



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 43 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

CONSTANT INDAVACHI MURENDE.....DEFENDANT

J U D G M E N T

Constant Indavachi Murende (herein referred to as the accused) is charged with murder contrary to section 202 as read with section 204 of the penal code. The particulars of the offence are that on the 18th June, 2011 at Likobero village in Kakamega District within Western Province murdered Joseph Murenda (herein referred to as the deceased).

The prosecution case is that the deceased was the father to the accused. That on the material day the deceased, the accused, the accused's sister Eunice PW2 and the deceased's granddaughter called Laura (did not testify in the case) were at home. That at 5 pm Eunice PW2 left the above named persons at home and went to collect her mobile phone at a place where she had taken it for charging. That she went back home after about 10 minutes and found people at her home who were saying that her father had died. She entered into the home and confirmed that her father had indeed died. A village elder PW3 received the report. He went to the home of the deceased. He found the body of the deceased outside his house. Some members of the public wanted to attack the accused. PW3 took him to Khayega Ap Camp.

Meanwhile the wife to the deceased PW4 was at the time attending a funeral. Teresia PW2 called her through phone. She went home and found the deceased dead. On the following day the incident was reported at Kakamega Police Station. CI Musyoki PW5 visited the scene. He found the body still lying outside the deceased's house. It had some head injuries. Laura told him that it is the accused who had assaulted the deceased and caused his death. He collected a stick and a chair from the home. Laura said that the accused had hit the deceased with them. He collected the body. He picked the accused at Khayega Ap Post and escorted him to Kakamega Police Station. He took the body to Kakamega District Hospital Mortuary.

On 21/6/11, Dr. Muchana PW1 Conducted a post-mortem on the body. He found it with a fractured neck, fractures on left ribs No.3,4,5 and 6 with contusion of left lung. There was an injury on the spinal cord. The doctor formed the opinion that the death was caused by an unstable neck fracture secondly to blunt force trauma following assault.

After investigation the accused was charged with the offence. He denied the charge. During the hearing Dr. Muchana produced the post-mortem report as exhibit, pex 1. CI Musyoki PW5 produced the stick and the chair as exhibits, Ex1 and 2 respectively.

When placed to his defence, the accused gave a sworn statement. He stated that the deceased was his father. That on the 18/6/11 he was grazing cattle. That at 3 pm he returned home and told the deceased that he was going out for a stroll. He left the deceased at home with his uncle called Alexander. He went to a nearby garage. At 4 pm he heard screams coming from their home. He went there. He found a village elder Pw3 at the gate to his home. PW3 took him to Khayega Ap camp. He was locked up. On the following day a police vehicle was driven in the Ap camp. He was taken to his home. They found the body of the deceased near the door to his house. The police arrested his two sisters, his mother and an uncle. The body was put in the vehicle. They were taken to Kakamega Police Station. He denied that he assaulted his father.

Laura appeared in court on the 17/9/14 and a *voire dire* examination was conducted on her. She said that she was aged 16 years. The court made a ruling that she was to give sworn evidence. The case was then adjourned due to lack of judicial time. She did not turn up in court again.

The accused was represented by an advocate, Mr. Abok. Neither the state nor the defence advocate made submissions in the case.

The evidence of Eunice PW2 is that she left the deceased at home with the accused, Laura and some small children. She returned home after about 10 minutes and found the deceased having died.

Dr. Muchana PW1 examined the deceased and found that he died as a result of a neck fracture. The accused says that when he went to the shops he left his father at home with his uncle called Alexander, and Laura. Eunice said that it is the accused, Laura and small children who were at home at the time. The defence did not put any question to Eunice that she left Alexander at their home when she went to collect her phone. That aspect of defence evidence can only been an afterthought.

The deceased died as a result of assault. It is the accused and Laura who were at home when the deceased met his death. Laura did not testify in the case. Who then between Laura and the accused killed the deceased? Prosecution only gave hearsay evidence that it is the accused who killed the deceased.

Without the evidence of Laura, the case against the accused cannot be said to have been proved beyond all reasonable doubt. The prosecution did not close the gap to the possibility that Laura could also have killed the deceased.

There was no malice aforethought shown that proved that the accused would have wanted to kill the deceased. The prosecution has not proved the charge against the accused beyond all reasonable doubt. The accused is found not guilty of the offence charged and is accordingly acquitted of the same under section 215 of the Criminal procedure Code.

The accused is to be set at liberty forthwith unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 27th day of September, 2018.

J.NJAGI

JUDGE

In the presence of :

.....Accused

Khatethi Holding brief Abok .for accused

Juma for state

George court assistant

Right of appeal 14 days