



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 74 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KILATYA MUNYAO.....ACCUSED

J U D G M E N T

1. **Kilatya Munyao**, the Accused, is 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 night of **21st and 22nd July, 2013** at **Kwa Kasuni Village, Mandongoi Sub-Location, Kyangangi Location** in **Lower Yatta District** within **Kitui County** murdered **Martha Musyoka** (Deceased).

2. Facts of the case are that the Deceased was a domestic servant at the home of **Halima Daniel** where the Accused worked as a herdsman. On the **22nd day of July, 2013**, PW2 **Peter Mwanzi Mwanthi**, the son of the Deceased went to visit her only to find her mortal remains lying outside the house near the toilet. On closely observing the body, her eyes were gouged out, the skin that covered the face was removed and ears were missing. The Accused who was her fellow worker at the homestead was nowhere to be seen. He went and informed PW2 **Fundi Musyoka** his uncle, they reported the matter to the Chief who in turn reported to the police. PW6 **No. 64510 Corporal Livingston Katui** of Scenes Support Services Kitui CID visited the scene and took photographs of the scene and generally the Deceased. PW7 **Corporal Josphat Kinyua** led the investigating team to the homestead where the body of the Deceased lay. Some items were recovered from a pit latrine at the homestead. While at the scene he got some information about an individual who had been seen in the bush nearby. He mobilized people who combed the area. They found the person who turned out to be the Accused. He had a shirt and bed sheet tied around his waist. In the course of investigations a blood stained kitchen knife that had been concealed underneath some sand/soil was recovered.

3. The Accused was arrested and taken to the police station, **Kwa Vonza**, while the body of the Deceased was taken to the Kitui District Mortuary. An autopsy was later conducted, hence this case.

4. When put on his defence the Accused stated that he worked for a lady called **Halima**, a witchdoctor who lived in **Nairobi** as a herdsman at a ranch that was 5 kilometers away from her homestead. That he would only visit the home while going to slaughter for her goats. The caretaker of the home was the Deceased.

5. He stated that on the **21st July, 2013** he was grazing animals as usual. On the **22nd July, 2013** he was herding animals when he saw very many people about fifty (50) in number. They told him that **Martha** (Deceased) had been murdered. To the best of his knowledge he had been at homestead on the **30th June, 2013** when his employer visited the home. The police arrested him, assaulted him and took him to where the Deceased used to work. Behind the kitchen was a knife. The body of the Deceased was already in the police motor-vehicle. They took him to the police station. He denied having murdered the Deceased as he had not disagreed with her. It was further his evidence that whenever **Halima** would go to that home she would do bizarre things but he had worked for her for one (1) year and seven (7) months. As a result **Halima** is the one who should have explained what happened to **Martha**.

6. At the close of Defence case it was the submission of learned Counsel for Accused, **Mr. Mwalimu** that prior to the police arriving many people had gone to the compound. That some clothes were removed from the toilet while the police picked a knife behind the house that was blood stained. By then the Accused was not at home as he was in the bush with goats. He was arrested while in the grazing fields. That there was contradiction as to the location of the knife and where it was recovered. That the blood samples on the bed sheet that the Accused was found wrapped in were of unknown male person.

7. He urged that there was no direct evidence that points to the Accused as the killer of the Deceased. That the police tended to rely on circumstantial evidence that the Accused being a co-worker of the Deceased, he must have been the person who killed her while there was a possibility of other people visiting the home while the Accused was in the bush was not ruled out. So did the fact of the mysterious night visits by the Deceased's employer together with unknown guests. That the recovery of the killer knife was controversial but it was clear from PW2 that it was recovered before the Accused was arrested. That the police failed to avail the owner of the homestead **Halima Daniel** as a witness after being granted several opportunities to do so; a person who was suspected to be involved in human sacrifice and mysterious disappearance of her former employees.

8. In response, the learned State Counsel **Mr. Mamba** submitted that PW2 was in utter shock when he stumbled on the body of his mother lying on the ground with her face skinned to the bone with eyes gouged out. He called his uncle **Vundi Musyoka** who reported the matter to the Chief who then called the police. That the police in the course of their investigations decided to ask for the Accused whom they suspected had a hand in the incident as he was missing at the scene. That at the point of arrest the Accused had a bed sheet around his waist with dry blood stains. That the police recovered a blood stained checked shirt and a torn underwear believed to belong to the Accused from a pit latrine.

9. Further, he submitted that the Accused led the police to where they recovered the murder weapon that was within the compound.

10. He stated that the universal declaration of human rights states that the rights to life is unalienable one; granted to every human as such should not be taken away by another human being unless it is proved the act was in self defence. That the fact of death was established. That the Accused person's action amounts to murder.

11. Issues to be determined are:

- (i) The fact of death of the Deceased.
- (ii) Whether the unlawful act or omission that caused the death was committed by the Accused.
- (iii) Whether the act or omission if proved was caused with malice aforethought.

12. Witnesses who testified alluded to having found the mortal remains of the Deceased at the homestead of **Halima Daniel**. Ultimately the body was moved to Kitui District Hospital. A postmortem was conducted by PW1, **Doctor Patrick Mutuku**. He concluded that the cause of death was cardio-pulmonary collapse due to severance of major blood vessels and issued a Death Certificate **No. 592547**. This was proof beyond doubt of the fact of death.

13. None of the witnesses who testified saw the person who committed the act that resulted into the death of the Deceased. Externally the skin on the face and skull was removed. The eyeballs were removed. Ears were severed. The neck was broken. All facial muscles were removed. The neck veins and arteries were severed and the cervical spine was fractured while the spinal cord was severed.

