinzi and Kiteng'u Mukiti stand charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that between 13th and 15th October 2015 at Madongoi Sub-Location, Kavaani Location in Kyuso Sub-County within Kitui County jointly murdered one Kazungu Nzenge.
2. They have denied the offence. In an attempt to prove their case the prosecution has called several witnesses.
3. PW1 was Mwendwa Nzenge the brother of the deceased who testified that he burnt charcoal at Mandongoi with the deceased, Jonathan Mwangangi Mwinzi and Kiteng'u Mukiti. According to his evidence in September 2015, all the four were burning charcoal, but he went home to see his pregnant wife and remained there until he was called on the phone by Mutia Muthui who asked him whether the deceased had also gone home as the deceased had not been seen for some time.
4. He explained that, when they burnt charcoal, they slept under trees, and that when he left for home, the 1st accused who was also called "Calos" and Kiten'gu Mukiti and the deceased remained behind.
5. According to him, Mutia informed him that when he went to the forest to look for Kazungu the deceased, he saw Kiteng'u taking away the charcoal of the deceased. The next day which was a Sunday, he proceeded to Mandongoi where he saw the body of the deceased covered with tree branches. He also saw the shoes of the deceased and observed that the body was partly eaten by hyenas. He met Mutia and other people at the scene but "Calos" was absent. By the time he arrived, Kiteng'u had been already tied with ropes, and Kiteng'u said that it was possible that "Calos" had killed the deceased and escaped. According to this witness, Kiteng'u was arrested because he refused to release the deceased's charcoal.
6. It was also his evidence that the body was taken by the police in a government vehicle to Mwingi. He identified the two accused persons as the people he named as "Calos" and Kiteng'u.
7. In cross examination, he said that he was not aware if the area was a Government forest but knew that hyenas lived in the forest. He stated also that Mutia said that the deceased had been chased by Somalis. He stated that "Calos" escaped to Boka. He admitted that Somalis had come to that area with livestock. He agreed that there was a disagreement over water but maintained that it was not a standing issue that would have caused the death of the deceased. He stated also that though they burnt charcoal in different places in the bush, they slept at the same place. He maintained that the 2nd accused took away the charcoal of the deceased.
8. PW2 was Mutia Muthui a maternal uncle of the deceased who knew both Jonathan Mwangangi Mwinzi and Kiteng'u as farmers and charcoal burners. According to him, on the 12th October 2015 he went to the river Mitamisi at 6.45am and saw the deceased carrying water from the river. Between 13th and 14th October 2015, however he did not look for the deceased who he knew lived with "Calos" also called Mwangangi Mwinzi, Kiteng'u and Mwendwa. On 15th October 2015 he asked Kiteng'u where Kazungu was, Kitengu told him that Kazungu had gone home at Kalwa. He then made a telephone call to Kalwa though the phone number of Ngoki Musimi and informed the brother of Kazungu that he had not been seen for three days, and also asked another person called Ngoku Paul to make enquiries on the whereabouts of the deceased.

9. On 17th October 2015, when he went to the charcoal burning site he saw “Calos”, Mutemi Ngweso and the 2nd accused but did not see the deceased. He informed the Nyumba Kumi elder Sammy Nzelu and Headman Kitheka Mutemi about the disappearance of the deceased. People then gathered at 1 pm to try and trace the accused but the 1st and 2nd accused did not turn up. The public then contributed money among themselves for transport to trace Kiteng’u 2nd accused, and when they found him, he said that he had been told by the 1st accused that the deceased had gone home.

10. Next day, they went to trace the deceased at the charcoal burning site and found his body having been partly eaten by wild animals. He observed a rope around the neck and a sweater tied to the hands, and another rope tied to the waist. One shoe of the deceased was near the body, while the other shoe was about 100 meters away. A pair of trousers was also nearby. He found many parts of the body missing including the eyes, but he could identify the face which he knew well. He stated that Kiteng’u was present at that time and appeared shocked but “Calos” was absent. Later, the police arrived from Ngomeni and gathered the body parts which they took away. He did not know how the two accused persons were arrested but believed that they had killed the deceased. He identified both the accused persons in the dock.

