



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 43 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN MUCEE MAKEMBO.....ACCUSED

J U D G M E N T

1. **MARTIN MUCEE MAKEMBO** (accused) herein is charged with offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The facts as per the information presented to this court are that on 5th day of December, 2015 at around 20.00hrs along Mukothima-Kirigichi road Thiiti Location Tharaka Nithi County the accused murdered one **Josephat Mititi Mwiragua** (the deceased herein).

2. The prosecution case against the accused herein is circumstantial as there was no eye witness to the incident. The prosecution's case against the accused herein majorly hinged on the evidence of Daniel Murithi Kibue (PW1) who told this court that on the 6th December 2015, a day after the deceased was murdered, while he was in a drinking den, the accused reportedly joined him and told him that he had murdered the deceased herein the previous night and to show that he was serious he pulled out a blood stained knife from his pocket and told the witness that he had used the same weapon to stab the deceased. The witness then left the den and passed by the house of the sister of the deceased who confirmed that "**Nkura**" referring to the deceased herein had indeed been killed though she did not say who had killed him. He then proceeded to the deceased's home and later to the police station.

3. The evidence tendered by PW2 (Nicholas Muturi Makembu) did not add much weight to the prosecution's case as apart from testifying that he had given a ride on his bicycle to the deceased person on the material date, he did not know what happened to him after he dropped him at Mukothima.

4. Paul Mbaabu Rintari (PW3) and Francis Mugambi (PW4) testified and told this court that they identified the body of the deceased at the mortuary and that they observed some penetrative injury on left side of the abdomen near the chest when the postmortem was being conducted.

5. APC Justus Mugambi Kamora (PW5) told this court that the accused surrendered himself on 7th December, 2015 at Gatithiini AP Post where he was based. According to him, the accused reported to him that he had heard over radio that he had killed someone and that he had been attacked by boy as a result and showed the officers injuries he had suffered.

6. AP IP Edward Gikundi (PW6) told his court that while on duty on 5th December 2015 he received calls from members of the public informing him that someone had been killed along Mukothima- Kirigicha Road. He immediately proceeded to the scene in the company of two officers namely; APC Jeremiah Kaai and Joseph Kipkech. At the scene he found the body of a person lying in the middle of the road. He called the OCS who later came and collected the body and took it to the mortuary.

7. The officer further told this court that on 7th December, 2015, he got a report from one APC Festus Mugambi that a person (accused herein) had surrendered to the AP camp and had confessed to having committed the offence and that out of fear he had surrendered himself.

8. PW7 IP Geoffrey Mogere (PW7) confirmed that he received a call from PW6 on 5th December 2015, about a body of a male person being found along Mukothima Kirigicha Road. He told this court that he went to the scene and found the body belonged to a person named Josephat Mititi alias "**Nkura**". He further told this court that after observing the scene, he recovered two mobile phones from the pockets of the deceased and collected the body and took it to Meru Referral Hospital Mortuary. He later on 7th December, 2015 got another call from the same AP camp that someone had surrendered and that upon getting the report he went to Kathitini AP Post and picked up the suspect and took him to Gatunga Police Station where he booked him. He was later given the knife believed to be the murder weapon by the AP

who picked it from the father of the suspect. He tendered the knife as P. Exhibit 1 but conceded that he did send it for any forensic test or analysis. He also produced two pair of green slippers found at the scene as exhibits. He told this court that he suspected the slippers to belong to both the deceased and accused herein. He however did not subject the slippers recovered to any forensic test to test the veracity of his suspicion. He suspected that both the deceased and accused fought at the scene and left behind slippers but as I have said that suspicion was subjected to forensic test. He further told this court that he recovered two phones a Nokia and a Techno and tendered them as evidence P. Exhibit 3 and P. Exhibit 5 though again he conceded that he did not subject the phones to any forensic test to establish who the owners were.

9. The doctor (PW8) Dr. Kenneth Muthuri who tendered performed a post mortem report on the deceased told this court that post mortem examination was performed by Dr. Kathiri and vouched for the signature on the report stating that having worked with the said Doctor he was familiar with his handwriting and his signature. The post mortem report tendered as P. Exhibit 2 indicated that the deceased died due to cardio-respiratory arrest due to severe hemorrhage following a penetrating stab wound. The cause of death of the deceased therefore was not in doubt. He was stabbed with a sharp object and the knife produced as P. Exhibit 1 was the likely weapon used to cause the injury sustained.

