



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 73 OF 2013

REPUBLIC.....PROSECUTOR

-VS-

TIMOTHY MUNENE THIANE.....ACCUSED

JUDGMENT

1. Timothy Munene Thiane (“the accused”) is 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 night of 8th August, 2013 at Anjilu village, Miathene Location in Tigania West District within Meru County, jointly with another not before court, the accused murdered Josphat Nchebere M’Linyiru. The accused denied the charge with the prosecution calling a total of 7 witnesses.

2. PW1 Jane Mkiio Thiane, the mother of the accused, testified that on 8th August, 2013 she was at Kianjai market from 2:00pm. At 6:00pm, she received a call from her neighbour Mercy Mung’ori informing her that there was noise at her home. She came home but did not find anyone or hear any noise. In her home, she lived with her 5 children and 3 grandchildren. It was her evidence that she arrived home after 7:00pm and after finding nothing, she started cooking. At about 10:00pm, police came and asked for the whereabouts of the accused. She told them that she had not seen him. The police went but returned at about between 4:00am and 5:00am the following morning when they found him took him away from his house. She did not know why the police took him away.

3. PW 2 was Jephith Karithi Kairura. It was his evidence that on material day, he was in the farm at Kithio the whole day. When he returned home, his cousin one Kinya told him that the deceased had been beaten by the accused and taken to hospital. He proceeded to Miathene hospital at about 7 pm where he found the deceased abandoned outside the compound of the hospital. The deceased had serious injuries and could not sit up.

4. It was his further evidence that the deceased’s hands and legs were broken and the neck was fractured. He asked the deceased what had happened that made Timothy beat him but the deceased told him not to bother. He then took him to the ward with Stanley Mungania (**PW3**), a watchman at the hospital. The deceased was attended to but he died at about 10:00 pm that night. Later, **PW2** went to Miathene police post but found a report had already been made by **PW3**

5. PW 3 Stanley Mungania Ituru, a security guard at Miathene hospital, testified that on the material day while at work, he found an old man abandoned near the door of the casualty. The old man had injuries on the legs, hands and head. He called a nurse to attend to him. On inquiring from him who brought him there, the deceased told him that the person who beat him was the one who had brought him there and he was the son of Thiane. He told the court that he knew that Thiane had many sons who included one Kiki, Timothy and another who used to ride a motorcycle. The deceased later on died and **PW3** called Corporal Mathenge (**PW6**) and informed him that the deceased had passed on.

6. PW4 Timothy Mwika testified that on a date he could not recall he identified the body of the deceased for postmortem. **PW5 P K**, a child of about 10 years told the court on the material day, she and another child went to fetch water from a borehole at the home of the accused. They found the accused and another old man fighting. She did not know who the old man was. The accused told them to go back home and they obliged. She did not know what happened after that. She later recorded her statement with the police.

7. PW6 Corporal John Mathenge was the investigations officer. On the material day, he received a call from **PW3** who informed him that someone had been dropped at the hospital with serious injuries. He proceeded to the scene in the company of PC Kimeri and found the deceased. The deceased informed him that he had been attacked by the son of Thiane. He booked the report in the OB and in the company of PC Ng’eno and Mwangi went to the home of Thiane and found blood stains near the accused’s house and blood stained shoes. They did not find the accused at home. They returned the following morning at about 5:30am when they arrested the accused. He later recorded statements from witnesses. He established that the deceased had gone to the accused’s home and the dogs started to bark. That when the accused asked the deceased why he had gone there, a quarrel ensued.

8. **PW7 DR. Samuel Mutegi** testified and produced a postmortem report prepared by him at Miathene District Hospital on 13th August, 2013. According to the report, the deceased had deep cut wounds on the right arm, 2 deep cuts on the left leg, the left arm was swollen and the neck was dangling freely meaning that the joint which supports the neck had been disjointed. Both arms were dislocated at shoulder joints and the 2 lower ribs were fractured. The spinal column 1st and 2nd vertebra (atlas and axis) were disjointed, where the neck is supported possibly due to strangulation. He formed the opinion that the probable cause of death was excessive internal hemorrhage secondary to strangulation and multiple fractures.

9. In his sworn statement, the accused told the court that on the material day, he was herding cows between 8am and 6pm at a field located about 400m from his home. On returning home, he milked the cows and took the milk to Miathene market where he stayed and watched news in a hotel. That he returned home at about 8:00pm. The following morning at about 4:00am, he was arrested by police officers who searched his house but found nothing. That he was never informed why he was being arrested.

10. He further testified that he had had a long land dispute with **PW5's** father which he had reported to the police three times. That the case was meant to allow the family of **PW5** take way his land. That even after his arrest, they chased away his mother.