11. In cross examination, he stated that he did not burn charcoal and was not aware of any existing dispute between the deceased and the accused. According to him, the deceased was not married. He agreed that other people burnt charcoal in the forest. He stated that they found the thorax and upper part of the deceased body eaten. The body was on an old dead tree with firewood gathered around so that the body could not be easily seen. He maintained that he saw both shoes of the deceased and the sweater. He also maintained that the body parts were taken by the police to the mortuary. According to him, Mwendwa Nzenge the brother of the deceased had left the forest three weeks earlier.

12. In re-examination, he confirmed that the forest was not fenced and everybody could burn charcoal there. He stated that livestock herders were also present in the forest and confirmed that he did not witness the killing of the deceased.

13. PW3 was Samuel Nzelu Ngema the area Nyumba Kumi chairman who knew the deceased and the 2nd accused as charcoal dealers. On 17th October 2015, Mutia told him that Kazungu had disappeared on the 12th. They then looked for Kiteng’u Mutiki who was later brought in a drunk state on a motorbike and when they asked him about Kazungu, he said that he had been speared by Somalis. He also got information that Kiteng’u Mutiki had been seen taking Kazungu’s charcoal together with Mutemi Mbosho and Maimbu Kiteng’u. He met other people on Sunday at 2pm who did a search and found a shoe and then the body of the deceased. According to him, Kiteng’u appeared reluctant to participate in the search and wanted to go another way. He stated that, they sensed foul smell and then observed signs of dragging on the ground, before they found the remains of Kazungu placed on trees appearing to have been dragged by hyenas. He stated that the place appeared to have been set on fire which did not burn, and the second shoe was also found around the scene. He then phoned Ngomeni police who came and took the body. He observed that the deceased was tied with a rope around the neck, hands tied with a sweater, and the waist tied with a rope. Because they heard that Mwangangi was at Boka, they informed the area chief about that who arrested him the next day. He identified both accused persons in court.

14. In cross examination, he confirmed that the charcoal was burn in a game park which was not fenced. He maintained that because the two accused persons took the charcoal of the deceased, then they must have known about the death.

15. PW4 was Dr. Kiema Mwangi of Mwingi Hospital who produced a postmortem report filled by Dr. Elias Wakoli who had left public service. According to entries in the report, the body was found in a thicket. It was of a male African about 30 years old. Body was extensively decomposed and death was about 10 days earlier. Parts of the body from the knee downwards were missing. The pelvic bone was in two separate pieces. There was a fracture on the forearm. There was a tightly knotted rope around the neck and another tightly noted T-shirt on the left forearm. There was also a rope around the waist. The postmortem doctor found that the cause of death was asphyxia due to strangulation.

16. In cross examination, he stated that extensive body parts were missing, and cause of death was derived from the tight rope found on the neck, though there were no skin marks due to the state of the decomposition. He stated that other causes of death were possible.

17. PW5 was Sgt. Chris Mumia formerly of Kyuso Police Station but attached to Ngomeni Police Post. Currently working at Kombewa Police Station Kisumu County.

18. It was his evidence that he was the investigating officer and on 18/10/2015 he received a report from a person who was sent by a brother of the deceased Mwendwa Nzenge to report that the deceased had been missing for some days and had finally been found dead with the body decomposed and devoured by wild animals.

19. Together with other police officers, he visited the scene and on arrival found a crowd of people gathered. On inquiries, he was informed that the deceased and his brother, as well as Kitengu Mukiti and “Calos” used to burn charcoal together with the deceased and that the deceased’s brother had left the place where they burnt charcoal 1½ weeks earlier and the deceased was later found to be missing, and thereafter, Kitengu was questioned by elders on why he was seen harvesting the charcoal of the deceased and he said that he had been sent by “Calos” to do so and that “Calos” also informed him that the deceased had gone home.

