



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 51 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH MURUNGI M'ITHERIA.....ACCUSED**

**J U D G M E N T**

1. **JOSEPH MURUNGI M'ITHERIA** (“the accused”) has been charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya*. The particulars of the offence are that, on the 6<sup>th</sup> August, 2010, at Nchene sub-location, Athi location in Igembe South District, within Eastern Province, the accused murdered **JAVAN MURUNGI** (“the deceased”). The prosecution called five witnesses to establish its case.

2. **PW1 Erastus Mugambi**, testified that he was a step-son to the deceased and son to the accused. He told the court that on the material day, he was in his miraa shamba when his step-sister Priscilla called him and told him to go and separate the accused and the deceased because the accused was beating. On arrival, he did not get either the accused or the deceased and he reverted back to his house. After a while, the accused went to **PW1's** house and told him that he (accused) had thoroughly beaten the deceased that she would remember the beating even after 10 years.

3. **PW1** took no action and did not see the deceased. He slept but the following morning, at about 5 am, the accused went to his house and told him that the deceased had gone to her people with only one dress. **PW1** told the accused not to follow the deceased to her people' place. The next day, Priscilla came to **PW1** and told him that the accused was being rained on outside and that **PW1** should go and take him into the house. **PW1** and Priscilla went to where the accused was and recovered the accused's house keys from his pockets and when they opened the door, they found the deceased's body lying there.

4. **PW1** told the court that he then locked the door and returned the keys into the accused's pockets so that he would not know that **PW1** had known what had happened to the deceased. The two took sacks, spread them in the kitchen and carried the accused to the house. In the wee hours of the following day, **PW1** saw the accused enter the house where the body was and came out pulling something that was tied with a tethering rope. On taking a closer look, he realized that it was the body of the deceased. The accused dragged and dropped it into a pit latrine within the homestead.

5. **PW1** called the area chief and told him that the accused had killed somebody and that he knew where the accused hid the body. The Chief came with the police the next day and exhumed the body.

6. **PW2** was **ANISIA MUTHAU**. She told the court that she was a wife to the accused and a co-wife to the deceased. On 7<sup>th</sup> August, 2010, she was away from home. When she came back, **PW1** and Priscilla told her that the deceased and the accused fought and that the accused had told them that the deceased went back to her parent's home.

7. **PW4 No. 88272 PC Hillary Biwott** arrested the accused on 13<sup>th</sup> August, 2010 in Timau after his station received a request from Maua Police Station.

8. **PW3 Doctor Carol Kirachi** produced the postmortem report carried out on 23<sup>rd</sup> August, 2010 by Dr. I. Macharia. She stated that the deceased had multiple bruises on the thighs, head and neck. There was also a rope around the neck. The body had internal injuries which included; fracture of the mandible scalp and face hematoma, blood in the skin of the head space and fracture at the cervical spine at the neck from base of the skull. There were no internal abnormalities found. The cause of death was opined to be multiple injuries involving the head and neck.

9. When put on his defence, the accused gave sworn testimony. He testified that he did not know the deceased. That **PW1, PW2** and Priscilla

were children of his uncle. He denied that either **PW1** or Priscilla were his children. Neither was **PW2** his wife as alleged by her. He stated that there was a grudge at home over land where **PW1** and **PW2's** father and his father were fighting over it. On cross-examination, the accused stated that **PW2** was the sister to **PW1** and Priscilla was a neighbour in the village. He also stated that the body was not exhumed from his land but from **PW1's** land. That there was a grudge between him and **PW3** as the latter had bought land from his uncle. At the time of the arrest, he was with his farm workers at Timau. That he had been there for five days before his arrest.

10. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows:-

**“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

The four ingredients of the offence that arise from the above definition and that need to be proved by the prosecution beyond reasonable doubt are:-

**i) the fact of the death of the deceased;**

**ii) the cause of such death;**

**iii) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused; and**

**iv) proof that the said unlawful act or omission was committed with malice aforethought.**

11. On the first issue, **PW1** testified that on the night of 7<sup>th</sup> August, 2010, he saw the body of the deceased lying on the bed in the house of the accused. Later on at about 5 am of 8<sup>th</sup> August, 2010, he saw the accused drag that body which was tied with a rope and throw it in a pit latrine. The body was recovered on 8<sup>th</sup> August, 2010 from that pit. The recovery of the body was also confirmed by **PW3**.