11. Ms. Nelima, Learned Counsel for the accused submitted that the prosecution evidence was based on one eye witness (**PW5**) **Peris Kinya** and a dying declaration from **PW2, 3 and PW6**. Counsel faulted the testimony of **PW5** on the basis that she told the court in cross-examination that the accused was assaulting the deceased with a stick which stick was not produced for the court to satisfy itself whether it could kill the deceased. The case of **Mutua Mutisya v. Republic Cr.A. No 43 of 2006 (UR)** was cited in support of the submission that it is desirable that a weapon used in the commission of an offence be produced in court to ascertain if it is capable of causing the alleged injuries. She further submitted that the evidence of **PW5** was not supported by the post mortem.

12. With regard to the dying declaration, Ms Nelima submitted that **PW3 and 2** stated that the deceased said that he had been beaten by a son of Thiane and Timothy, respectively. That the deceased never gave any specific name. She further submitted that the investigations officer testified that the deceased told him that he had been beaten by son of Thiane and no name was disclosed. It was her submission that the declaration was given separately, was uncorroborated and the name given was incomplete. The cases of **Pius Jesanga s/o Akumu v. Republic (1954) E.A 331, Dzombo v. R Cr. A. No. 256 of 2006 (UR) and Jane Wangui Mathenge v. R Cr. A. No. 11 of 1996 (UR)** were cited in support of those submissions.

13. Finally, Counsel submitted that the postmortem report was not conclusive as there is nothing in medical terms known as "dangling neck". That the report was a mere opinion and not binding on the court.

14. On his part, Mr. Kiarie for the State submitted that the prosecution had proved its case to the required standard. With regard to the post mortem report, Ms Nelima was not an expert in medical matters and that the same stated that the deceased died because of multiple injuries. On the dying declaration, Counsel submitted that under **Section 33 (a) of the Evidence Act**, a court can convict on the evidence of a dying declaration so long as it cautions itself. Counsel concluded that recovery of the murder weapon was not mandatory to find the accused guilty.

15. I have carefully considered the evidence on record and the rival submissions by the parties. The accused is facing a charge of murder. **Section 203 of the Penal Code Cap 75 of the Laws of Kenya** defines the offence of murder in the following terms:-

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

16. From the foregoing, the prosecution is called upon to prove four issues; **the fact of death, the cause of death, that the death of the deceased was caused by the wrongful act of the accused and that the accused was of malice aforethought**. The burden lies with the prosecution to prove its case against the accused on the standard of proof beyond any reasonable doubt.

17. On the first and second issues of the fact and cause of death, the testimonies of **PW2, PW3 and PW6** were that on the material day, the deceased was found abandoned at Miathene District Hospital with serious injuries. He was admitted but died while undergoing treatment. **PW4** identified the body for postmortem. According to the postmortem report produced as **PEX.1**, the deceased died from multiple injuries. To this extent, I am satisfied that the prosecution was able to prove the fact and cause of death to the required standard.

18. The next issue is whether the death was as a result of an unlawful act on the part of the accused. The only eye witness to the incident was **PW5 Peris Kinya**, a 10 year old girl. It was her evidence that on the material day, she was going to fetch water at a borehole at Kathima in the company of one Mutuma. They found the accused and another old man fighting in the home of the accused. She positively identified the accused in court as the person who was fighting with the old man. She told the court that they did not fetch water as the accused told them to go back home. In cross examination, she remained firm that she and Mutuma had found the accused fighting with the old man. When asked by the court about the accused, she stated; **"I knew Timothy and their home."**

19. **PW1** testified of having been called by her neighbor, Mercy Mung'ori, and being informed of noise in her house which was in the same compound with that of the accused.

20. **PW2 Jepither Karithi** testified that on the material day, he arrived home at 6pm and was informed by **PW5** that the deceased had been beaten by the accused and taken to hospital. He proceeded to Miathene hospital where he found the deceased abandoned outside the compound. That the deceased told him that Timothy had beaten him. On the material day at about 7.30pm, **PW3**, a guard at Miathene District hospital was making rounds within the compound when he found the deceased abandoned at the door of casualty. The deceased told him that the son of Thiane, who had beaten him, had brought him there.

21. **PW6** was called to the hospital by **PW3**. He interrogated the deceased who told him that he had been injured by the son of Thiane.

22. **PW5** remained firm in her testimony that she saw the accused fight with an old man. Although Ms. Nelima submitted that **PW5** had indicated in cross-examination that the accused was using a stick, the record does not show that fact. In this regard, the case of **Mutua Mutisya v. R (supra)** relied on by counsel is not applicable. **PW5** placed the accused at the scene. **PW1** had also testified that she had been informed of some commotion in her compound. This corroborated the testimony of **PW5**. Although the prosecution did not call Mercy Mung'ori who had informed **PW1** of that fact, **PW6** explained that the witnesses in this matter were unwilling to come forward and make statements.

23. The evidence of **PW5** was further corroborated by **PW3** who told the court that the deceased told him that the person who beat him is the one who brought him to hospital.

24. There is the issue of the dying declaration by the deceased. They were three in number. **PW2** said that the deceased told him that Timothy had beaten him but he did not tell him why. **PW2** concluded that the named Timothy was the accused but did not explain why. **PW3** testified that the deceased told him that the person who beat him was the son of Thiane. Likewise, he told **PW6** that it was the son of Thiane who beat him.

