



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 64 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MARTHA KATHURE MUTUMA.....1ST ACCUSED

MORRIS MAORE MURUNGI.....2ND ACCUSED

JUDGEMENT

1. **MARTHA KATHURE MUTUMA** and **MORRIS MAORE MURUNGI JULIUS NKUNJA** (“the accused”) have been charged with the offence of 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 being that on the 1st day of September 2016 at Mariri village, Ntunene location, in Igembe North sub-county, within Meru County jointly murdered **PETER MUTHURI** (“the deceased”). The prosecution called four witnesses to establish its case.

2. **PW1 Dr. Simon Mwonje** told the court that externally the body had bruises on the face and cut wounds on the head. On systemic exam the only finding was on the head which had cut wounds. On the nervous system there was a massive subdural hematoma on the cerebral region on the left side; blood between coverings of brain and brain. As a result of exam the cause of death was established to be severe head injury due to assault.

3. **PW2 James Mwiti** recalled that on 1st September 2016 he got a report from the deceased’s wife that the 2nd accused and Phillip Kaberia had assaulted the deceased. He took a motor bike and went to the scene with Christopher Mwiti which was at the 1st accused’s pub. The deceased had a stab wound on the middle and back of his head and was not talking. Pw2 said he found the deceased under the table and that there was water in a jerry can on the table and the water was blood stained. The 1st Accused was also at the scene. PW2 said that the 1st Accused was charged because she refused to record a statement and yet the offence was committed within her pub. PW2 said that he was with Christopher Mwiti and that they took the deceased to All times hospital where he was treated and discharged. The following day they took him to Maua hospital and he was admitted for 2 to 3 days before he was referred to Meru Level 5 hospital for an x-ray. The X-ray was done and the deceased was admitted but he later died while undergoing treatment. PW2 also said that it was Kathure the first Accused who told him that Philip Kaberia and Morris Maore had attacked Muthuri.

4. **PW3 Phillip Kareithi** brother to the deceased and brother in law to the 2nd accused told the court that when he arrived in Meru on 9th September 2016 is the day the deceased died. He was able to identify the body and post-mortem done. PW3 also confirmed that accused no. 1 Martha Kathure escaped when she was required to record a statement and that is why she was treated as a suspect. That the incident happened at accused 1 pub and she was not ready to say what happened. He also said that the deceased was in a coma on 1st September 2015 when he was attacked until he died on 9th September 2015. He said that the 2nd accused Morris Maore is married to his cousin and that he had been together with the deceased the entire day on the material day and that they were also friends.

5. **PW4 No. 93629 P. C Peter Letunga** the investigating officer told the court that on 6th September 2016 Tabitha and Richard made a report of the deceased’s assault by the 2nd accused and Philip Kaberia who had stabbed him on the head with unknown type of weapons. Once the case was assigned to him he visited the deceased at Meru Level 5 Hospital. On 9th September 2016 a report was made of his death. He recorded statements of witnesses and compiled a police file of which he preferred charges against the 2nd accused. The 2nd accused, the deceased and Phillip Kaberia were at the 1st accused’s bar taking beer. A fight ensued amongst the three and in the process the deceased got hurt. It did not come out clearly what they fought about. PW4 arranged for post mortem on the body of the deceased and it was done on 19th September 2016 after the family members had identified the body to Dr. Simon Mwangi PW1. Accused No. 2 was seen at Laare township on 20th September 2016 by members of the public who reported to PW4 and in company of other officers they proceeded and had him apprehended and escorted to the police station where he was charged. Philip Kaberia the other suspect was said to be still at large.

6. At the close of the prosecution’s case the accused gave sworn testimonies and called one witness. **DW1 Martha Kathure Mutuma** she told the court that on the material day at around 7.00 – 7.30 PM the deceased, the 2nd accused and Phillip Kaberia who were drunk came to

her kiosk and asked for beer. She told them that she could not sell to them since she was out of stock. She closed the counter and went to her house which was 50 meters away to get tea for her customers.

7. While in the house she heard some noise and went back to the canteen. She heard the 1st accused say “wacha” and on arrival she found the 1st accused and Phillip Kaberia outside the canteen. On entering it she found the deceased fallen and bleeding from his forehead on the left side. When she asked what had happened the 1st accused and Phillip Kaberia escaped. She called on the deceased but he told him “Kathura nimekufa”. She sent her son to call the deceased’s mother, who came together with brothers and sisters of the deceased and they took the deceased to hospital.