10. When placed on his defence the accused person denied committing the offence saying that on the material day he was in church almost the whole day because he says he went to church from 8 a.m to 4 pm. He further stated that he slept at his house at around 9 pm and went for work the following day.

11. The accused also stated that the deceased person was a person he knew as they worked together as casual labourer at a construction site nearby. According to him he only learnt about the demise of his friend on 7th December, 2015 when he went to the construction site that Monday. He told this court that as they were still pondering on who was responsible, a villager named Kimathi came to the site and reported that he knew one of the killers to be one of the labourers at the site and according to him this raised the tension at the site and since he used to stay with the deceased at the construction site he suspected that the people may suspect him and cause harm to him and that is why he decided to go and report the matter at the AP Post.

12. The accused further defended himself that he had never differed with the deceased and had no reason to harm him. According to them, he was with the deceased last on 4th December, 2015 and did not meet him on 5th December, 2015 the day he was killed.

13. This court has considered the evidence tendered by both the prosecution and the defence. I have also considered the submissions made by both counsels. To sustain a conviction of murder the prosecution must establish and prove beyond reasonable doubt two important elements. *Actus Reus* (the act or the unlawful conduct) and *mens rea* (malice aforethought or motive of the murder). The two ingredients must be connected to the accused and the evidential burden is usually heavy to the prosecution as they need to prove them beyond reasonable doubt to sustain a conviction.

14. Let me begin with the first element of *actus reus* and determine whether the prosecution were able to establish and prove it. The prosecution's case on this score hinged on circumstantial evidence. No one witnessed the incident. The prosecution's main witness that remotely connected the accused with the commission of this crime was Daniel Murithi (PW1). His evidence that the accused confessed to him that he had murdered the deceased was however not corroborated well by the prosecution's other witnesses. A crucial gap was left out when the police bungled up the investigation by not carrying out forensic investigations on the items recovered at the scene. The knife produced as the murder weapon was not taken for forensic analysis to establish whether the blood stains on it were connected with the deceased. The two phones were not analyzed to show whether they belong to the deceased and accused herein. Furthermore, the slippers found at the scene were not also subjected to forensic analysis like DNA when it was easier to do so in order to find out if the slippers belonged or were used by the accused person or the deceased. Failing to connect those cited items found at the scene to the accused or the deceased in my view were fatal to the prosecution's case. What remains of prosecution's case is mere suspicion and nothing more. Suspicion alone however strong cannot found a conviction. In this regard I agree with the decision cited by the defence in the case of Republic- versus- Daniel Musyoka Muasya & 2 others [2014] eKLR that;

" Suspicion alone no matter how strong cannot form the basis for a conviction. There must be tangible and concrete evidence adduced to remove issues in dispute from the realm of suspicion and into the realm of proven facts."

15. This court finds that concrete and tangible evidence is lacking in this case on the element of *actus reus*. The police and the prosecution should have done more to establish and prove this important ingredient and connect it to the accused persons.

16. I have also considered the defence put up by the accused person and I must say that the defence put up negated the weight of prosecution's case. The defence stated that he had no quarrel with the accused and in fact shared a room at the construction site. This was not challenged in any serious way under cross-examination. I also find that the evidence of the defence that he had gone to church on the material date and the details he gave on the chain of events from Friday all the way to Monday when he was arrested, creates doubts about the weight of the evidence tendered by PW1, PW5 and PW7. This finding means that the prosecution has failed to discharge their burden of proof to the required standard. The element of *mens rea* is lacking in the prosecution's case as I find no evidence even remotely suggesting the presence of this crucial element in this case. The prosecution has failed to prove that the accused in this case had motive to cause harm to the deceased.

From the foregoing, this court find that the prosecution's case against the accused has failed the test of law. The police in their investigations left so many gaps that left this court with no option but to find that the case against the accused cannot stand. The accused is not guilty of the offence charged. I accordingly acquit him and order for his immediate release unless otherwise lawfully held.

Dated, signed and delivered at Chuka this 21st day of June, 2018.

R.K. LIMO

JUDGE

21/6/2018

Judgment dated, signed and delivered in the open court in the presence of Machirah for state and Ann Thungu holding brief for Kaaria for accused.

R.K. LIMO

JUDGE

21/6/2018