



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KNEYA**

**AT MERU**

**CRIMINAL CASE NO. 54 OF 2013**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**HARUN MBAE KIBITI.....1<sup>ST</sup> ACCUSED**

**DENNIS MUNENE.....2<sup>ND</sup> ACCUSED**

**TITUS MURITHI MOSES..... 3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

**Murder**

1. The three accused persons, namely Harun Mbae Kibiti, Dennis Munene and Titus Murithi Moses were charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on 5<sup>th</sup> May 2013 Karindine Sublocation, Kiria location in Meru central District within Meru County murdered Peter Kaumbara M<sup>o</sup>Murungi.

**SUMMARY OF EVIDENCE**

2. **PW1 JENIFFER GAUKU** testified and told the court that the deceased herein Peter Kaumbara was her husband. On 5<sup>th</sup> May 2013 at 9:00 pm Harun Mbae, Titus Murithi and Dennis Munene came in the company of other people and forced the door open and removed her husband from their home. She identified the three among the group as there was a lamp in the house and moonlight outside. They just forced the deceased out of the house even, as he offered them a cow in order to talk the next day. As they took her husband she screamed but no neighbors came to their rescue.

3. **PW1** found a panga and phone the next abandoned along the way. She went to make a report to the police at Karindune and she was referred to Kariene police station. Later she learnt a body of a deceased person had been discovered at river Kereen. She proceeded to the scene and found her husband's body had been burnt partly with injuries on the body. The body was collected and taken to Meru Level 5 hospital Mortuary.

4. **PW2 PATRICK MUTEMBEI** testified and told the court he recalls that on 6<sup>th</sup> May 2013 his mother called and informed him that his father was taken away at night by more than 15 people. She was able to identify 3 people among those who took him away. These were Harun Mbae Titus Murithi and Dennis Munene who are his cousins. He went to report the matter at Kariene Police station. The police accompanied them and on the way, they were informed a body had been seen at the river. When they went to check they found the body was his father's. The body was collected and taken to the mortuary.

5. During Cross Examination **PW2** confirmed that he was not in the house during the incident and it was his mother who told him what happened.

6. **PW3 SAMSON MWEBIA** testified and told the court that he hails from Karindune Location. He is a farmer and was an elder in the village for ten years. The deceased wife reported to him on 5<sup>th</sup> May 2013 at 10:00 pm that a group of unnamed people took her husband away. She told him the deceased had urged them to take a cow as security so that they could have him and have the matter discussed the following day but they refused and still led him away from the house forcefully. On 6<sup>th</sup> May 2013 he proceeded to the deceased home and met Jeniffer coming to his home. She asked him to accompany her to report and they went to Kirindune AP post. At the AP post he was with Jeniffer and her two sons and they were referred to Kariene police station to report. He left them to go to the police station while he went to the shamba. Later on he got a call from a police officer who told him to go and identify a body found near a river. He identified the body as that of the deceased herein. The body was recovered at River Njue in a raised part surrounded by 2 tributaries of the river. They found a

litre bottle placed on the deceased chest as he was facing upwards. The body was burnt and fingers were cut.

**7. PW4 PAUL MURIUKI** testified and told the court that he is the assistant chief of Karindune sub location. He recalls that on 6th May 2013 at about 8 am he got a call from Samson Mwebia area manager of Kiongingine village, who reported that Peter Kaumbara disappeared from home on the night of 5th May 2013 and he did not know where he was. At about 9:00 to 10:00 am while he was in the office Coporal Kuriuki and Coporal Gatuya also informed him they had received the report of a kidnapping. As procedural administrators they started searching. They were directed to river Njue where a body had been seen. On arrival they found a body of an adult man whose body was burnt from the waist upwards and firewood was on him. He reported to the D.O and the O.C.S Kariene police station. They came to the scene and the body was collected and taken to the mortuary.

8. During Cross Examination **PW4** did not handle any complaint between the accused persons and the deceased. However, the deceased was known to him as a resident of his sub location. The accused persons are also known to him as they are from the same home.

**9. PW5 ELIAS KIRAITHE** told the court that he hails from Kariene and is a farmer. He recalls that on 1st May 2013 there were prayers for Zaverio Kimathi who was sick. The Pastor Gitonga said that the sickness was a result of witchcraft. He asked for anointing to remove the witchcraft. They accepted and he took a panga and dug under the bed of Zaverio and took out something that had been tied with a paper. He told us to take him to where Mwigia tree had been cut in the river. From the river he dug where the cut tree and removed 2 other items tied with papers. We then went to the deceased home and before we go into the home the pastor dug in the banana plantation removed a white paper. In the home of the deceased he told the wife to open and under the bed where pastor dug out the other things tied in paper

**10. PW6 JAPETH MUSIMI** testified and told the court that he currently stationed at nyamache Sub County, on 6th May 2013 he recalls he was in the office when the OCS came and informed him of a murder under OB12/6/5/13. He joined OCS to Karindune sub location to find out the incident of murder. We met the local police officer Corporal Ataya at Karindune market together with Corporal Muriuki. They led me to the scene where the deceased had been burnt severely on the chest hands and lower abdomen. He also had cuts on the hand. They delved into the issue to establish the perpetrators of the murder. The body was removed from the scene and taken to the mortuary.