8. **DW2 Morris Maore Murungi** stated that on 1st September 2016 at about 6.00PM he went to the 1st accused’s bar where he found other people including the deceased and Phillip Kaberia. At around 7.30 PM the deceased and Phillip who had been drinking together differed as the latter told the deceased to buy him beer. The deceased refused and Phillip hit him on the head with a beer bottle which caused everyone to run out of the bar. He went and told them to stop the fight and then ran to report to the sub-area whose home was about 400 meters away. Kathure came running after when she heard the noise at the bar as she was not there when the incident happened. The sub - area accompanied him to the bar and found that it had already been closed. This was about 8.30 PM.

9. **DW3 Mwerwa M’ikimunya** a village elder and sub- area of Kinisa village recalled that on 1st September 2016 at about 7.30 PM the 2nd accused came to him and reported that someone had been assaulted at the canteen where beer is sold. He accompanied him there and found that it had been closed; this was at about 8.00PM.

10. At the close of the defence case parties were ordered to file written submissions and the 1st and 2nd accused persons advocates filed their respective submissions which together with the evidence on record this court is to determine whether the prosecution has proved beyond reasonable doubt that the accused persons committed the murder of Peter Muthuri.

11. The offence of murder is defined under **Section 203 of the Penal Code** as:-

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

Consequently, the four ingredients that the prosecution ought to prove beyond reasonable doubt are:

- 1. The fact of the death of the deceased.**
- 2. The cause of such 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 lastly**
- 4. Proof that the said unlawful act or omission was committed with malice aforethought.**

12. The fact and cause of death of the deceased is that the deceased was assaulted and hit on the head while at the premises of 1st accused. According to the prosecution witnesses is that the deceased was attacked by the 2nd accused and Philip Kaberia. The deceased is said to have died on 9th September 2016. PW3 and PW4 identified the body of the deceased for purposes of examination by PW1 to confirm the cause of death. **PW1** established that there was massive subdural haematoma on the cerebral region on the left side i.e blood between coverings of the brain and the brain membrane. As a result, the cause of death was established to be severe head injury due to assault. Accordingly, the fact and cause of death of the deceased has been established.

13. The third ingredient is that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; that is *actus reus*. From the evidence adduced before this court by the prosecution is based on no eye witness but circumstantial evidence. The Court of Appeal in the case of **Joan Chebichii Sawe v Republic [2003] eKLR** explained the reliance of circumstantial evidence as follows:

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

Similarly, the same court in **Judith Achieng’ Ochieng v Republic [2009] eKLR** held as follows:-

“It is settled law that when a case rests entirely upon circumstantial evidence such evidence must satisfy three tests:-

- (i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.**
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused**

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

14. According to **PW4** is that the 2nd accused, the deceased and Phillip Kaberia were at the 1st accused’s bar taking beer. A fight ensued amongst the three and in the process the deceased got hurt. It did not come out clearly what they fought about. **PW2** said it is the 1st accused who told them that 2nd accused together with Philip Kaberia attacked the deceased and inflicted injuries on him. Accused no. 2 confirms that the deceased was injured and he implicates Philip Kaberia who is at large. However, when the incident occurred he alleges to have gone to report to DW3 the Village elder (Sub-area) about the incident but from 1st September 2016 he never reported to the relatives of the deceased what happened and yet he is married to a cousin of the deceased. He was arrested from Laare Township on 20th September 2016 when members of the public saw him and alerted the police. The conduct of the 2nd accused person in not taking the deceased to hospital when he alleges he had been injured by Philip Kaberia and the fact that he went underground after the incident makes this court infer that he was involved in the actions that led to the death of the deceased herein. If he didn’t have malice aforethought the deceased person being his close relative the reasonable action he ought to have taken was to inform the relatives of the deceased and to see how to save his life. Although he was arrested within Laare Township where Laare police station is situated he had not reported that Philip Kaberia had attacked and injured his wife’s cousin. This court therefore finds that although there was no direct evidence implicating accused no. 2, it can safely be inferred that accused no. 2 and Philip Kaberia jointly attacked and inflicted the injuries that led to the death of the deceased Peter Muthuri. This court finds the 2nd Accused guilty as charged and is convicted. The 1st accused is acquitted of the charge preferred against her.

HON. A. ONG’INJO J

JUDGE

JUDGMENT DELIVERED, DATED, AND SIGNED IN COURT ON 25TH JULY 2019

HON A.ONGINJO

JUDGE

In the presence of:

C/A:

Ms Mbithe for the State:-

MS Gachango Advocate for A1

Mr Ojiambo Advocate for the A2:-

Mr Kaimba Advocate W/B for the family of the deceased:-

A1:- Present in person

A2:-Present in person

HON A.ONGINJO

JUDGE

MS Mbithe for state.

I don’t have records. We can take a mention date for records.

Order: Mention 31.7.2019 for Records and mitigation.

HON A.ONGINJO

JUDGE