



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 13 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JACOB KITHOME.....1ST ACCUSED

FRANCIS NGUI.....2ND ACCUSED

J U D G M E N T

1. **Jacob Kithome** (1st Accused) and **Francis Ngui Mwenga** (2nd Accused) 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 **6th day of April, 2008** at **Nzikani Village, Musavani Location** in **Kyuso District** within the **Eastern Province** jointly murdered **Enoch Mutemi Maithya** (Deceased).

2. Brief facts of the case are that on the **5th day of April, 2008**, PW1 **Solomon Mwendwa** accompanied the Deceased to **Kaningo** area where elders to arbitrate over a dispute involving the Deceased and his cousin, **Mwangangi Kisavi**. They found **Mwangangi** and a headman. Elders that were to be availed by **Mwangangi** were missing therefore the matter was adjourned. They decided to go back home. On reaching the home of 2nd Accused, the 1st Accused called the Deceased. PW1 left the Deceased going home. Thereafter PW2 **Justus Mulanga** and PW3 **Muthui Musyoka** went on a drinking spree with both Accused persons. Having imbibed enough alcohol they left going to their respective homes. However, the Deceased did not return home. His body was found on a path where PW1 left him with the two (2) Accused persons. PW4 **Joseph Masika Muthengi** the area Assistant Chief was notified of the occurrence. He reported the matter to the police and also moved to the scene. PW7 No. **512174 Sergeant John Ndirangu** moved to the scene with his colleague. He observed the body and noted traditional liquor oozing from the mouth. He noticed "Akala shoe" prints which they followed and reached the home of **Ngui**. There were also some other several footprints. They searched the house and recovered a pair of "Akala shoes" from a metal box. Investigations carried out culminated into the Accused persons being arraigned in Court to answer charges per the information.

3. When put on their defence, the 1st Accused stated that on the **5th April, 2009** he spent the day harvesting honey. He was with his uncle **Katumo Mwanza** now deceased at the forest and on their way back they found some men sitting at a place where they had constructed a house. The people were known to the Deceased. The people said they wanted to subdivide the land as they had occupied it previously. They went home where they continued preparing honey until **4.00 p.m.** They ate and slept. He denied having known the Deceased herein. He was arrested on the **27th July, 2009** by the police who were led to his home by the son of the Deceased. On interrogation about the Deceased he stated that he had seen him among the individuals who wanted to subdivide the land.

4. The 2nd Accused stated that on the **6th day of April, 2008** he saw people having gathered on his farm. The Sub-Chief called him. He found the police being among the people. He found a person he knew already dead. The body lay on the path between his land and that of the Sub-Chief. The police noticed prints that shoes made as he passed taking his herd of animals to the river. He was asked to explain. They fitted his shoe on the print and took them as exhibits. He was made to record a statement at the police post and told not to leave his area of jurisdiction. Thereafter he was arrested. While in custody a certain old man known as **Nzikano** who had a land dispute with the Deceased was arrested. The stated person **Mwangangi** was released after ten (10) days. He (2nd Accused) was released and instructed to continue reporting to the police station. A year later, the son of the Deceased led the police to where he was working. He was taken to **Kyuso Police Station** and subsequently charged. In the course of hearing the police adduced in evidence a pair of shoes No. 6 that was not his as he wears No. 8.

5. Submissions were filed by both parties that I have taken into consideration.

6. The Prosecution is duty bound to prove:

(i) The death of the person.

(ii) That the Accused caused the death through an unlawful act or omission.

(iii) That the Accused acted with malice aforethought.

7. PW1 was one of the persons who identified the body of Deceased to **Doctor Maonga**, who conducted the postmortem. He found that the Deceased had a strangulation mark around the neck, a bruise on the forehead. As a result he concluded that the cause of death was Asphyxia secondary to strangulation. This was proof of the fact of death.

