



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 10 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTOPHER MUSAVI KYALO.....1ST ACCUSED

MUTISO PETER.....2ND ACCUSED

J U D G M E N T

1. **Christopher Musavi Kyalo** and **Mutiso Peter**, hereinafter 1st and 2nd Accused persons respectively are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the 5th day of **September, 2006** and 6th day of **September, 2006** at **Mosquito Estate** in **Kitui Town** of **Kitui District** within the **Eastern Province** murdered **Fredrick Kimanzi Munuve** (Deceased).

2. This is a case where the Deceased was found inside his house lying in a pool of blood with penetrating stab wounds to the lower limbs, chest and heart. Investigations carried out culminated into the arrest of the Accused persons.

3. To prove the case the Prosecution called thirteen (13) witnesses. PW1 **Samuel Mbiti Maithya** of Psychiatry Department assessed the mental status of the Accused persons and found them capable of conducting their defence.

4. PW2 **Kyang'a Mweina** a resident of **Mosquito Estate Kitui** heard a cry and was called by **Mama Lillian**. He accompanied her to the home of the Deceased where they found him lying on the floor in a pool of blood with only an inner wear. He reported the matter to the police.

5. PW3 **Catherine Kioko** was at her shop at **10.00 a.m.** on the **6th September, 2016** when the 1st Accused her customer went and offered to sell to her a DVD Player. The device had the name '**Kimanzi**'.

6. PW4 **Purity Nduku Muoki** who lived on the same plot with the Deceased returned from overnight prayer meeting and found the Deceased dead.

7. PW5 **Daniel Mwalimu Ng'ang'a** was woken up by screams of a child called **Lillian** the daughter of the Deceased his neighbor. He saw the body of the Deceased that lay in a pool of blood.

8. PW6 **Breta Kavutha Mwalimu** a neighbor of the Deceased was also woken up by his daughter **Lillian's** screams. She testified that the Deceased lived with one **Mulu** whom she had not seen for three

(3) days. And on that night she heard some commotion and the Deceased saying that he would beat someone and all went quiet.

9. PW7 **Josephat Kiguo Kyalo** stated that he was given a cellphone by the 1st Accused, his nephew. The police traced him and caused him to record a statement as it was stated that the cellphone belonged to the Deceased.

10. PW8 **James Mutunga Munuve** identified the body of the Deceased to the Doctor who conducted the autopsy.

11. PW9 **No. 52149 PC Japhet Mulomo** interrogated the Accused persons after they were arrested as suspects for the offence of Robbery with Violence. The 1st Accused led them to the recovery of a cellphone and a DVD make LG from a butchery. The 2nd Accused on the other hand led them to **Kalundu Market** area, in a dwelling house where they recovered a wall clock and radio. He led them to another house where they recovered a speaker, items that were alleged to belong to the Deceased.

12. PW10 **Kyalo Maluki** a caretaker at the plot of one **Wambui Malei** identified the house that was occupied by the 2nd Accused as a tenant. The 2nd Accused claimed that he lost keys to the padlock. The police caused it to be broken and a recovery of a wall clock, radio, cassette and speakers was made.

13. PW11 **No. 71489 Corporal Simon Chege** accompanied the DCIO to the scene of crime.

14. PW12 **John Kakai Kalenge** the Landlord of the Deceased found the body having been removed from the house.

15. PW13 **Dr. Joshua Matu** conducted a postmortem on the body of the Deceased and formed the opinion that the Deceased died of penetrating injury to the heart muscles and lungs inflicted by sharp object.

16. When put on their defence, the 1st Accused who gave evidence under oath stated that he was working on his farm at **Kunda Kindu Estate Kitui**. He left for his **Kisasi** home and arrived at **6.00 p.m.** on **6th September, 2016** he woke up and went to his farm as usual at **7.30 p.m.** while on his way home he was stopped by people who identified themselves as police officers. He was arrested for allegedly riding a bicycle without head lamps. He was taken to the police station where he was assaulted and accused of killing people. The following day they took him to **Kwa Vonza** and tortured him. They held him at the police station for 42 days prior to charging him. His cellphone Motorola C117 was taken by the police.

