



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 67 OF 2014**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**REUBEN MUTWIRI MWORIA.....ACCUSED**

**JUDGMENT**

The accused Reuben Mutwiri Mworira was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

The particulars are that Reuben Mutwiri Mworira on the night of 19<sup>th</sup>/20<sup>th</sup> September 2014 at unknown time at Guchici village, Gaitu West Location in Imenti Central District within Meru county murdered M'Nduria M'Ngaiti.

PW1 testified that he had gone to cut grass when he saw the deceased persons door open but when he called out there was no response. When he entered he found the deceased lying dead on his bed. He informed his parents Benjanmin Muruthi and Regina Kanario who called the police and police came and collected the body. He said he used to see accused at the market but had not different with him.

He said the deceased was taking care of the land where he went to fetch grass for cattle. He said the deceased used to stay alone and he didn't see accused at the deceased persons home.

PW2 Joshua Mwebia got report of murder from Reuben Mureithi, PW2 made phone call to chief and reported death of the deceased and he was instructed to visit scene and confirm.

That when he entered the deceased persons house he found maize poured on the floor. In the 2<sup>nd</sup> room he found the deceased persons body. He said deceased had a cut on the chest and one finger had been cut off. That there was a deep cut on lower back of the head and on the side of the face. That when he confirmed to the chief that the murder was committed he was advised to call police from Chaaria. That OCS Chaaria police station in company of scenes of crime police officers visited the scene took photographs and collected the body to the mortuary. Information from Jediel was received that Kabasu is the one who stole maize from the deceased after killing him and went to sell to his brother David at night.

That when David was accosted he led the group of people that was looking for the killer across the ridge where he said the accused Mutwiri was employed. That Mutwiri was found with his employer in the farm and he was arrested. That on arrest, the accused persons employer identified the house where accused lived in and on conducting search, blood stained trouser and blood stained jacket was recovered hanged on a line in the house among other clothes.

That on recovering blood stained clothes irate members of public wanted to lynch the accused and PW2 made phone call to chief requesting for reinforcement. That in a bid to rescue accused, PW2 went with him to the road and stopped a motorbike on which he and Mutwiri boarded so he could take him to police station. That before they could go far they met the chief and police and accused was escorted to Chaaria Police Patrol Base and OCS brought station vehicle and collected the accused. That when accused was allegedly interrogated at the patrol base he said he had left panga at his employers home.

That accused asked his employer for the panga he uses to cut grass for the cow. He said that was the one he used to cut the deceased. That accused led police to where he had sold maize but no one was found at home.

PW2 said they proceeded to Kaguma police station where he recorded a statement and Mutwiri was charged. PW2 said that accused person used to threaten to kill the deceased because of rivalry between the deceased and a mad woman who was a friend to the deceased. PW2 said he didn't include issue of mad woman in his statement and he didn't take accused persons, seriously when he threatened that he would kill the deceased over a mad woman.

PW3 Sabera Kajuju accused persons employer also testified that on 23.9.2014 of about 10.45 am she was with the accused in the farm when a crowd of people came and surrounded the accused and carried him to her gate and tied his hands and that is when accused said he is the one who killed Mzee M'Ngaiti.

That when police came accused identified the panga he used to kill the deceased. That accused said he had washed the panga at the river after committing the offence.

She said the crowd of people that went to her farm were not armed and were violent. She said she was present when accused identified the panga he used to kill the deceased.

PW3 said she was so shocked on learning what accused had done that she even fainted. She said that clothes were recovered from accused persons house. She said her house is 10 m from where accused used to sleep. She said she could not tell if accused left the house at night on the material night.

PW4, former Assistant Chief testified that while in church he got a text message from someone who told him that his son had found the deceased murdered in the house. The chief also called and instructed that he proceeds to scene of murder. That 2 police officers accompanied him to scene where they found the deceased lying on his back on the bed and had very bad cuts. He said there were cuts on the head and chest. That police collected the body.

That after 3 days PW4 got information that Reuben Mutwiri the accused herein who had killed the deceased had been arrested. PW4 said he had not differed with the accused. PW4, said that the deceased persons house was 2 KM from where accused was working.

PW5 Chief Gaitu East location testified that on 20.9.2014 he received phone call from area manager of Ngiechia village informing him that there was an old man who had been killed. That he called Assistant chief PW4 and instructed him to go with police to scene.

That on 23.9.2014 the assailant who was alleged to has killed and stolen maize from deceased had been arrested at Kajujus home. PW5 called police and proceeded with them to the scene and arrested accused from members of the public who wanted to lynch him. He said that clothes recovered from accused persons house had blood stains. That the accused identified the panga he used to commit offence and it was taken as exhibit. He said the brown trouser recovered from accused persons house had a lot of blood on the lower part. PW5 said the T-shirt also had blood but accused said he washed blood stains on the panga in the river. Chief said accused persons employers home to deceased home is a stone throw away.

