



**REPUBLIC OF KENYA**

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

**CRIMINAL (MURDER) CASE NO. 62 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PATRICK KYALO MUNYWA.....1<sup>ST</sup> ACCUSED**

**LAWRENCE MULWA MUNYWA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. **Patrick Kyalo Munywa and Lawrence Mulwa Munywa**, the accused persons herein were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

*On 28<sup>th</sup> November, 2013 at Katheka Kai Village, in Machakos District within Machakos County jointly with others not before court murdered Joel Mutunga Muindu.*

2. The prosecution summoned a total of 7 (seven) witnesses in support of its case while the defence called the two accused persons.

3. **PW 1 David Musyoka Muindu**, the brother to the deceased testified that on 28.11.2003 at about 10.00 p.m he went to his late brother's house and saw the accused persons together with David Mwanzia (not before court) who were holding clubs.

4. He went on to testify that David hit him saying that the deceased had taken their herd of cattle and that with the moonlight he saw the accused persons hit the deceased with sticks. He testified that he heard the father of the accused persons utter that they should have killed him. Further that the following morning he heard on radio that a suspect had been beaten and taken to Machakos Police Station and he went to the said hospital and was directed to search all the hospitals and later learnt that his brother had been taken to Nairobi and that his wife confirmed that the deceased was at Kenyatta Hospital Mortuary. He reported the matter to the police station and recorded statements and confirmed that a post mortem was conducted on the deceased but however maintained that the deceased was registered under a different name. On cross-examination, he testified that he heard that a head of cattle that belonged to Kyalo Munywa were stolen and he saw the accused persons hit the deceased with sticks and reported the matter to the police and recorded his statements dated 2.12.2013.

5. **PW.2, Maureen Mwikali** testified that on 28<sup>th</sup> November, 2013 at 10 pm she was woken up by noise and when she went out she found Kyalo, Mulwa and Mwanzia who were carrying clubs and who were beating up the deceased. She testified that there was moonlight that enabled her to see the deceased and that she went and woke up David Musyoka and told him that some three men had carried away the deceased. On cross-examination she testified that the deceased was a broker of cattle and on the material day she saw three persons assaulting him but did not indicate in the statement that was recorded that there was moonlight.

6. **PW.3, Simon Maingi Daudi**, testified that on the material day he went outside after hearing noise and saw three persons taking away Uncle Mutunga Muindi and that the three were Kyalo, Mulwa and Mutuku who had claimed that they were taking him to the police station. He testified that he met their father on the way who uttered that they should have killed him and then Kyalo, Mutuku, Munyao and their father assaulted him. He testified that they had sticks and metal bars. On cross-examination he testified that Mutuku, Mumo and Kyalo were demanding for their heads of cattle and that the weather was dry, there was moonlight. He testified that he did not see the persons who removed the deceased from his house and further that the statement he recorded did not bear his signature, and on re-examination, he testified that in his statement he was not asked to state about weapons.

7. **PW 4- Jane Mwikali David** testified that on 23.11.2013, her brother in law was taken by Kyalo Munyua, Mulwa Munyua and Mwanzia and she followed them from behind and saw them beating the deceased with sticks. She testified that their father Mwema Nzioki ordered them to finish him and they assaulted him till he died and then Kyalo, Munyua and their father took the deceased to Machakos Level 5 hospital. She testified that she went there and found him dead and later he was taken to Kenyatta National Hospital. On cross-examination, she testified that on the material day it had not rained but it was a rainy season and emphasized that Kyalo, Mulwa and Mwanzia hit the deceased on the head and chest. She further testified that there was moonlight and that the first accused hit the deceased with a piece of

wood, and she recorded her statement on 5.12.2013, however the statement dated 17.12.2013 bore a signature that was not hers. On re-examination she confirmed that part of what she stated was recorded.

