



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 70 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAVID MURIUNGI M'ITIMBURI.....ACCUSED**

**JUDGEMENT**

1. The accused herein has been charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on 27<sup>th</sup> April 2011 at Nyumbaiti village Akirang'aondu location in Igembe Central Sub county within Meru County jointly not with others before court murdered **Patrick Mutembe**.

2. The prosecution called seven (7) witnesses in support of its case.

3. **Pw1 Alice Kathure Mutembe** testified that she is familiar to the accused person. That on 27<sup>th</sup> April 2011 the accused together with **Joanina Mwirigi** and **Mugambi Kobia** beat up her husband (the deceased herein). That on the material date the accused person together with Joanina & Mugambi came to their premises at 10:00 a.m. armed with rungu. The accused told the deceased he has to vacate the land or else he would demolish the house. That the accused person tied the deceased on his hands and neck and dragged him for about 150 metres as they continued beating the deceased together with the other two persons. That neighbours came to try and assist but they did not manage to stop them. The accused together with Joanina & Mugambi later left the deceased with the aforesaid injuries. It was pw1's testimony that it took the intervention of Mutwiri who helped her to take the deceased to the house.

4. She further told the court that the deceased condition worsened at night and so they took him to Laare Hospital. That on 1<sup>st</sup> May 2011 the deceased was referred to Meru Hospital where on 10<sup>th</sup> May 2011 the deceased died while undergoing treatment.

5. She also stated that the accused person herein is an uncle to the deceased with whom they had a land dispute.

6. In cross-examination PW1 testified that the deceased was involved in a land dispute in Plot No. 1315 and that the deceased did not have any health complication prior to his death. That the deceased died due to the beating and strangulation by the accused person.

7. In re-examination she testified that they have been staying on the land for the last 12 years. That the deceased was killed because the accused person wanted him to vacate the premises. That previously the accused person had charged the deceased herein with the offence of stealing miraa. The deceased was however acquitted.

8. That at the time of her testimony the accused had not yet been buried.

9. **Pw2 Morris Mutwiri** corroborated the testimony of Pw1 when he testified that on the material day he was in the farm picking miraa when he heard screams from the deceased's home. That he later on rushed to the home and found the accused person had tied the deceased in both his hands and neck. That the accused person was equally beating the deceased together with Joanina and Mugambi. That he tried to plead with the accused but the accused informed him that the deceased was a thief hence he ought to be beaten.

10. That he went to the shamba but returned later and found the deceased rope still tied on the neck. He untied the rope and took him to the house which was approximately 150 metres away. That at midnight Pw1 came to his home which was 200metres apart and informed him that the deceased neck had swollen. That together with Lemiru, Theuri and Muthee they took the deceased to Laare Hospital where he was admitted for three (3) days. He was later transferred to Meru Hopital where, Pw1 informed him, he succumbed to his injuries.

11. He confirmed that there was a dispute over the suit premises. That the deceased was born on the aforesaid land. The accused had however alleged that the deceased did not own the aforesaid land and therefore he wanted him to vacate.

12. He alsoalleged that the accused had taken the deceased father to hospital when he was sick only for the deceased father not to return dead

or alive.

13. In cross examination he testified that he heard Pw1 shouting that the accused person ought to be left alone. He also heard the voice of a man saying “**Hatuachaninayeyehuyunimwizi, lazimaakufe.**” He confirmed that the deceased person never left hospital during the time of his ailment until his demise.

14. **Pw3 was Nahashon Lemiri.** His testimony corroborated the statement of Pw1 & Pw2. He confirmed being there when the accused person and two others beat up the deceased and also assisted in taking the deceased to hospital. He stated that when they were taking the deceased to hospital the deceased could not walk on his own. That he later learnt that the accused was claiming that the deceased steals his miraa. That at the time of his testimony the deceased had not yet been buried.