APC Kinoti – PW6 testified that on 23.9.2014 at 10.00 am area chief reported that there was a suspect who was about to be lynched by members of public. That in company of APC James Muriuki they rushed to scene on motorbike and found a crowd of people who had tied the suspect and wanted to lynch him.

That they rearrested him and removed rope used to handcuff him and took the suspect to OCS. APC Kinoti said that blood stained trouser and T-shirt recovered from accused persons house was taken as exhibit.

PW7 Dr Kisilu produced PM Report prepared by Dr Kihumba who performed autopsy on the body of the deceased and established cause of death as severe hand injury due to multiple cut wounds.

PW8 Elizabeth Oyiengo Government Chemist Analyst conducted DNA profil on blood samples from accused, deceased and compared with the slightly stained trouser. She concluded that blood stains on trouser didn't give a full DNA profile. She said the DNA was for more than one person and that there was partial profile of accused. She said it was not confirmed from whom the other profile was (It appears that item Q- deceased persons blood sample was not matched to blood stains on Item Z)?

PW9 PC Manase Ithiru on 20.9.2014 accompanied OCS Gaituu Police Station to scene of murder in Guchia village. That photographs of scene were taken and body removed to the mortuary. That later a suspect of murder was arrested by village elder assister by members of public. That on search of his house blood stained trouser and T-shirt were recovered. PW9 said that blood samples from accused and deceased were taken for DNA profiling by Government Chemist and Report was later returned – EX P3.

PW9 said that wife to David confirmed that accused had sold maize to her husband on the material night deceased was killed.

PW10 Dr Maria Muthoni produced post-mortem report prepared by DR Kahumbi .

PW11 PC Kirui produced panga – ExP4, Brown Trouser – EXP5, Green Manila bag – ExP6.

When placed on defence accused person in sworn said that on 23.9.2014 he saw 5 groups of people who came and surrounded him where he was with his employer. That Joshua and the village Manager arrested him. That Zakayo hit him on the head with a panga and he lost consciousness. That he was told he had killed M'Ndiria. He said the deceased was not known to him. That he was led to his house and search conducted. That a trouser, T-shirt and jacket that had blood stains was recovered. That the clothes and a panga he was using in the farm were taken as exhibits. He said that Zakayo said his leg or hand should be cut before he is taken to police. That when he was being led to where his leg could be cut police arrived and rescued him using a motor bike. That on the way they met police vehicle and he was handed over. That he was taken to David's home where he was alleged to have sold maize but there was no one. That a manila bag found in the compound was taken. Accused said he didn't commit offence. Accused person said he bled from his nose and that is the blood that stained the trouser and T-shirt. Accused said he accepted he had killed the deceased because he was being beaten and Sabera urged him to accept so that he is not killed at her home.

He said he was bugled to where his hand or leg was going to be cut when police came. He said it is in court he heard the deceased sustained cut injuries. He said he had nothing to say about PW4's evidence. He denied stealing maize from deceased after killing him. He said PW5 – chief and police officers rescued him from the mob.

From the evidence on record for the prosecution and defence this court is to determine whether ingredients of the offence of murder as defined under section 203 penal code have been established that is:

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

The ingredients of the offence of murder as set out in section 203 of the Penal code are :-

1. The fact of death of deceased
2. The cause of death
3. Proof that the deceased met his death as a result of an unlawful act and/or omission and that such unlawful act and/or omission was actuated with malice aforethought.
4. That the unlawful act and/or omission actuated with malice aforethought was perpetrated by the accused.

I have carefully considered the evidence on record and it is not in dispute that the deceased died and that his death was not accidental because according to the post-mortem report he had multiple deep cuts to the right side of the head with one cut reaching the base of the skull;

- There was a deep cut wound on the occipital region extending to the left side of the face
- Amputated right index finger
- Deep cut on the left palm.

Dr Kihumba concluded that cause of death was severe head injury and exsanguinations due to multiple cut wounds. These injuries were obviously not self-inflicted and they were meant to cause grievous harm or even death of the victim. The perpetrator of the heinous act could not have been acting in good faith particularly when he or she came at night to attack the deceased. That action must have been actuated by malice aforethought.