8. **PW 5- Philip Mwanthi Muindu** testified that on 28.11.2013 he received a call from the sister to the deceased that the deceased had been taken away from the house by Kyalo, Munywa and Mulwa Munywa and Mwanzia Daudi. He testified that he went to his house and found nothing and proceeded to the police station with his brother Daudi but didn't find him and after searching in several hospitals and found his name was at Machakos Level 5 Hospital and discovered that he had been referred to Kenyatta National Hospital where the body was found in the mortuary and it had an injury on the head. He testified that he witnessed the post mortem. On cross-examination, he testified that he received information from the deceased's sister via phone and did not witness the assault, however this was not recorded in the statement that he recorded with the police on 23.12.2013.

9. **PW-6- Dr. Bernard Owino Midia**, a pathologist at Kenyatta National Hospital stated that he performed an autopsy on the body of **the deceased on 18.12.13** and confirmed that the deceased had wounds on the forehead and face, had fractures on the upper teeth, there were fractures on the third ribs and he had a blood clot on the skin on the head; there was clotted blood on the head and his conclusion was that the cause of death was head injury due to blunt trauma. He signed the form on 18.12.13 and stamped it on 23.12.13. Upon cross examination, he confirmed that he conducted the post mortem and wanted the form to be accepted with the discrepancies which he confirmed during re-examination was an authentic form and that the same could be explained by the investigating officer. He produced the post mortem report as **EXH.1**.

10. **PW.7- Pc Ibrahim Gedi No 85363**, testified that he on 30.11.2013 received a report from David Musyoka that the deceased had been taken away by three persons known as Kyalo Munyua, Mulwa Munyua and Mwanzia Daudi and that the said persons had assaulted him and were joined by Munyua Nzioki who urged them to kill the deceased. Further he confirmed that a report had been made by the alleged assailants alleging that the deceased had been beaten by the mob and the names given of the deceased was Tundu Muindu. He testified that he learnt that the victim was transferred from Machakos Level 5 Hospital to Kenyatta National Hospital and had died at the casualty section. A post mortem was conducted and the cause of death was opined as blunt head injury and that he received the forms on 18.12.3013 and he took the same for stamping on 23.12.2013. On cross-examination, he testified that he arrested the accused persons and that the form show that the persons who identified the deceased were David Muindu and Philip Muindu. Further that some details were not indicated on the form before being supplied to the defence, for example the original form has the name of the station as Machakos whereas the defence form did not have the said details. He testified that he did not cross-check with the registrar of births and deaths of the names of the deceased and denied having conducted arm-chair investigations. Nevertheless he admitted that the accused persons gave false information concerning the names of the deceased. On re-examination he testified that some of the killers are still at large.

11. At the close of the Prosecution case, this Court ruled that the Accused persons had a case to answer and put them on their defence. The 1<sup>st</sup> accused denied committing the offence. He testified that he is a driver by profession and that on the material day, at night he noticed a large crowd and stopped his vehicle and noticed someone on the ground who was badly injured and he offered to take him to hospital. He testified that he passed by Machakos Police station to report the injury and informed the police officers that he had escorted the injured person to the hospital and then on 29.12.2013 he was arrested whereupon he explained to the police that he was just a good samaritan. He denied being part of the crowd who attacked the deceased. During cross-examination, he testified that he knew the deceased as Tundo and that he had no differences with the deceased. He testified that the 2<sup>nd</sup> accused who is his brother helped him to pull the vehicle that he was driving alone because it was stuck in the mud. He confirmed both in cross-examination and reexamination that it was dark was thus he was unable to identify who was in the crowd.

12. Dw2 was the 2<sup>nd</sup> accused and who denied committing the offence. He testified that on the material day he met his brother who informed him that he was assisting an injured person to hospital and then he was arrested on 24.12.2013 at his workplace. He testified that he had no reason to kill anybody, further that it was dark and he was not able to identify anyone in the crowd. On cross-examination, he testified that the 1<sup>st</sup> accused's car had lights and when he arrived he also found that the deceased was already seated next to the 1<sup>st</sup> accused in the vehicle, however he could not identify the deceased. He testified that he was told that the deceased was called Tundo hence he accompanied the 1<sup>st</sup> accused to Machakos police station plus others and booked the incident then went to hospital. He also testified that he knew the Pw1 to Pw3 and he had no differences with the family of the deceased.