20. He also gathered that further inquiries and telephone calls had been made in an attempt to find the whereabouts of the deceased in vain and that thereafter a search was conducted in the bush where the pieces of the remains of the deceased were found. He stated that he was shown the sleeping place of the deceased and observed signs of a struggle and dragging on the ground. He also saw a plastic “Tanga” shoes. He observed that the body of the deceased had been in a place where it was dragged by wild animals for 50 meters. He thus picked the body remains and the “Tanga” shoes, and drew a sketch plan. He produced the “Tanga” shoes and the sketch plan in court as exhibits. He arrested the accused because they harvested charcoal of the deceased and in addition, “Calos” had disappeared and none of the two had informed the relatives of the deceased about his disappearance. According to him, the tying of the ropes on the neck and waist of the deceased indicated that he was not killed by wild animals. He identified both the accused in court.

21. In cross examination, he maintained that the place was disturbed and that he saw skid marks but not shoe marks. He said that no

photographs of the scene were taken because photographers were far away at Garissa, Embu, Kitui and Thika. He stated that he did not physically recover a blue jumper or take the rope around the neck. He confirmed that the body was by then of only bones and no fresh. He said that the nearest human settlement was about 10 to 15 kilometers away and that the police motor vehicle could only reach a certain point from which one had to walk on foot to the scene. He maintained that it was not possible for another person to have killed the deceased.

22. In re-examination, he stated that it was for the doctor to make a report on the rope. He confirmed that the blue jumper and sweater recovered were the clothes of the deceased.

23. After the closure of the prosecution evidence, the two accused persons elected to make unsworn defence statements.

24. DW1 was Jonathan Mwinzi the 1st accused (unsworn) who stated that on 17/10/2015 he was at Boka and that he carried two customers on his “boda boda” motorcycle. On reaching Ngomeni Police Check Point, the police informed him that the two people he carried were dangerous people and they arrested all the three of them, took them in cells for 4 days and thereafter released the two but retained him in custody. On 21/10/2015 he was taken to Kyuso Police Station and detained for 6 days after which the second accused was brought. The OCS then asked him if he knew about the death of Kazungu Nzenge and he denied knowledge of the same. Then he was brought to Garissa and charged in this court.

25. Kitengu Mukiti the 2nd accused gave his unsworn defence statement as DW2. He said that on 25/10/2015 he opened the gate for the goats in the morning and proceeded to his farm where he worked. At 10 am, the Assistant Chief approached him and asked him to accompany him to the police station. The Assistant Chief then took him on his motorcycle to the Ngomeni Police Station where the police arrested him and kept him in custody for 3 days. He was then transferred to Kyuso Police Station and placed in custody for three weeks, then taken to court.

26. This was the defence of the accused persons, as they opted not to call witnesses. Thereafter counsel for the defence and the Prosecuting Counsel made oral submissions in court.

27. This is a case of murder, and the prosecution is required to prove all the elements of the offence. First of all, the prosecution is required to prove that the deceased died. Secondly, the prosecution is required to prove that the death was unlawful. Thirdly, the prosecution is required to prove that the death was caused by the accused. Fourthly, the prosecution is required to prove that the death was caused with malice aforethought.

28. The standard of proof in criminal cases is beyond any reasonable doubt. In the case of Karanja & Another vs Republic [2004] 2KLR 140 at page 151 the Court of Appeal cited with approval what was stated in the Ugandan case of Sekitoleko vs Uganda [1967] EA 531 where in it was held as follows –

“(1) (i) As a general rule of law, the burden on the prosecution of proving the guilt of the prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else,

(ii) the burden of proving an alibi does not lie on the prisoner and the trial magistrate had thus misdirected herself”

29. It is thus the legal position that in criminal cases, the prosecution has the burden to prove each of the elements of the offence beyond any reasonable doubt. The accused does not have the burden to prove his innocence. He may only raise doubts to weaken the prosecution case.