11. He did record the statements of the witnesses including Jenniffer Gauka, the deceased person's wife. As the only eye witness she said that a group came to attack them in the house. The 1<sup>st</sup> accused had dropped his phone in the house which he produced into evidence as MKP1. Additionally that Dennis and Titus were among the group that attacked her and her husband. The 3 were known to Jennifer as they were all brought up in the same homestead. The suspects went into hiding after the killing of the deceased.

12. Dr Mutuku carried out a post-mortem on the body of the deceased, Peter Kaumbara. He compiled a report thereto dated 10<sup>th</sup> May 2013 and reported that the deceased cause of death was 100% burns with head injury trauma. The report was produced by **PW7 DR TIMOTHY RIUNGE**. Who testified that Dr. Mutuku is known to him and he can confirm his handwriting and signature. Therefore confirming the fact of death of Peter Kaumbara and that an unlawful act caused it.

**13. DW1 HARUN MBAE** testified and told the court that the deceased is known to him as he was his uncle. On 5th May 2013 at 9:00pm he was at the market. He got home between 10:00- 10:30pm. He went home and slept. On 6th May 2013 at 8:00 am his mother woke him up and asked if he had any information on his uncle and I told her that I did not. She told him that learnt that his uncle had gone missing from his home. There were some rumors spreading within the area about witchcraft. There were prayers that were conducted by the family members and it was found that the deaths that were happening in the family were due to witchcraft.

14. After his mother informed him of the disappearance he did not do anything. When he went to the market he learnt that was a body seen at the river. He proceeded to the river but by the time he got there the body had already been collected by the police. The people who were present said that the body was his uncles. Subsequently, he went to college and on return to visit his sick mother he was arrested. There is a grudge between their two families and he was not involved in the death of his uncle.

15. During cross-examination he said that his parents died two weeks after the deceased was killed. His two sisters died before the deceased was killed and in total he has lost 4 people because of witchcraft.

16. In his testimony **DW2 DENNIS MUNENE** told the court that the deceased was known to him as he is married to his niece. He stated that he did not commit the offence because on 5th May 2013 at around 9:00pm he was at the shop working up to 9:30 pm and then he went to sleep. Then he used to sleep in the shop. The following day at Karendine while at work he heard the milk vendor say that Peter had gone missing at night and later at about 10:00am he learnt that the body had been seen at the river. When he proceeded to the river he found that the body had been collected. He was arrested one month later. He however said that it is not true that he went to the deceased house at 9:00 pm and was not involved in the death of the deceased. During cross examination he said that he was at the shop with his wife on the night of the incident. He added that he has no grudge with the deceased wife and doesn't know why she would say that she saw him.

**17. DW3 TITUS MWITHU** testified and told the court that on 5th May 2013 at around 9pm he was at home sleeping. He was arrested and charged on 6th May 2013 when he learnt that Kaumbura had died he denied that he was involved in the murder and what PW1 said was not true.

## ISSUES FOR DETERMINATION

18. Upon consideration of the evidence on record for prosecution and defence as well as defence submissions issues for determination are:-

- a. Fact of death
- b. The cause of death

c. That the cause of death was unlawful act or omission which was actuated with malice aforethought.

d. That the accused persons are the ones who perpetrated the unlawful act with malice aforethought.

**19. The fact of death is undisputed.** The deceased was found dead at River Njue. He was severely burnt on the chest, hands and lower abdomen.

20. PW7, Dr Riungu produced PM Report in which Dr Mutuku established cause of death as 100% burn with head injury due to trauma. The deceased was not burnt accidentally. According to his wife, PW1 a group of people came on 5<sup>th</sup> May 2013 at 9.00 pm and forcefully removed and went with him to an unknown place and his body was found the next day burnt and left at the river. Prior to this incident the family and clan members had on 7.5.2013 called for an exorcist on suspicion the sickness and deaths that had affected the family was as result of witchcraft. PW5 said because the deceased didn't attend during the prayers he was suspected to be the witch.