17. On cross examination he denied having given his uncle a cellphone or having taken a DVD device to **Catherine Kioko's** shop. He also denied having led the police to where the items were recovered.

18. The 2nd Accused stated that he was working for his Landlord at **Kalundu Market**. On **6th September, 2016** he continued with the work. He was arrested on the **25th September, 2016** as he went to look for the items he was using to sink the well. He was suspected following screams by people in the area. The police took them to **Majengo** where it was alleged the robbery happened at **Majengo** and he was a suspect. He was moved to the area where many people had gathered but none identified him. Thereafter the police took him to his house in **Kalundu**. They searched the house and took possession of his radio make Sony, a speaker and wall clock. He rang his wife from upcountry who availed the receipts. He was moved to **Etole Police Station** and subsequently charged with murder. On cross examination he denied having acted following instructions from **Winnie Mwikali** to kill the Deceased.

19. Issues to be determined are:

(i) The fact of death.

(ii) Whether it was caused by the Accused persons.

(iii) Whether the act that resulted into the death of the Deceased was actuated by malice aforethought.

20. The fact of death was proved by evidence adduced by the Doctor who performed the postmortem on the body of the Deceased. PW13 examined the body of the Deceased noted the fatal wounds sustained and formed the opinion that the cause of death was severe haemorrhage secondary to the penetrating injury to the heart muscles.

21. The persons who inflicted the injury on the person of the Deceased were not seen by any of the witnesses who testified.

22. None of the witnesses who testified knew how the Accused persons were arrested. However, the record indicates that on the **8th November, 2006** they made their first appearance before Court and the information was subsequently read to them on the **28th November, 2006**. They were jointly charged with a lady called **Winnie Mwikali Munuve**.

23. By the time PW9 was assigned duties of assisting in investigations of the case the Accused persons were already in custody. He took up the duty on the **6th October, 2006**. He testified that the Accused persons had been arrested and charged with the offence of **Robbery with Violence**. He further stated thus per the evidence recorded by **Asike Makhandia, J** (As he then was):

“We removed the 1st Accused from the cells and escorted him to the Office of the DCIO for interrogation. In the course of interrogation he admitted having participated in the crime together with the 2nd Accused. The 1st Accused admitted having taken the phone of the deceased which he gave to a neighbor. The neighbor was summoned and he brought the mobile phone. This is the mobile phone. It is Nokia 1100. It has receipt belonging to the deceased. Later the 1st Accused escorted us to a place in Kalundu area to a certain butchery where we retrieved a DVD make LG. It had the name of the deceased. In the afternoon we removed from the cells the 2nd accused upon interrogation, he took us to the dwelling house at Kalundu market. We searched and recovered a radio that belonged to the deceased, a wall clock. The 2nd accused then took us to another house in the compound where he retrieved a speaker belonging to the deceased. The accused claimed they had been contracted to kill the deceased.”

24. Confession or admission are generally inadmissible unless it is made before a person who is authorized. **Section 25A(1)** of the **Evidence Act** provides thus:

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.”

25. PW9 was a police constable therefore not authorized to take a confession from a suspect. However looking at what transpired the statement made allegedly led the police to the recovery of some evidence that may have incriminated the Accused persons. The evidential burden would therefore be upon the Accused to explain the recovery of the items that were within their knowledge (**See Section 111(1) of the Evidence Act**).

In the case of **Douglas Thiongo Kibucha (2009) eKLR** it was stated thus:

“... In view of what we have stated above it is our view that if indeed the appellant led Atola to the recovery of the deceased’s body parts; that was a confession. However, it is a confession which by reason of Section 111(1) of the Evidence Act is admissible if given as an explanation to satisfy the evidential burden under the sub-section The explanation under Section 111(1) above need not be under caution or oath.”