25. This death declaration was given to three different people at three different times and separately. Ms. Nelima submitted that the death declaration was not corroborated as it was made to three different persons at different places. The cases of **Dzombo Chai v. Republic (supra)** and **Jane Wangui Mathenge (supra)** were relied on.

26. In the case of **Philip Nzaka Watu v Republic [2016] eKLR** the Court held as follows;

“decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, CHOGE V. REPUBLIC [1985] KLR1, KIHARA V. REPUBLIC [1986] KLR 473 and NELSON JULIUS KARANJA IRUNGU V. REPUBLIC, CR. APP. NO. 24 of 2008. Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence. Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

27. Firstly, I caution myself that reliance on a death declaration has its limitations. It is a statement that is untested and sometimes given in circumstances that a deceased is in either extreme pain or confusion. The deceased is usually unavailable to be cross-examined on that statement. Secondly, I note the deceased did not give **PW2** the other names of the Timothy who assaulted him. He also did not disclose to **PW3** and **PW6** the names of the son of Thiane who allegedly had assaulted him.

28. Despite the foregoing, I am satisfied that the dying declaration was sufficiently corroborated. **PW5** had informed **PW2** that Timothy had fought with an old man in the compound of the accused. **PW5** identified the accused as the said Timothy. Although Thiane, the father of the accused had other sons, none of them apart from the accused was alleged to have the name Timothy as his own save for the accused. Further, there could be no confusion or difficulty in identifying the son of Thiane who is known by the name of Timothy. In this regard, the case of **Dzombo Chai v. R (supra)** is not applicable as in that case, the appellant was known by many names Dzombo being one of them and there were other Dzombos apart from the appellant unlike in this case.

29. Further, the case of **Jane Wangui Mathenge v. R (supra)** is not applicable because in that case, there was contradiction in the death declaration given separately to three separate witnesses as to the cause of the fire that led to the demise of the deceased. In the present case, the declaration was consistent and corroborative of each other.

30. In his defence, the accused denied having committed the offence. According to him, he was away herding cows between 8am and 6pm. He returned home at about 8:00pm after taking milk to the market. In his evidence, he seemed to suggest that he was framed up by **P5 P K** and her father one Gaithikia and that he had reported them to the authorities several times. In cross examination, however he admitted that he did not have anything to show that he had reported the alleged incidents to the authorities. In both his evidence in chief and in cross examination, the accused contradicted himself when he stated that he never knew the deceased. He stated that the deceased's home was in Mbeu whereas his (the accused) home was in Miathene. One wonders how the accused knew the deceased's home to be at Mbeu yet he had claimed that he never knew him.

31. With regard to the defence of alibi, it was raised by the accused at the time of his defence. It was never raised to any of the prosecution witnesses. In **Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal while citing with approval the case of VICTOR MWENDWA MULINGE V R. [2014] eKLR** stated as follows regarding alibi:-

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

32. In view of the foregoing, I find the defence of the accused to be an afterthought and I accordingly reject the same. Similarly, the allegation that PW5 (a child of tender years) was used by the prosecution to buttress its case against him was equally without basis. There was no reason given as to why a 10 year old child would implicate the accused of the offence charged.

33. From the foregoing and having carefully examined the evidence of the prosecution witnesses, I am satisfied that it the unlawful act of the accused that caused the death of the deceased.

34. The next question for determination is whether the accused had the requisite malice aforethought at the time of commission of the offence to support a charge of murder. In Daniel Muthee – v- R CA No. 218 of 2005 (UR), the Court of Appeal observed as follows:-

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

35. According to the postmortem report produced as **PExh.1**, the deceased sustained deep cut wounds, one on the right arm, two on the left leg; each 3CM long, the left arm was swollen, the neck was dangling freely, the left leg had compound fractures, both arms were dislocated at the shoulder joint, two lower right ribs had been fractured, the spinal column 1st and 2nd vertebra (atlas and axis) were disjointed and the spinal cord contused at the cervical region. The doctor formed the opinion that the most probable cause of death was excessive internal hemorrhage secondary to strangulation and multiple fractures. Even if the post mortem report was not conclusive as to the type of the murder weapon used to inflict the injuries, there is no doubt that the deceased suffered very severe and serious injuries

36. In inflicting these injuries upon the deceased, the accused must have known or had a reasonable belief that the same would either cause grievous harm to the deceased or cause his death.

37. In view of the foregoing, I am satisfied that the accused had the necessary malice aforethought at the time of the commission of the offence to support the charge of murder.

38. Accordingly, I find the accused guilty of the murder of **Josphat Nchebere M’Linyiru** and I convict him of the offence of murder under **Section 322 of the Criminal Procedure Code**.

DATED and **DELIVERED** at Meru this 24th day of September, 2018.

A. MABEYA

JUDGE