21. PW5 testified that on 5.4.2013 Assistant chief had send him to talk to the deceased as there was a problem and a clan meeting was held in which a warning was issued that nobody should take the law into their hands until a meeting was held. However, on 5.5.2013 before this meeting was held the deceased was forcefully removed from his house at night and killed on suspicion of being a witch. From the evidence on record, the deceased, A1 and A3 stay in the same homestead and therefore ought have heard the alarm raised by the deceased persons wife when she and husband were attacked and the deceased taken away. The village elder and Assistant chief must have had prior knowledge of the plans to eliminate the deceased when PW3 was send to give a warning that no one should take the law into their hands.

**22. The malice aforethought** exhibited by the people who attacked and took the deceased away is that they went into the home at night; when PW1 tried to intervene she was assaulted and wrestled down. The deceased pleaded with the group and offered to give them a cow as security so that the matter could be sorted out the next day but they were bent on killing him. They didn't heed to his pleas. The injuries inflicted on the deceased namely:-

- 2 deep cuts 5 cm long on the head, on the frontal and parietal regions and 100% burns in the river was meant to inflict maximum pain and injury to which the deceased could not have survived.

23. The ingredients of **malice aforethought** were proved beyond all reasonable doubt.

24. The remaining issues for determination is whether **the prosecution has proved beyond all reasonable doubt that accused persons committed the murder.**

25. The evidence of identification of the assailants/Culprits is given by PW1 the widow of the deceased herein. She said that accused persons who are her brothers –in laws son came in a group of other people, forced her door open and removed her husband and left with him into the darkness while beating him. She said the accused persons are the ones who entered the house and she identified them because there was a lamp in the bedroom where they entered to remove the deceased. She also said that she picked a phone belonging to A1 as well as a panga abandoned after the deceased had been whisked away from the house.

26. PW1 said that the accused persons and their group made noise that drowned her screams and that it was also raining and neighbours could not hear her whereas her brothers –in laws didn't bother to intervene because they claimed her husband was a witch. PW1 gave the names of the accused persons to police. When she reported the incident and she said it was because she saw them on the material night. A1 said he was not at home at 9.00 pm. When the deceased was allegedly removed from his house. He says he returned home between 10.00 and 10.30 pm and went to sleep and that it is his mother who told him the deceased had gone missing.

27. A1 is said to have disappeared from home after the murder of the deceased and his claim that he went to college is not believable. PW1 said his phone was picked at the scene the next day and PW6 the Investigating officer testified that A1 went to make a report that his phone was lost, but A1 has not denied that the phone found at PW1's house after the attack was his. He has not controverted evidence by PW6 the Investigating officer that he went to report that his phone was lost subsequent to attack and murder of the deceased herein. Although the evidence of PW1 on identification of A1 is that of a sole witness there is corroboration of the finding of his phone and the evidence of particularly PW5 who said A1 and A3 were present when the prayers were held and were among those who were grumbling saying that because the deceased had refused to attend the prayers he must be the one who bewitched other members of the family concerning identification of A2, PW1 said he was with A1 and A3 when they entered the house forcefully to remove the deceased. She said there was a lamp in the bedroom which enabled her identify the A2 and A3 together with A1 and A3.

28. She told police as well as PW2, that accused persons were among the attackers and that it is the 3 who entered the house and removed the deceased forcefully. The deceased had a conversation with them pleading a cow as they await discussions the following day as PW3 had warned that no one should take the law into their hands but they didn't heed.

29. The evidence of 1<sup>st</sup> Accused that he didn't attend the meetings is controverted by evidence of PW5 that A1 and A3 attended during the prayers. A1 also contradicted his own evidence that he went to college after the deceased was found dead in the river and that he was arrested long after when he returned to visit his sick mother. When we said that his parents died 2 weeks subsequent to the deceased person's death, 2 weeks from 5.5.2013 is 19.5.2013 and yet he was arrested and arraigned in court on 4.6.2019. This gives credence to the Investigations officer PW6's evidence that they escaped after committing the offence. A1 had no proof he went to college.

30. The evidence of accused persons that they were not at scene of offence is not corroborated. The evidence of PW1 coupled with the circumstances surrounding this case and the evidence by PW3 and PW5 that it was suspected that the deceased was the witch among the family members this court believes that he was killed on that suspicion and that the killing was instigated by family members with the help of other people whom PW1 remained outside when A1, A2 and A3 forced their way into her house and removed her husband to go and kill him.

31. This court finds that prosecution has proved its case beyond reasonable doubt and finds accused persons guilty. They are convicted under S. 322 CPC.

**HON A. ONG'INJO**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 27<sup>TH</sup> DAY OF JUNE 2019.**

**In the presence of :**

C/A: Kinoti

State : Ms Mbithe for state

A1: Present in person

A2: Present in person

A3: Present in person

Mr Omari Advocate for accused - present

**HON A. ONG'INJO**

**JUDGE**