30. Did the deceased die? The evidence of the prosecution on record is that the deceased was engaged in burning charcoal in the game reserve in Ngomeni area of Kyuso Sub-County. He disappeared from the place where he burnt the charcoal. Members of the public conducted a search in the bush in the area he burnt charcoal and found a human body which was decomposed and eaten by wild animals said to be hyenas. The body could not be identified or there is no evidence that anybody identified and recognized the appearance of the deceased. The sweater of the deceased was found tied to his lower hands. His two pieces of “Tanga” shoes were found nearby. This was near the place he used to sleep and store his burnt charcoal. Postmortem examination was conducted on the body remains at Mwingi Hospital on 18/10/2015. The postmortem doctor Elias Wakholi whose report was produced by another doctor concluded that death was due to asphyxia due to strangulation. The doctor also stated in the report that he could not rule out other causes of death including stabs on soft tissues, now that they are decomposed, though he found that there were no blood stains on available clothing. The doctor also found a tight knotted T-shirt around the forearm, and tight knotted rope around the neck and also a tight knotted rope around the waist.

31. In my view, based on the evidence that the T-shirt of the deceased was found tied around the forearm and his plastic “Tanga” shoes were also found nearby in the same area where the deceased burnt charcoal with others, though the body was decomposed and eaten by wild animals, I find that the remains found belonged to the deceased. The deceased thus died. I therefore find that the prosecution has proved beyond any reasonable doubt that the deceased died in the way described by the doctor through asphyxia by strangulation.

32. Was the death unlawful? The circumstances under which the death of the deceased occurred in my view establish that the death was unlawful. No suggestion has been made that the deceased took his own life through hanging. A suggestion has been put by the defence that the death was caused by wild animals. If indeed it was caused by wild animals, I cannot imagine the same wild animals tying the deceased hands with a T-shirt; and tying tightly the neck and the waist with ropes. In my view therefore, the death of the deceased was unlawful and caused through unlawful means.

33. Did the accused persons cause the death of the deceased? This is a case based on circumstantial evidence because no one witnessed the death of the deceased. In a case based on circumstantial evidence, the surrounding facts and evidence must point to the guilt of the accused and to no other reasonable conclusion. In the case of Mwita vs Republic [2004] 2KLR 60 at page 66 the Court of Appeal held as follows –

“It is trite that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a

conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

34. In the above case the Court of Appeal applied the reasoning in the earlier case of Simoni Musoke vs R [1959] EA 715.

35. I have considered the facts of this case. Both the accused persons burnt charcoal together with the deceased in the national reserve. The brother of the deceased PW1 left them there some days earlier and went home. The deceased disappeared never to be seen again. The 2nd accused was seen taking away the charcoal of the deceased while the 1st accused had left the scene and gone to do other things in a far-away place called Boka.

36. Each of the accused persons in their unsworn defences implied that they were not together with the deceased person when he died. They were arrested away from the scene. There was a suggestion by the defence counsel in cross examination that the death of the deceased could have been caused by Somali herdsmen.

37. The glaring curiosity in my mind is that none of the accused person attempted to explain when they left the deceased and went their own ways. Certainly, none of them made any attempt either to look for the deceased or to report any unusual occurrences to the deceased. The impression one gets is that they were not concerned about what happened to the deceased person with whom they were burning the charcoal and sleeping together with every day.

38. I appreciate that an accused person does not have a burden to explain his innocence. However, with all the evidence on record, I would expect them to deny the offence and explain when and how they left the deceased in the bush. With all the facts on record, my irresistible conclusion is that the death of the deceased was caused by the accused persons and no other person. It was not caused by Somalis or wild animals. The wild animals just found a dead body and helped themselves by eating the same. I find that the prosecution proved beyond any reasonable doubt that the two accused persons caused the death of the deceased.

39. Was the death caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code. It is in summary an intention to cause death or do grievous bodily harm. The tightening of the rope on the neck in my view was intended to cause death by suffocation. I thus find that the prosecution proved beyond any reasonable doubt the death of the deceased was caused with malice aforethought.

40. Consequently, and for the aforesaid reasons, I find that the prosecution has proved its case of murder against the two accused persons beyond any reasonable doubt. I therefore find each of them guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convict them accordingly.

Dated and delivered at Garissa this 28th day of February, 2019.

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George Dulu

JUDGE