



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 25 OF 2012

[FORMERLY NYERI HCCR 36 OF 2011]

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM MBURU MUNGAI.....ACCUSED

JUDGMENT

1. According to two neighbours of the deceased, the accused and the deceased had a loud quarrel on the night of 16th November 2011. The lifeless body of the deceased was found the following morning. It had a fatal blow to the head.
2. The accused is the *son of the deceased*. They were living in the *same* house. The accused was suspected of having a hand in the homicide.
3. The Republic brought information to the High Court charging him with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
4. The particulars are that on the night of 16th and 17th November 2011 at Gatune village, Githima Sub-location, Murang'a County, he murdered *Evans Mungai Kibunja*.
5. He pleaded *not guilty*. The prosecution called *six* witnesses.
6. PW1 was Stephen Kibunja. He is a brother and neighbour to the deceased. on the night of 16th November 2011 he heard the accused and the deceased quarrelling. He could not tell the exact nature of the dispute. At around 20:30 hours, the noise died down.
7. PW1's house was 60 metres from the scene. He did not attempt to go to the scene because he had been previously threatened with death by the accused. Josphat Kibunja (PW2) also heard the quarrel between the accused and the deceased. PW2 heard the deceased say that "*he was going nowhere and would die there*". Everything then went quiet. PW2 said that the deceased and the accused used to quarrel. PW2 had also been threatened by the accused. He said that the accused and the deceased lived in the same house; and, that no one else resided in the compound.
8. PW1 and PW2 went to the deceased's house the following morning. They pushed the door open. They found the body of the deceased lying on a bed. It had a wound on the head close to his ear. They alerted a daughter of the deceased, Eunice Wambui (PW4), who joined them at the scene. They then notified the police who removed the body to Gaichanjiru Hospital mortuary.
9. PW3 was Cecilia Njoki, the widow. She testified that on 17th November 2011, at about 6:00 a.m., the accused came to her house at Kaherero Shopping Centre. She testified that she had a broken leg. As a result, she was living at the shopping centre. When the accused called her that morning, he said he had something "*serious*" to tell her.
10. PW3 summoned her two daughters Rose Wangui and Eunice Wambui (PW4). The accused told them that the deceased had died. He claimed that on the night of 16th November 2011 he met Stephen Murigi (PW1) on the path leading to the home of the deceased. He (accused) said he never spoke to the deceased and went to sleep in his quarters.
11. Both PW3 and PW4 confirmed that the accused was a drunkard. But they denied that there was a land dispute between the deceased and the accused. They also denied any knowledge of a quarrel between the two.
12. PW5 was Dr. Thuo. He carried out a postmortem examination on 21st November 2011. The body had turned black; a sign of oxygen deficiency. There was a fracture at the back of the head and bleeding in the lungs. In his opinion, death resulted from cardio-pulmonary

arrest due to suffocation and the blow to the head. The Post Mortem Form was produced as exhibit 1.

13. The last witness was Police Sergeant Adan. He took over the investigations from Chief Inspector Mohamed. On 17th November 2011 the accused and his mother (PW3) reported the matter to Kahariro Police Post. The accused claimed that he found the body of the deceased in the house. The police went to the scene with the accused and PW3. There were injuries on the head. The accused was arrested. No photographs were taken at the scene.

14. When the accused was placed on his defence, he testified as follows:

On 16/11/2011 I was at home. I had left Nairobi on 2/11/2011 to see my mother who had a leg injury. I got her a place to live in Kahaririro because of that condition. I had returned home to help my father. He used to live with my mother. That is why I needed to help him. I had separate quarters in the main house. The house has 4 rooms. Mine was at the corner with separate door.

My parents were living in the last room. The house was L-shaped. On 16/11/2011 I woke up at 6.14 a.m. and went to Kahaririro to cut trees at my uncle's farm, William. In the evening I went to Kahaririro to drink alcohol. I started drinking at 5.00 p.m. I then went home. The home was 2 kms away. I got there at 7.30 p.m.

On the path passing through my grandmother's farm I met (PW1) He is my uncle. At that point he was in our compound. My farm and Stephen's are next to each other. My grandmother's house is on the other side. PW1 spoke to me. I did not reply. I went to my room and slept. I did not see my father. I did not go to his room as I was drunk.

The next morning I woke up at 6 a.m. I found the sitting room door open. The bedroom of my father was separated by a curtain. I called him. He did not answer. I opened a window. I saw he was asleep. But when I touched him he was not responding. When I lifted his head, I saw blood. He was dead.

I decided to run to my mother's place at Kahariro. I explained to her. I went to Kahaririro Police Post. I reported to P.C. Kimere. He did not enter it in the O.B. but asked me to accompany him to the scene. When we reached there he called Stephen Murigi. Stephen said I killed my father. He showed P.C. Kamere the body. I was taken back to the police post by foot. I was taken to Muthithi police station and was later charged. The police never followed up on the fact that I had seen Stephen Murigi leaving our compound the previous night.

I had no disagreement with my father. It is not true we used to quarrel over alcohol. Stephen Murigi was opposed to my mother's marriage to my father. I did not kill my father. No weapon was recovered from me. The charge is false.

15. Learned counsel for the accused, Mr. Kirubi, filed final submissions on 8th October 2019.

16. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

17. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

18. There is absolutely *no* doubt about the *death* of the deceased. He died from cardio-pulmonary arrest due to suffocation and the blow to the head. I also entertain *no* doubt that the cause of death was *unlawful*.

19. There was no *eye witness* to the murder. The entire case for the prosecution is built upon *circumstantial evidence*. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

20. The incriminating evidence is from PW1 and PW2. PW1 strongly suspected that the accused killed the deceased following a quarrel on the night of 16th November 2011. But the accused denied it and said that he got home drunk and never spoke to the deceased. He said he went straight to his sleeping quarters. He claimed that he met PW1 leaving the home of the deceased but the police ignored the lead. I think the accusation on his uncle (PW1) was a diversionary tactic.

21. The accused and the deceased were the only ones in that compound that night. PW1 and PW2 heard the two quarrelling loudly. Then it went deathly quiet. The accused used to drink; and, he and the deceased quarreled regularly. The body of the deceased was found the next morning. Clearly, the accused had an opportunity to kill the deceased.

22. The accused after seeing the body ran to Kahariro Shopping Centre to inform his mother (PW3). I got the distinct impression that PW3 and PW4 were shielding the accused by claiming that he and deceased were living in harmony.

23. Unfortunately, the evidence of PW1 and PW2 does not reach the threshold of proof *beyond reasonable doubt*. The totality of their evidence raises strong *suspicious* against the accused. But there is no *concrete* evidence, *beyond reasonable doubt*, that the accused perpetrated this heinous crime.

24. The demeanour of the accused showed he was untruthful. He may have concealed some vital information. But our criminal justice system places the *burden of proof* entirely upon the shoulders of the prosecution. See **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

25. I have reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. See **R v Kipkering arap Koske & another** [supra], **Sawe v Republic** [2003] KLR 364. I *cannot* say with confidence that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused, of *malice aforethought* killed the deceased.

26. I accordingly enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 29th day of October 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Kirubi for the accused.

Mr. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.