13. The prosecution did not file submissions.

14. Learned Counsel L.N. Ngolya for the accused persons submitted that the prosecution has failed to prove the ingredients of the offence of murder against the accused persons. He submitted that the prosecution has relied on the contradictory evidence of the prosecution witnesses. For example, Pw1 admitted that his written testimony did not name any person whereas his oral testimony named the accused persons as the ones who beat the deceased from 10.00 pm to 3.00 am. He further submitted that the Pw2's evidence in cross examination contradicted her evidence in chief that she saw the accused beat up the deceased and that Pw3 changed his evidence in cross-examination that he did not see the persons who picked the deceased from his house; that Pw4 disowned her written statement. Counsel submitted that the prosecution evidence that they saw the accused taking away the deceased is not credible as it would be unsafe to identify the accused as killers of the deceased. Further, he submitted that the investigation was shoddy and that the post mortem report has glaring errors that weaken the prosecution case. Counsel cited the case of **Woolmington v DPP (1935) AC 462** that emphasized that the prosecution had a duty to prove the guilt of the accused and submitted that the state has failed to link the accused with the commission of the offence hereof.

15. Having considered the evidence and the submissions, the issue for determination is whether the death of the deceased can be attributable to the actions of the accused persons. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:-

**(a) That the death of the deceased occurred;**

**(b) That that the accused committed the unlawful act which caused the death of the deceased; and**

**(c) That that the accused had malice aforethought.**

16. The evidence on the death of the deceased has been proved by PW1, 2, 3, 4, 5, 6, and 7 who saw deceased's body that was lifeless and by the postmortem form **EXH. 1** produced by PW6 that confirms that deceased *died of head injury due to blunt trauma*. It is not in dispute that the deceased died as a result of mob justice. The main evidence which the prosecution linked the accused to the offence herein was that of the evidence of Pw1 to Pw5 which identified them and placed them at the scene of crime as well as the evidence that there was a disagreement over cattle that the accused have denied. The accused also explained that they were at the scene of crime as good Samaritans.

17. The Accused persons have denied that they committed the unlawful act which caused the death of the deceased. They testified that they were good Samaritans and I wonder why there is no independent evidence resultant from investigations that there was a brawl over cattle, there is no murder weapon that has been produced in court. From the foregoing; I find that the Prosecution has not been able to prove beyond reasonable doubt that the Accused persons were responsible for the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence. The evidence against the accused persons has not been presented before the court so as to say with certainty that the accused committed the offence of murder.

18. I came to the above finding with all caution, because all the witnesses who placed the accused at the scene gave evidence that the accused were known to them prior to the incident hence it was easy to recognize them. The accused even admitted being at the scene of crime therefore recognition of their presence was not a complicated issue. What was required was to identify the fact that the accused persons are the ones who rained blows on the deceased so as to prevent a miscarriage of justice.

19. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **Roba Galma Wario v Republic [2015] eKLR** where the court held that;

***“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”***

20. In order to establish malice aforethought so as to secure the conviction in the circumstances of the case, **Section 21** of the **Penal Code** come into play. The section stipulates:

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

21. With regard to common intention, the case of **Mabel Kavati & Another vs. R [2014] eKLR** wherein the Court quoted with approval the following excerpt of **Rex vs. Tabula Yenka S/o Kirya & 3 others [1943] 10 EACA 51** applies in this case:

***“To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”***

22. From the evidence of the prosecution that there was a brawl over cattle, of all the people who were present on the material day only the deceased's relatives were availed as prosecution witnesses 1 to 5. The investigating officer was expected to have given an independent angle to the case by finding out if indeed there was such an issue with regard to stolen cattle so as to create a nexus between the assault and the death of the deceased. The said investigating officer did not give evidence regarding the claim that the deceased had been involved in some cattle theft so as to establish whether or not the deceased had met his death as a result of mob justice.

