



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 26 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JORAM KOBIA MORIIRA .....ACCUSED**

**JUDGMENT**

[1] **JORAM KOBIA** ('the accused') herein has been charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the night of 8<sup>th</sup> March 2014 at Riverside Village, Timau Location, Buuri District within Meru County, jointly with others not before this court murdered **TIMOTHY KINIGWI** ('the deceased'). The prosecution called seven (7) witnesses to establish its case.

[2] **PW1 AM** a minor and son of the deceased recalled that on 8<sup>th</sup> March 2014 the deceased went and took alcohol and came back about 7.00PM to the hotel he had told him to sit at. They bought maize flour and rice and went to his grandmother's house. On the way, after about 2KMs, his father was beaten and robbed. They were 5 people and he was able to know the owner of the hotel called Taran who hit him with a piece of wood with a nail on the head. He affirmed that the person he saw beating the deceased was the accused. That the wife of the accused came with a torch and that is how he was able to see; she used it to flash at his face for a few minutes. His father was taken to hospital by the accused, Mberia and Kaboria together with him.

[3] **PW2 Daniel Kibori M'Ikunyua** testified that on the material day at about 9.00PM he heard a child screaming about 100 meters away. As he was about to leave he received a call from his neighbor, the accused. He told him that somebody had been beaten near his house. When he reached there he asked who beat him and was told that they did not see them. From the scene he, the accused, Mberia and the child went to the police station at Timau where the deceased reported the incident. They then took the deceased who was drunk to hospital as he was bleeding from the head. He later got a report that the deceased had died. During cross-examination he stated that he did not hear the deceased say that he was robbed of his property or **PW1** say that it was the accused that beat his father.

[4] **PW3 Simon Kosisia** brother to the deceased stated on 8<sup>th</sup> March 2014 he parted ways with his brother at about 5.00PM. The following day he was informed of his brother's death and he reported the matter to Timau Police Station. He stated that there were dogs which were related to the death of the deceased. He testified that the accused told his mother that he would use his money to block investigations and that she would continue to cry. He did know the accused although he knew his home

[5] **PW4 Susana Nkanula Lolkipine** mother of the deceased told the court that the accused's dogs started barking which caused the boy to run and the dogs chased him. The deceased then hit the dogs and made some yap noise. The residents of the accused's home came out and started to beat the deceased. When she was told the story she went to hospital but the deceased was dead. She reported the matter to the police. The accused and his family run away from his home.

[6] **PW5 No.93103 Jennifer Mbai** testified that on the material day she was on duty when the deceased, **PW1** accompanied by members of the public came to the station. The deceased reported that he had been beaten by a mob on his way home around 9.00 – 10.00PM at the home of the accused. That upon reaching there, dogs were chasing him and he picked stones and pieces of timber which he used to hit the dogs but the neighbors thought that he wanted to steal the timber. The owner of the timber was also there. They did not ask him any question but only set upon him with timbers and he bled profusely.

[7] That the deceased told him that the accused was the owner of the dogs and one of the people who beat him. However, the accused was among the people in the group that reported the incident. After the report, he gave the deceased a note to go to hospital. That the accused only came to the deceased's rescue after he realized that he knew him.

[8] **PW6 No. 235820 Inspector James Opiyo** the investigating officer in this case stated that he commenced his investigations by calling the relatives of the deceased through the sub-area. He also received the deceased's son whom he interviewed and who told him that one of

the attackers was the accused. That the deceased and accused were living in Riverside village and he knew the accused and his home well. The dogs barked after hearing his drunken father speaking loudly and the attackers came from the accused's home.

[9] When he visited the scene on 14<sup>th</sup> March 2014 the boy showed him where the deceased fell after the attack; there was dry blood. He also identified the brown dogs. The scene was about 30 meters from the home of the accused and there was nobody there. He enquired from the sub- area who organized for him to meet the accused's wife. He interrogated her and held her in custody. He discovered that the accused went to Nairobi after the incident and arrested him on 26<sup>th</sup> April 2014.

[10] From the wife he was able to establish that there were workers in the homestead who took care of cattle. The workers and the cows had also vanished from the homestead. From his investigations he found that the accused together with others who came from the homestead attacked the accused. He therefore charged him with the offence.

[11] **PW7 DR. Ayub Gitaka Macharia** produced the post mortem report. The cause of death was severe extra and intracranial hemorrhage with subsequent brain injury. This is bleeding inside and outside the brain which caused brain injury.

[12] When put on his defence the accused gave a sworn testimony and called one witness. **DW1 Joram Kobia Muriira** told the court that on the evening of the material date at 9.50 PM he was at his house when he heard screams. He went out with his torch where he saw about five people of which three of them left. They were talking and he asked what he could do to help. They told him that they were being beaten by the people who had left. He called the sub area called Kibori and informed him, who came and spoke with the person who was beaten. He also called Mzee Mberia.

[13] The three of them together with the child of the victim took him to the hospital but first they went to the police station. When they were referred to Nanyuki Hospital he paid the admission fee as well as the transport. The following day he went to Nairobi where he stayed for two weeks. Upon coming back is when he learnt that the victim they took to hospital had died and that the police were connecting him to his death. Three weeks later he was arrested.