26. The explanation given by the Accused persons in their defence was a denial. Accused 1 denied having possessed the cellphone that was marked for identification. He stated that his cellphone was different from the Nokia 1110. He denied having given his uncle the cellphone or having led the police to where items were found. Accused 2 on the other hand claimed ownership of the radio, a speaker and wall clock that the police took from the house he was taken to.

In the case of **Njuguna s/o Kimani and Others vs. Republic (1954) EA 316** it was stated that:

“(1) It is the duty of the court to examine with the closest care and attention all the circumstances in which a confession has been obtained from an accused especially when the accused has been in custody for a long time.

(2) The onus is upon the prosecution to prove affirmatively that a confession has been voluntarily made and not obtained by improper or unlawful questioning. The prosecution also has to prove that any inducement to make the confession had ceased to operate on the mind of the maker at the time of making it.”

27. A perusal of the information sheet indicates some 35 witnesses were to testify in this case. A total of six (6) police officers were to testify but only PW9 testified. PW7 was found with a cellphone, a Nokia 1100 that he alleged was given to him by his nephew Accused 1. It was alleged that the cellphone belonged to the Deceased. PW9 stated that the cellphone had a receipt. No service provider was called as a witness to establish the alleged ownership of the same. A DVD make LG was recovered from a butchery according to PW9. The person who had it prior to being recovered was not called as a witness though stated to have recorded a statement to shed some light on how he came to possess the device. PW3 stated that the 1st Accused went to her shop with a DVD player which had the name ‘**Kimanzi**’. A wall clock, Radio and speaker were adduced in evidence by PW9 and stated to belong to the Deceased. These items were believed to belong to the Deceased because PW9 stated that they were identified by the wife and son of the Deceased. He was not specific as to which wife of the Deceased identified the items. A *Nolle Prosequi* was entered against one **Winnie Mwikali Munuve** the Deceased’s alleged second wife who allegedly contracted the Accused persons to kill the Deceased but she was not treated as a witness. The alleged son was also not called as a witness. Without evidence of the persons who identified the items as belonging to the Deceased, there is no proof that indeed they belonged to the Deceased. Whether or not the Deceased owned the cellphone alluded to by PW7 is also a matter that was not proved. There was no explanation on record as to why the Prosecution chose to call thirteen witnesses out of thirty five witnesses and why crucial witnesses were not called to testify.

28. The Accused persons were charged with the offence of **Robbery with Violence** prior to being taken to the DCIO for interrogation in the instant case. Circumstances in which they were interrogated and later moved to where items were recovered remain unexplained.

29. Evidence adduced by the Prosecution against the Accused persons is not direct but circumstantial. In the case of **Sawe vs. Republic (2003) KLR** the Court of Appeal held that:

“1. 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 guilt.”

2. Circumstantial evidence can the basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

In the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs. Republic Nyr CA Criminal Appeal No. 272 of 2005** the Court of Appeal held thus:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

(i) That the property was found with the suspect;

(ii) That the property was positively the property of the complainant;

(iii) That the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

30. As I have aforesaid, circumstances in which the properties were found are uncertain. Those who knew the Deceased were not called as witnesses to identify the properties that were adduced in evidence therefore there was no positive identification of the items as having belonged to the Accused. The DVD was stated to bear the name **Kimanzi**. No one told the Court how the name was inscribed thereon and by who. Therefore there was no proof beyond any reasonable doubt of possession of the items by the Accused.

31. Consequently, following the shoddy investigations carried out and failure to call crucial witnesses in the matter by the Prosecution, there is no proof beyond any reasonable doubt that the Accused herein committed the act that caused the death of the Deceased.

32. In the circumstances the case against them is not proved to the required standard. Accordingly they are acquitted of the offence of murder.

33. Orders accordingly.

Dated, Signed and Delivered at Kitui this 21st day of February, 2018.

L. N. MUTENDE

JUDGE