



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 4 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MUTUMA M'IMPWI.....ACCUSED

J U D G M E N T

1. **Julius Mutuma M'Ipwi ("the accused")** has been charged with murder contrary to *section 203 as read with section 204 of the Penal Code Cap. 63 Laws of Kenya*. It was alleged that on the night of 16th December, 2014 at Antubeiga Location, Igembe South District within Meru County, the accused murdered **Francis Maore**.

2. The prosecution called four (4) witnesses in support of its case. **PW1 Said Mohammed**, a medical officer attached to Meru Level 5 Hospital, appeared and produced the post-mortem report prepared by **Dr. Guantai** on the body of the deceased. He told the court that the post-mortem was carried out on 9th January, 2015 at Meru Level 5 Hospital Mortuary. On examination, there was a stab wound on the chest measuring 4 cm wide and 8 cm deep. Internally, there was severe haemothorax. The cause of death was opined to be cardiorespiratory arrest secondary to haemothorax arising out of a stab wound to the chest by a sharp object. The report was produced as **Pexh1**.

3. **PW2 Eric Musinde**, testified that on the material day, he was with the deceased guarding miraa belonging to **James Ntonjira (PW3)**. That as they were patrolling the farm, at about 11:00 pm, they saw the accused on top of a miraa tree. That there was moonlight and they used a torch to identify the accused. The accused ran away and entered a house nearby. He came out with a knife and stabbed the deceased on the chest. He then returned to the house and locked himself inside.

5. **PW1** then went to a neighbour by the name Njiru to seek assistance but upon returning, they found the deceased had passed on. That the accused had run away through the roof.

6. **PW3 James M'Tonjira**, a brother to the deceased told the court that he was the owner of the miraa farm which **PW2** and the deceased were guarding. That the accused was his elder brother and was at the time residing in a house next to his said farm. He had suspected that the accused was stealing his miraa and that is why he employed the two guards.

7. On the material day at about mid night, he received a call from **PW2** that the deceased had been killed. The following morning, he accompanied **PW2** to Maua Police Station where they reported the matter. The police came and removed the body to the mortuary.

8. **PW4 PC Peter Mwilu** appeared and narrated to court the contents of the investigation file. He stated that the officer who investigated the case, **PC Dreik Atulo** had been transferred to Baringo. He told the court how the incident was reported at the police station on the 16th June, 2015 at about 9.00hrs by **PW3**. The police visited the scene and removed the body to the mortuary.

9. In his Defence, the accused narrated how he and **PW3** and his brothers had been engaged in a protracted land dispute. This had led him to move away from his home in Njiaburieuri and live in Muringene. He denied that he killed the deceased. He stated that on the material day, he was unwell at his home at Muringene having been injured by thieves who had attacked and robbed him. He was arrested in the hospital where he had gone to have the plaster removed and was told that he had killed someone at M'Njira. He denied knowing either the deceased or **PW2**.

10. The accused faces the charge of murder. To secure a conviction for murder, the prosecution must prove beyond reasonable doubt; **the fact of death, the cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that the accused had malice aforethought as defined under section 206 of the Penal Code**.

11. On the fact and cause of death, **PW2** testified that on the material day, he was with the deceased on **PW3's** farm guarding Miraa when the deceased was stabbed on his chest and died. **PW1** appeared and produced a post-mortem report which showed that the deceased had died as a result of cardiorespiratory arrest due to hoemothorax following a stab wound on the chest by a sharp object. The fact and cause of death was therefore proved to the required standard.

12. The next issue is whether the death was caused by an unlawful act or omission on the part of the accused. **PW2** was the eye witness. He told the court how on the material day at about 11pm, he and the deceased stumbled upon the accused atop a miraa tree stealing the same. How they gave a chase and the accused entered a house near the farm, came out with a knife with which he stabbed the deceased on the chest.

13. **PW2** was the only eye witness. He stated that there was full moon on the material night and that he and the deceased had torches with which he used to recognise the accused whom he had known for 5 months.

14. When cross-examined, he admitted that he had not told the police that there was moonlight or that he had used a torch to recognise the accused. He testified that the house in which the accused entered and emerged with a knife with which he stabbed the deceased was made of iron sheets. And that the accused escaped through the roof between the lintel and the iron sheets.

15. **PW3** told the court that the alleged house was a mud house with iron roof. That it belonged to one of his brothers by the name Kabiru. That the house was under the occupation of the accused and the said Kabiru at the time. That he did not like the accused as he had at all times suspected him of stealing his miraa.

16. The accused gave a defence of alibi. That he was at Muringene, miles away from the scene of the incident. That he had been injured by thieves who had stolen from him. That he was arrested at the hospital when he had gone to seek treatment for the removal of a plaster.

17. The only eye witness **PW2** had been in the employment of **PW3 James Ntonjira**, for five months by the time of the incident. He knew that **PW3's** brother by the name Kabiru was the owner of the house where the accused allegedly run to and drew the murder weapon.. It was not his evidence that he knew that the accused was living in that house.

18. To my mind, although **PW2** stated that he recognised the accused by use of a torch and the full moonlight, he had not stated this in his statement to the police. To my mind, a court must be very slow to admit very crucial evidence such as this from a witness who did not disclose it in his statement to the police. Such information is too important to escape the investigator. It is expected that the police must have a basis for arresting a suspect. Information given at the earliest opportunity to a person in authority is crucial in testing the veracity and truthfulness of what a witness tells a court many months or years after the incident. By that time, a witness would have had time to reflect and the likelihood of giving a different story to suit him is probable (*see Tekerali s/o Korongozi & 4 others versus R [1952] EACA 259*).

20. In the present case, **PW2** stated that the accused was arrested by members of the public. He never told the court when and where the arrest was effected. On his part, the accused told the court that he was arrested at the hospital when he went to have a plaster removed.

21. The accused's defence brought out the existence of deep rooted family dispute between the two families of the father of the accused. He told of how the family of the second house had hounded him out of the land of **Njiaburieuri** because of land. **PW3**, the employer of **PW2** and the deceased admitted that he did not like the accused before the incident. That he had employed the two because he had suspected the accused of stealing his miraa.

22. The prosecution gave contradictory evidence. The case was not properly investigated. It was not proved how and where the accused was arrested. **PW2's** evidence was shaky. The defence of the accused firm and consistent. It was plausible. The long land dispute between the accused and **PW3** could have been the reason for **PW3** implicating the accused with the offence.

23. To my mind, the prosecution did not prove the case against the accused beyond reasonable doubt. There were doubts as to whether the accused was really at the scene of the incident or not. This doubt has to be resolved in favour of the accused.

24. Accordingly, I find the accused to be innocent and I acquit him of the charge of murder under *section 322 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya*.

It is so ordered.

DATED and DELIVERED at Meru this 27th day of June, 2019.

A. MABEYA

JUDGE