[14] **DW2 M'Lintari M'Rimberia** testified that on the material day he was at his house when he received a call from the accused who informed him of the incident that had occurred outside his home. He went to the scene where he found the sub area Kibori, accused and a small child. They took the injured person to the hospital after they had been given an OB by the police.

[15] This matter was canvassed by way of written submissions. The accused submitted that the case against him has not been proved beyond reasonable doubt. Since it has not been proved that he attacked the deceased or that he was one of the attackers for identification by the minor is not reliable.

## **ANALYSIS AND DETERMINATION**

[16] According to **Section 203 of the Penal Code:-**

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

Arising therefrom are the following four elements which need to be proved by the prosecution beyond reasonable doubt in order to sustain a conviction for murder, to wit:

- 1. The fact of the death of the deceased**
- 2. The cause of the death**
- 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and**
- 4. Proof that the said unlawful act or omission was committed with malice aforethought**

### **Fact and cause of death**

[17] Concerning the first and second issue, i.e. the fact and cause of death of the deceased; the evidence of **PW7** and the post mortem report confirms that the deceased died, and of severe extra and intracranial haemorrhage with subsequent brain injury. I am satisfied that the fact and cause of death of the deceased has been proved.

### **Was the death caused by unlawful act or omission of the accused?**

[18] The prosecution ought to prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; *actus reus*.

[19] **PW1** was the only eye witness to the incident. He told the court that when they were walking to his grandmother's house his father, the deceased, was attacked, beaten and robbed by about five people. One of them was the accused who he was able to identify under torch light. The wife of the accused came with after a torch which she used to flash at the face of the accused for a few minutes. **PW1** however, confirmed that it was he, accused, Mberia and Kibori who took the deceased to the hospital.

[20] Upon cross – examination it was pointed out that in his statement he stated that when they reached a certain home two dogs emerged and they are the ones which attacked his father who took soil and threw at them. That is when the five people arrived four of whom came from the home of the accused.

[21] **PW2** who is the sub- area stated that he was called by the accused and informed him of the incident. He stated that he neither witnessed the incident nor heard the deceased or **PW1** say that it was the accused who robbed the deceased. **DW2** who was also called by the accused confirmed this fact. He stated that the deceased told him that some people beat him up and disappeared. When the accused came out the assailants ran away. **PW5**, the officer present when the deceased came to report the matter stated that the deceased reported that the accused together with other people attacked him. However, it seems that no action was taken against the accused who was amongst the people with the deceased when he reported the matter.

[22] What’s more is that **PW3** stated that the accused told his mother that he will use his money to block investigations and that she would continue to cry. However, contrary to the statement by **PW3**, the mother of the deceased **PW4** confirmed before this court that she has never talked to the accused about this matter.

[23] From the adduced evidence it is apparent that there are some discrepancies and contradictions in this case. I am aware that discrepancies may occur in a case; minor ones may be overlooked. Except, however, discrepancies which create reasonable doubt should affect a case. See the case of **Njuki vs. Rep 2002 1 KLR 77** that:

**“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.**

[24] See also the decision by the Court of Appeal in **Philip Nzaka Watu vs. Republic [2016] eKLR**:

**“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. 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 recognised 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.”**

[25] The burden of proof never leaves the backyard of the prosecution; to prove its case against the accused person beyond any reasonable doubt. There is evidence that the deceased was attacked by a group of people; possibly members of the family of the accused. The accused was also present when the deceased was attacked. There is also a possibility that he may have attacked the deceased too. But, when he realized that the deceased was a person he knew he started to help; took him to report to the police, to hospital and even paid his bills. Only his conscience will judge him. Nonetheless, what does the evidence portend?

[26] The accused stated that he came out when he heard noises outside. When he got there he found the accused already beaten and lying down. He went ahead to call **PW2** and **DW2** with whom he went to the police station and thereafter the hospital. The only prosecution’s eye witness, **PW1**, tendered evidence in court which contradicted his statement. **PW2** then testified that the deceased and **PW1** did not say that it was the accused who attacked him. It bears repeating that **PW5** stated that when they all went to report to the police the deceased stated that the accused attacked him. Such would have been powerful dying declaration had the police acted on the information. But, now that bit of information is without any basis whatsoever. The alleged assailant was at the police station when the alleged statement was made by the deceased but nothing was done either to arrest him or record some statement. Why wasn’t the accused arrested considering the deceased allegedly pointed him out as the assailant? The accused assisted the deceased; took him to the hospital and paid for transport and admission fees.

[27] The discrepancies I have analyzed have created a serious doubt as to the guilt of the accused which this court cannot overlook. Such doubt should be resolved in favour of the accused. Accordingly, I find and hold that the prosecution has failed to prove beyond any reasonable doubt that the accused caused the death of the deceased through his unlawful act or omission.

[28] In the upshot, I give the accused person the benefit and acquit him of the charge of murder contrary to **Section 203 of the Penal Code under Section 322 of the Criminal Procedure Code**. It is so ordered.

Dated, Signed delivered and in open court this 30<sup>th</sup> day of July, 2019.

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

Rimita for the accused

Accused – present

Namiti for state

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**F. GIKONYO**

**JUDGE**