The only issue that remains to be determined is whether it has been proved beyond reasonable doubt that it is the accused who inflicted the injuries that resulted in the deceased death. No one witnessed the offence being committed and the evidence brought by the execution that was meant to link the accused to the offence is that of Joshua Mwebia M'Ritari PW2 who said that on 22<sup>nd</sup> September 2014, Jediel called him and asked if he knew who killed Mzee M'Ngaiti and he told Jediel that it was only rumours that he had heard that it was Kabaso who murdered him. PW2 said that Jediel told him that Kabasu killed the deceased and stole maize which he went to sell to his brother David at night. PW2 further said that he confirmed with David that the accused went with 20Kgs of maize late at night and woke them up to buy the maize. PW2 further said that on 23<sup>rd</sup> September he met David and other young men who were going to work and they started talking about Mutwiri the accused herein. That while they were talking a group of people in company of Jediel came and told David to say the truth otherwise he would be the one to be arrested. That David said they should go to Mutwiri who was employed across the ridge as Mutwiri wanted to put him in trouble. Two groups of people went to the home where Mutwiri was employed and others went to the farm of Mutwiri's employer and they found Mutwiri with his employer PW3 in the farm. Jediel and David did not attend court to testify and confirm that indeed the accused herein sold maize suspected to have been stolen from deceased person's house. In the circumstances whatever they told PW2 is hearsay evidence which unless corroborated by independent evidence it cannot be admitted. PW2 also stated that the accused said that if he knew he was being arrested for the murder of the deceased he would have killed another person. That allegation is also not corroborated by any other witness and the confession was not taken by an authorised person.

A search was done in accused person's house and blood stained jacket and trouser were recovered which made PW2 and members of the public confirm that the accused committed the offence and wanted to lynch him. Police rescued the accused person and he was escorted to the Patrol base where on interrogation he said he had left the killer weapon at his employers home. When he was escorted by the police back to PW3 home, he asked PW3 where the panga used to cut grass for cows was. Again PW2 claims that the accused said that was the panga that used to cut Mzee M'Ngaiti and washed it at the river. PW2 says the accused led the police where he had sold maize stolen from the deceased but nobody was found at the home. According to PW2 the accused and the deceased had a grudge with each other because of a mad woman whom both were having an affair with and that the accused used to swear that he will kill the deceased. However in a statement he never referred in the issue of a mad woman and he said that he did not take it seriously.

PW3 said that a crowd of people found her and the accused in the farm and surrounded the accused carried him to her gate and tied his hands and that is when the accused said he is the one who killed the deceased. That the accused also identified to the police the panga he used to kill the deceased which he said he had washed at Mararia river after committing the offence. PW3 said she was shocked when she learnt the accused had killed the deceased, she confirmed that blood stained clothes had been recovered from the accused person's house.

PW5 Chief of Gaitu East Location who said that the brown trouser that was recovered from accused persons house had a lot of blood on the lower part that a red T-shirt with black stripes had also blood and these exhibits were taken as exhibits to the police station.

There are 3 civilian witnesses namely:- Faith Karwira, Stephen Mutua and Luka Kirinya whom the prosecution was not able to avail to testify in court. PW9 the Investigating Officer said that he recorded the statement of Faith Karwira who confirmed that Reuben had sold the maize which was in DAP fertilizer sack and they recovered the sack but left the maize with Karwira. That sack was produced in court as exhibit 6 but its connection to the accused would only have been confirmed by Faith Karuitha and her husband David who was said to be the brother to the accused. There was also a T-shirt which was recovered but which was never subjected to a DNA examination and it was also not produced in court.

PW8, Elizabeth Waithera Oyiengo a Government analyst examined the blood stained trouser and T-shirt for DNA profiling and compared them with the blood sample recovered from the accused and her report was to the effect that the trouser Item Z was slightly stained with blood of human origin. In her conclusion she said that DNA profile generated from the blood stains on the trouser was a mixed DNA profile which showed contribution of partial DNA profile of blood sample in Item R indicated as of the accused Reuben Mutwiri Mworira. There was no clarity as to what the other part of the mixed DNA profile originated from whether from the deceased or any other human or animal. That report does not indicate whether the blood stains on the trouser item Z was compared to the blood sample on item labelled Q which was indicated as of the deceased.

Failure by the Investigating officer to submit the T-shirt and the panga to PW8 for DNA profiling of the blood stains to the blood samples obtained from the accused and the deceased and failure by PW8 to examine blood samples taken from the deceased to the blood stains on the trouser recovered from the accused persons house were fatal to the prosecution case.

There is therefore very strong suspicion that the accused committed the murder of the deceased but there is no direct or circumstantial evidence linking him to the offence. The prosecution left out loopholes which makes this court incapable of finding with certainty that the accused committed the offence. The threshold required in criminal cases of beyond all reasonable doubt has not been achieved by the prosecution and this court therefore resolves the doubt raised in favour of the accused person who is hereby acquitted.

**HON A. ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 30<sup>TH</sup> DAY OF MAY 2019.**

**In the presence of :**

C/A: Mr Kinoti

Prosecutor: Ms Mbithe

Accused: Present in person

Mr Wamache Advocate for accused.

**HON A. ONG'INJO**

**JUDGE**

**Mr Wamache Advocate**

I pray to be supplied with a copy of judgement

Order: Copy of judgment to be supplied to accused counsel and state counsel.

**HON A. ONG'INJO**

**JUDGE**