14. There being no direct evidence to prove who did the act, the Court has to rely on circumstantial evidence. The question one must pose would be: who was the last person seen with the Deceased or what motive could the person who did the act have had? To prove a case based on circumstantial evidence some conditions must be established. In the case of **Hanumant vs. State of M.P. (1953) SCR 1091** it was stated that:

“1) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

2) The facts so established should be consistent with the hypothesis of guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3) The circumstances should be of a conclusive nature and tendency;

4) They should exclude possible hypothesis except the one to be proved; and

5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

15. In the case of **Abanga alias Onyango vs. Republic (2014) eKLR** the Court considered circumstantial evidence and 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.”

16. It therefore follows that the Prosecution has the duty of establishing all incriminating evidence adduced against the Accused. Suspicion however grave cannot be used to substitute the proof required by law. And where there is a reasonable doubt following the explanation given by the defence, then the Accused will be entitled to an acquittal.

17. At the point of his arrest the Accused had a bed sheet wrapped around his waist. The bed sheet had blood stains. The bed sheet that was marked as item 'C' was subjected to analysis at the Government Chemist. Per the report of Government Analyst adduced in evidence the DNA profile generated from the blood stains on the bed sheet were of an unknown male profile.

18. A kitchen knife – item 'A' had blood stains. The DNA profile generated from the blood stains on the knife was for the biological mother

of the donor of blood sample for the child to the Deceased. The knife was not found in possession of the Accused but at the homestead of the employer. It was the Investigating Officer, PW7 stated that after the Accused was arrested following interrogation carried out he led them to where the knife had been concealed underneath sand. PW4 **No. 54383 PC Fredrick Kariuki** one of the officers who went to the scene stated that they recovered the knife after they arrested the Accused and he led them to the compound to a place that the knife was on the ground, approximately 5 meters away from the kitchen. PW6 also stated that it was the Accused who led the police to where the knife was.

19. However, their evidence was contradicted by that of PW2 and PW3. PW2 the son of the Deceased stated that the police recovered the knife behind the house. He stated thus:

“The police are the ones who recovered the knife. I do not know where the Accused had gone.....”

PW3 stated that the Accused showed the police the knife but on cross examination he stated that the police recovered a knife, some clothes, a panty and a shirt. That the knife was found near the kitchen. That the police are the ones who recovered the knife and this was before the Accused was found. There is indeed a material contradiction as to whether it was the accused who led the police to the recovery of the murder weapon or not.

20. A shirt indicated as belonging to the Accused was submitted to the Government Chemist for analysis.

21. The police did retrieve a shirt, Exhibit 3, a torn pant (underwear) from a latrine. The shirt was indicated as belonging to the Accused and it was stained with blood. The DNA profile generated from the blood stains on it was for the Deceased (biological mother to the donor of blood sample who was stated to be the child of the Deceased). The greenish checked shirt (Exhibit 3) was one of the items found in the toilet. This is the shirt that was taken to the Government Chemist for analysis. The shirt the Accused was found wearing at the time of his arrest was not examined.

22. On cross examination regarding exhibit 3, PW7 the Investigation Officer stated that the shirt was a unisex one that could be worn by either a woman or man. Witnesses who were familiar with the Accused were PW2 and PW3. None of them identified the shirt as belonging to the Accused.

23. According to evidence adduced by PW2 and PW3, a herdsman from another homestead, one **Mwinzi Isika** is the one who told them that the Accused was in the thicket and that he had asked him to collect for him some drinking water. It was the herdsman who led them together with other people to where they found the Accused. This particular individual was not called as a witness. The owner of the homestead **Halima Daniel** was not availed to testify. On the **25th November, 2015** the Prosecuting Counsel in an application for an adjournment told the Court that **Halima Daniel** a witness who was in constant communication with the Investigation Officer but had failed to turn up despite promises to honour summons. Subsequently the State closed the case without her evidence.

24. The defence put by the Accused that he rarely went to the homestead as he lived elsewhere herding goats that belonged to **Halima Daniel** was not controverted by the Prosecution. If indeed the Deceased lived alone with her two (2) year old child then there was a possibility of other people having accessed the home, the owner of the homestead inclusive.

25. Circumstances in which the Accused was found in the bush/thicket at the outset could only be explained by **Isika** who led the members of public to where they found him.

It was the evidence of PW2 that they found the Accused asleep and he seemed confused and he was worried. PW3 said that when they found the Accused he was not in his right thinking state of mind. He denied having killed the Deceased.

With this kind of evidence the Investigation Officer should have considered having the Accused examined to establish whether he could have been under the influence of any substance. Further, the individual known as **Isika** should also have been investigated as to how he came to find the Accused in the bush. This was a vital witness to the Prosecution's case. In the case of **Bukenya & Others vs. Uganda (1972) EA 549**, the East African Court of Appeal held that:

“(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

(ii) The court has the right and the duty to call any person whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

26. Evidence adduced by the Prosecution proved beyond any reasonable doubt that the Deceased was killed in a bizarre manner that surpasses conventional intrigue but the State failed to call important witnesses whose evidence could help link up evidence of the fact that it could only be the Accused who could have committed the offence in question. The chain of evidence called did leave a reasonable doubt that is consistent with the innocence of the Accused. In all human possibilities, this was an act that could have been done by any person, the owner of the home inclusive who was alleged to be a sorcerer.

27. In the premises the Prosecution has failed to prove beyond any reasonable doubt, the case against the Accused. Accordingly, he stands acquitted.

28. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of September, 2018.

L. N. MUTENDE

JUDGE