15. **Pw4 Joseph Mwithalie** testified that on the material date at 9:00 a.m. he was informed by the accused that the accused had found out that the deceased was stealing his miraa. That around 10:00 a.m. he went to the house of the accused where he found the accused beating up the deceased. That he spoke to the accused and asked him to take the deceased to hospital. He agreed to take him to hospital. At night he heard people pass by his home. He got out to hear what it was about. The next morning he learnt that the deceased had been taken to hospital. He also testified that the deceased father had been taken to hospital by the deceased never to be heard of again.

16. In cross-examination he confirmed that in the year 2010 the deceased had been charged in court with the offence of stealing miraa. He was released on bond and when the investigation were concluded it was found that the said allegations were a fabrication.

17. He also confirmed that the distance between scene and the police station is 10 minutes using a motor cycle. And if the police had been called the deceased would not have died.

18. **Pw5 Oresti Theuri** confirmed that he was with Pw4 and that they tried to stop the accused from beating the deceased but he declined to do the same. He was also present when they took the deceased to hospital and frequently visited the deceased prior to his demise. He told the court that he was familiar to the deceased and the accused and also knew that the deceased and the accused had a dispute over land. He stated in cross-examination that if the accused and the deceased were not related he could have separated them. That the deceased underwent surgery of the neck at Meru General Hospital.

19. **Pw6 Sergeant Victor Jairus Nambunya** explained the course of the investigation. That they received a report from Pw1 of the demise of the deceased hereinafter Meru Hospital. That he went to the homestead of the deceased and interrogated a number of people who had witnessed the ordeal. The family also requested him to assist in conducting a post-mortem report which he did with the assistance of Dr. Mutuku. After post mortem report the body was released to the family. He however came to be informed that there was a court order restraining the burial of the deceased alleged to have been filed by unknown people sponsored by the accused. In cross-examination he told the court that he only investigated the murder of the deceased and did not investigate the assault.

20. **Pw7 Dr. James Kihumba**, a medical officer attached to Meru Teaching and Referral Hospital identified the signature and handwriting of Dr. Mutuku having worked with him for two years. He told the court that the cause of death was cardiorespiratory arrest due to septicemia infection within the blood. That septicemia is caused by localised infection that spreads through blood vessels. He also stated that pneumonia can also occur after blunt assault- pulmonary contusion can lead to pneumonia and can also cause death.

21. In cross examination he testified that there were no features of chest injury noted in the post-mortem report. That cardiorespiratory arrest was due to complications of pneumonia. Blunt injury can cause pneumonia. He stated that in this case there was no evidence of strangulation in the post-mortem report and he cannot tell with certainty that the veins in the deceased person's neck was injured.

22. In his defence the accused called one (1) witness.

23. **Dw1 the accused person** herein testified that he comes from two families which live in separate locations. That the deceased's grandfather was an employee of his grandfather and they were not in any way related. That the deceased was brought to their land after his father suffered from mental illness and their after the accused persons father allowed him to live on their land.

24. He told the court that the land is where his 1<sup>st</sup> wife resides. That Pw2 Pw3 and Pw4 are also related to the deceased, the deceased having married from their family, and they had a land dispute during the gathering of land in the year 2015 (15.08.2018) and part of his father's land was excised in their favour.

25. He also testified that the deceased suffered from cancer of the mouth, neck and leg and that he had frequently taken him to hospital. That at one time he was unable to take care of him and it was agreed that the deceased father ought to come and take care of him.

26. That on 19<sup>th</sup> April 2011 they contributed kshs 5000/= that was given to Joel Thona (now deceased) to take the deceased to hospital. That it is Joel who took the deceased to Laare hospital on 27<sup>th</sup> April 2011.

27. He denied that he ever assaulted the deceased on the material date since he was not within the locality. He stated that it is Pw3 who had fabricated the story and that Pw2, Pw3 and Pw4 caused his arrest. That it was when he was arrested that he learned that he had been accused of killing the deceased.

28. He also stated that he had obtained an arrest warrant against Muthee who had said they would cause his arrest so that he would not be able to erect the boundary in the land.