23. The defence counsel has also raised the issue of contradictions in evidence as well as cast doubt on the post mortem report. The role of the report is to establish that the deceased died and give the cause of death. Therefore the attack on the post mortem report is of no useful purpose. In the case of **Dorcas Jebet Keter & Another v R [2013] eKLR** the court observed:

***“We think, every case must be decided on its own merit but where evidence is overwhelming that the deceased has died at the hands of a suspect, then even in the absence of a postmortem report, the court can still convict. We are certain such cases are very few and far between.”***

24. With regard to contradictions, the court of appeal has in two separate cases considered how a court should deal with inconsistencies in evidence. In the case of **Joseph Maina Mwangi v Republic Crim. Appeal No. 73 Of 1993** the learned Judges of appeal held:

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”***

25. In the case **Philip Nzaka Watu v Republic [2016] eKLR** the court of Appeal stated:

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to***

*the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.*

26. In this case the accused's counsel points out that Pw1 admitted that his written testimony did not name any person whereas his oral testimony named the accused persons as the ones who beat the deceased from 10.00 pm to 3.00 am. He further submitted that Pw2's evidence in cross examination contradicted her evidence in chief that she saw the accused beat up the deceased and that Pw3 changed his evidence in cross-examination that he did not see the persons who picked the deceased from his house; that Pw4 disowned her written statement. The contradictions may or may not go to the root of the case. However in the absence of proof of malice aforethought, the court is not able to make such a finding on the effect of the said contradictions.

27. I have considered the injuries occasioned to the deceased. The post mortem report indicated that the deceased was beaten by several persons and from the scanty evidence on record, one cannot say that it was or was not the accused persons who occasioned the injuries. I am not persuaded by the evidence that the prosecution witnesses have presented and I am not satisfied with the investigations. It appears that there is concealment of evidence to enable the court find as a fact that the assault was a combined effort of the accused persons and that the accused persons were angry with the deceased for stealing cattle.

28. From the foregoing the evidence on record raised a reasonable doubt the benefit of which ought to go to the accused. In **Paul v Republic [1976-80] 1KLR 1622 at 1624**, the Court stated as follows:

*“In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt; see Simon Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480,489, was quoted at page 719):*

‘It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’

29. PW 1 to 4 in their evidence went ahead to aver that the deceased was beaten by the accused persons regarding a dispute over theft of cattle. The accused in their evidence stated that they had no reason to attack the deceased for they had no dispute. The investigation has not presented any evidence of the persons who would have any hard feelings towards the deceased to want to harm him and failed to create a nexus between them and the death of the deceased. The fact that the said accused persons were at the scene of crime is not enough to infer guilt on their part in the absence of any credible evidence that indeed there had been some cattle theft attributed to the deceased person. Even though the accused persons have confirmed being at the scene, their version of events is that they assisted the deceased as good samaritans to the police station and then to hospital. Such kind of behavior does not suggest that that the accused persons were behind the death of the deceased as they could not be attackers and at the same time act as good Samaritans. There were no weapons recovered from the accused persons as well as absence of circumstantial evidence presented to infer guilt on their part. As earlier pointed out, the investigating officer failed to visit the scene and establish the real circumstances surrounding the death of the deceased herein. Of note is the issue of cattle theft allegedly attributed to the deceased and the subsequent mob justice. This was not brought out quite clearly by the said investigating officer so as to leave no doubt about the involvement of the accused persons herein.

30. In my considered view, the prosecution evidence is wanting. There seems to be several gaps not filled by the prosecution in this case. For instance it is unusual that none of the villagers testified and only members of the deceased were called yet the circumstances had the hallmark of a mob justice. I am not satisfied that malice aforethought has been established in terms of Section 21 and 206 of the Penal Code.

31. Consequently, I have come to the conclusion that the state has not presented evidence to enable it prove its case beyond reasonable doubt. The defence evidence has cast doubt upon that of the prosecution and hence the benefit of such doubt must be resolved in favour of the accused persons in any event. In the result I find both accused persons not guilty of the charge of murder. They are hereby acquitted of the offence of murder and are accordingly set free unless otherwise lawfully held.

It is so ordered.

**Dated, signed and delivered at Machakos this 25<sup>th</sup> day of June, 2019.**

**D.K. KEMEI**

**JUDGE**