12. The post mortem report produced by **PW3** as **PExh.1** indicated that the body had multiple bruises on the thighs, head and neck. There was also a rope around the neck. Internal injuries included; fracture of the mandible scalp and face hematoma, blood in the skin of the head space and fracture at the cervical spine at the neck from base of the skull. The doctor concluded that multiple injuries involving the head and neck was the cause of death. In this regard, I am satisfied that the prosecution has established the first and second issue, the fact and cause of death, to the required standard.

13. On the third issue, **PW1** told the court that, on the material day, his sister called him from his miraa farm and told him that the accused was beating the deceased. When he came home, he neither found the accused nor the deceased. However, later the accused told him that he had given the deceased a beating she would not forget for ten years. The next day, **PW1** entered the accused house and saw the deceased's body lying on a bed in the accused's house. He also saw the accused dragging the body which was tied with a tethering rope and throw it into a pit latrine. The accused in his defence stated that **PW1** was not his son and that on the material day he was in Timau.

14. It was submitted for the accused that the prosecution had failed to prove the case to the required standard in that, the evidence relied on was circumstantial. That the rope that was allegedly used to strangle the deceased was not produced in court. This court's opinion is that, failure to produce the rope was not fatal as the cause of death was '**multiple injuries involving the head and the neck**' and not strangulation as submitted by Counsel.

15. Counsel further submitted that **PW1's** testimony should be taken with caution as the testimony before Apondi J differed in content with that given before Wendoh J. Counsel referred to the case of **Dzombo Chai vs. Republic Cr.A No 256 of 2006(UR)** for the proposition that the evidence given previously, though immaterial, can be used to test the veracity of a witness.

16. I have carefully considered the testimony of **PW1** given before Apondi J and Wendoh J. I am not satisfied that there were any material discrepancies. It may be true that the testimony before Apondi J was sketchy and lacking in detail as opposed to the one given before Wendoh J. However, the court notes that the prosecutors who appeared before the two courts were different. I take judicial notice that different prosecutors will prosecute a matter differently. In this regard, it will depend on the expertise of a particular prosecutor in bringing out the evidence from a particular witness. I reject the invitation to discredit the testimony of **PW1** on the basis of the length of his testimony before Wendoh Judge as opposed to the previous one.

17. The prosecution relied on circumstantial evidence in this case. In **Erick Odhiambo Okumu v Republic [2015] e KLR** relied on the case of **Abanga Alias Onyango V. Republic, CR. APP. NO 32 OF 1990 (UR)**, the Court of Appeal stated:-

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

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

**(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**(iii) 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.”**

18. In this case, the test is established from the testimonies of **PW1, PW2 and PW3**. The testimony of **PW1** remained unshaken as to what he witnessed between 6<sup>th</sup> and 8<sup>th</sup> August, 2010. His testimony that the accused told him that he (the accused) had given the deceased a beating she would never forget in 10 years was not denied and it remained unshaken. The accused denied knowing the deceased or having *more than one wife*. However he failed to challenge the testimonies of **PW1, PW2 and PW3** that he was married to 4 wives, the deceased included.

19. **PW1, PW2 and PW3** were categorical that the accused was accustomed to beating his wives. That some had run away because of domestic violence metted out on them by the accused. The evidence on record shows that, Several hours to the disappearance of the deceased, the accused had beaten the deceased. The body was later discovered in his house by **PW1** and the accused was seen dragging and dropping the same into a pit latrine within the homestead.

20. The accused admitted in his defence that he was arrested at Timau 5 days after he had gone there. His arrest was on the 13<sup>th</sup> August, 2010. That is five days from the date that **PW1** told the court that the accused disappeared after threatening him with death. That means that the accused was at the scene of the crime during the material days, 6<sup>th</sup> to 8<sup>th</sup> August, 2010. Despite the prosecution evidence placing him at the scene, the accused did not explain how the body of the deceased was found in his house and later in a pit latrine within the homestead.

21. From the foregoing, I am satisfied that the circumstantial evidence relied on is as sufficient as any direct evidence that would have been adduced in this matter. I am satisfied that the death of the deceased was caused by an unlawful act on the part of the accused.

22. Was there malice aforethought? **Section 206 of the Penal Code** provides that:-

*“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) .....*

*(d) .....*

23. **PW1** stated that the accused told him that he had given the deceased a beating that she would not forget for 10 years. **PW3** also testified to the fact that he knew the accused beat his wives. The injuries sustained by the deceased include multiple bruises on her thighs, abdominal wall, head and neck. The injuries inflicted on the deceased were so serious that they were intended to cause grievous bodily harm and the death of the deceased.

24. Accordingly, I am satisfied that the prosecution has been able to prove its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Javan Murungi** and convict him of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**.

**DATED and DELIVERED at Meru this 27<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**