29. The accused is charged with the offence of murder. Section 203 defines the offence of murder and requires proof of the following if the

offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. Section 206 defines Malice aforethought as follows;

30. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

31. The first issue for consideration is the fact and cause of death of the deceased. The post mortem report indicated that the deceased's cause of death was cardiorespiratory arrest due to septicemia infection within the blood. The doctor who did the post mortem noted that the cardiorespiratory arrest may be due to pneumonia. That pneumonia may be caused by a blunt object. He however noted that there were no traces of strangulation. The deceased cause of death was therefore established.

32. The next issue is whether the accused caused the death of the deceased. The accused in his defence has tried to deny the fact that he assaulted the deceased herein. The Accused claimed that he was in his home in Muiri on 27<sup>th</sup> April 2011 where his wife Kagwiria leaves. He said he didn't know what killed Mutembei but that he had been taken to hospital and he died on 11<sup>th</sup> May 2011. He said he didn't assault Mutembei and that it is Limiri who had fabricated him. He says he was fabricated because of a land dispute. However, the evidence of the prosecution was very clear. Five witnesses testified seeing the accused person assault the deceased and they confirmed they assisted PW1 to take the deceased to hospital on the material day. PW1 the wife of the deceased said, the accused and his wife Joanina and one Mugambi Kobia went to their home while armed with rungas and told the deceased he had to vacate land and that accused tied the deceased with a rope on the neck and hands and started beating him using rungas. That he was joined by his wife and Mugambi Kobia in beating the deceased. When PW1 raised alarm Theuri, Mzee, Mutwiri and Limiri responded and their plea to the accused and his companions to stop beating the deceased were not heeded to. And the 4 left the scene while the accused was still beating the deceased. The manner in which the accused and his 2 companions carried out the assault persistently after tying the deceased person who was in a state of helplessness and failure to heed to the pleas by PW2 -5 is evident that the accused intended to cause grievous harm or death to the deceased. It may be true that the accused went to Muiri village as alleged by him and his 2 witnesses but that must have been after he had committed the offence. When the deceased was taken to hospital on 27<sup>th</sup> April 2011 he was admitted and subsequently referred to Meru General Hospital on 1<sup>st</sup> May and he died while undergoing treatment on 10<sup>th</sup> May 2011. The Claims that the deceased suffered from cancer only arose during the accused persons defence and he failed to avail medical documents to prove that the deceased had been undergoing treatment for cancer. The accused also failed to raise the defence of alibi in good time for the prosecution and the investigating officers to interrogate the same and establish authenticity of his claim. The injuries suffered by the deceased on 27<sup>th</sup> April 2011 resulted in him being taken to hospital and he subsequently succumbed to those injuries. Those injuries were proximate to the death of the deceased. It is therefore clear that the unlawful act or omission on the part of the accused resulted in the death of the deceased.

33. The deceased person's body has not been buried to date because the accused person restrained the burial and it is confirmed both in the prosecutions case and the defence case that there was a land dispute between the accused and the deceased person. The accused claiming that the deceased was a grandson of his fathers employee and therefore not entitled to the land where the deceased and his wife PW1 were residing. On the material morning PW1 says that the accused demanded that the deceased vacates the land or that he would demolish his house. He also claimed that the deceased had stolen his miraa and hence the reason for beating him up. There was therefore every motive on the part of the accused to commit the felony. The evidence of Pw1 to Pw5 alludes to the above position. It is as a result of this dispute that the accused person assaulted the deceased and the injuries inflicted eventually led to the demise of the deceased. I therefore find that malice aforethought was proved by the prosecution.

34. I therefore find that the prosecution has proved its case against the accused person beyond reasonable doubt. The accused person is guilty as charged and is convicted.

**HON A. ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 25<sup>TH</sup> DAY OF JULY 2019.**

**In the presence of :**

C/A: Kinoti

MS Mbithe for state:-

Mr Mutegi Advocate for accused:- Ngugi Advocate holding brief

A1: Present in person

**Ms Mbithe**

I don't have records for accused. I pray for mention date to confirm.

**Order**

**Mention 31.7.2019**

Records and mitigation. Accused remanded in custody

**HON A. ONG'INJO**

**JUDGE**