8. None of the witnesses who testified saw the person who did the act that caused the death of the Deceased. PW1 stated that as they reached the home of the 2nd Accused, the 1st Accused called the Deceased. It was at that point in time that he parted with his father, the Deceased. The next day he saw his motionless mortal remains. PW 2 one of the elders who was to hear the dispute between the Deceased and **Mwangangi** stated that after the matter was postponed the Deceased took them to the home of **Mwanzia** and bought them alcohol. They were with **Peter Mbua**, the 1st Accused, **Nguti**, the Deceased's brother and **Musembi Kavuta**. The Deceased gave the 1st Accused **Kshs. 40/=** to go and buy 'karubu' the traditional liquor for his brother from the home of the 2nd Accused. That the Deceased left at **4.00 p.m.** alone stating that he was to meet his son who had travelled from either **Mombasa** or **Nairobi**. The rest of them drunk alcohol until **6.30 p.m.** and they left. PW3 **Muthui Musyoka** told the Court that on the material date, the **5th April, 2008** he was drinking alcohol at the home of the 2nd Accused in company of **Mutemi Syengo, Mutemi Matei, Musyoka Yonga** and **Matii Isola** and they left going home at **4.30 p.m.** He denied having seen the Accused, and stated that he only saw **Ngui's wife**.

9. I have read written submissions by the learned State Counsel regarding what PW3 allegedly stated. According to him he testified that he witnessed as **Ngui Mwenga, Kithome Muasya, Francis Ngui Mwenga, Munube Ngui** assaulted the Deceased whereafter they carried him to a nearby bush. The stated witness testified on the **26th September, 2012** before **Asike Makhandia, J** (as he then was) where he stated thus:

“ I am called Muthui Musyoka.

- I am from Mwingi.

- I am a farmer.

- On 5th April, 2008 I went to school for construction work. We left at about 4.00 p.m. and went home.

- Thereafter I, Mutemi Syengo, Mutemi Matei, Munyoki Yunga and Matii Isola left for Ngui's house.

- We started drinking. I took a bottle of Karubu.

- We thereafter left for home at about 4.30 p.m.

- At home I bathed and rested until the following morning.

- I did not see anything on my way home.

- I did not see the accused on that day.

- I only saw Ngui's wife.

- I never saw the accused even the following day.”

The Prosecution did not seek to treat him as a hostile witness therefore the Court believes what he told the Court.

10. PW5 **Nguti Maithya** stated that he was a party in the land dispute. After the matter was adjourned at the instance of **Mwangangi** they paid sitting allowance to the village elders and they proceeded to drink alcohol. The 1st Accused was with them. The Deceased left them going home. They stayed drinking alcohol and he even slept there. On cross examination he stated that the land dispute did not concern the 1st and 2nd Accused.

11. From the evidence adduced by the witnesses who were with the Deceased, they were not eye-witnesses to the act that resulted into his death.

12. Evidence on record against the Accused persons is therefore circumstantial in nature. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated that:

“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) 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.”

In the case of **Omar Chimera vs. Republic Criminal Appeal No. 56 of 1998** the Court stated that:

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition p 31). It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V THE QUEEN (1952) AC 480 at page 489).

Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge.”

13. With regard to the 1st Accused the Prosecution did establish that he was one of the persons drinking alcohol with the Deceased but the Deceased left him at the drinking den. PW7 was candid on cross examination. He stated that he did not know how 1st Accused person was joined in the case, that he found him in Court.

14. Regarding the 2nd Accused, the body of the Deceased was found on a path near his homestead. When PW4 observed the scene he did see footprints of four people. According to him the scene was disturbed. PW7 also stated that there were other footprints but the ‘Akala’ shoe prints did lead them to the home of **Ngui**. He could however not differentiate between those prints and for other shoes and he agreed that it was not only the 2nd Accused person who wears ‘Akala’ shoes. In his defence the 2nd Accused stated that indeed he had used the path while coming from the river herding his animals. He argued that although the police took away ‘Akala’ shoes from his home that belonged to him the ones that were adduced in evidence were different. In such circumstances, the Prosecution would be required to call evidence to rebut the assertion which was indeed a new matter. **Section 309** of the **Criminal Procedure Code** provides:

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

15. The Prosecution did not foresee the 2nd Accused coming up with such a defence. Therefore they would have been diligent enough to call evidence to rebut the assertion.

16. Having failed to do so, the incriminating facts put forward have been dislodged by circumstances that destroyed the allegation that the 2nd Accused person did commit the act. It could have been any other person who left footprints that were noted at the scene.

17. Therefore the case against the Accused persons is not proved beyond any reasonable doubt. Accordingly they are not guilty and are acquitted of the offence of **Murder**.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of August, 2018.

L. N. MUTENDE

JUDGE