



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 38 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

MWANGANGI MUSYOKA.....ACCUSED

JUDGEMENT

1. The accused Mwangangi Musyoka stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 29th November 2012 at Maturumbe village, Ndathani Sub-Location in Kyuso District of Kitui County murdered Mutinda Kimanzi.

2. He has denied the offence. In proving their case, the prosecution called a number of witnesses.

3. PW1 was Robert Kimanzi Muniyithya the father of the deceased. He stated that the deceased was 6 years old and was schooling at Mitamisi Primary School.

4. That on 29th November 2012 at 6 pm he was with the deceased and Ndinda Kimanzi his daughter. They had goats and cows, and Mutinda took the cows towards the homestead. They remained behind and took the goats home later. However when they arrived home they found that Mutinda had not brought the cows home. As darkness started coming in, they sent his brother Muthui to look for him. Muthui met Kimwele Mbuve a young man who informed him that Mwangangi had chased them away from a thicket because they were grazing animals there in the community thicket. Kimwele escorted Muthui back home and they explained to him that Mwangangi had chased away Tito, Muniyithya and Mutinda. The witness then called his family including Mutinga his son and his wife and they met at 9 pm and proceed to Tito's homestead. The mother of Tito said that Tito had returned in the evening frightened and entered the house and did not talk to anybody but explained that they had been chased away by Mwangangi. They then went to the house of the father of Mwangangi whom they found together with his wife Christine and they were told that Mwangangi had not been seen. It was later at night and they went back home. The next day, one of the witness's son joined him and they went to the place where Mwangangi was said to have chased away the children. At the scene, they found one shoe of the deceased and saw footsteps and when they followed they saw another shoe. These were plastic shoes and he identified them in court.

5. While at the scene, Christine Maiyani and Muniyithya came. Maiyani was the mother of the accused. They went down the valley and Mwaniki Kimanzi the witness's oldest son saw the body of the deceased. He also walked there and saw a piece of cloth that Mwangangi used to tie on his head hanging on the branches of the tree. Underneath they saw the body of the deceased. He identified the piece of cloth in court.

6. The Sub-Chief was informed and later the police arrived. They looked for Mwangangi but did not know where he was. He was not aware of any bad blood between the deceased and the accused. According to him, the accused was an uncle of the deceased.

7. The body lay with the face facing upwards and the neck was cut like a slaughtered goat. There were also some other cuts on the body but did not see the weapon. He attended postmortem examination. He identified the accused in court.

8. In cross examination, he said he knew Mwangangi from birth and that he left school when young. He said that he was aware that the accused consumed drugs and had completely changed his behavior but he did not know his mental status. He said that Tito said that they were chased away. The accused escaped at night to Tseikuru where he was arrested near the Tana River but he did not know the person who arrested him. He merely heard that two knives were recovered from the accused but he did not see the knives. He maintained that Tito said that the accused chased them away. He denied the existence of a grudge between him and the accused.

9. PW2 was Titus Ngundu who is also described as Tito. At the time of testimony, he was aged 17 years and said he was born in 2001. He tendered evidence on oath.

10. He knew Mutinda Kimanzi who was his cousin. He also knew the accused Mwangangi Musyoka. They came from the same area. On 29th November 2012 at 4 pm, he was herding cattle near the farm when he heard screams of somebody who appeared to be the deceased as if he was being chased by Mwangangi. He rushed home and informed his mother about the incident. He did not see them chasing each other but it appears as if the deceased was running while Mwangangi was asking why he had brought cows there. He left the cows behind and his mother told his elder brother Muniyithya to go for the cows which he did. That evening the mother of Mutinda whose name is Beth came home and asked for Mutinda and told her that Mutinda had been chased by Mwangangi. She then went home and with her older son Mwaniki, started looking for Mutinda. They did not however get him that night and the next day, Mutinda was found lying dead around the place where he thought he was being chased by the accused. He knew the accused before and identified him in court.

11. In cross examination, he said that he was 11 years old at the time of the incident but denied that he had forgotten what happened. He confirmed however that he did not see anybody chasing another or carrying a weapon. He also did not witness the stabbing.

12. PW3 was Muniyithya Musyoka who testified when he was 18 years. He stated that he was a cousin of the deceased and Titus and a brother of Mwangangi Musyoka. On 29th November 2012 at 6 pm while herding cows next to their farm, he met Titus who asked whether he had been chased by Mwangangi but he said he had not. Mutinda Mbuve then suggested that maybe Mutinda the deceased who was grazing in that area was the person who was chased. They did not see Mwangangi and played football and at around 6 pm parted ways and went to their respective homes. At around 9 pm, the parents of Mutinda came to their home asking for Mutinda. These were the mother, father as well as neighbours.

13. On 30th November 2012, they went to the place where Titus said he heard screams and on checking footprints, they found the shoes of Mutinda and further on they found Mwangangi's scarf which had green colour and flowers hanging on a tree. The body of Mutinda was found lying under a tree with the throat cut in the front and a cut on the forehead. He identified the blue shoe slippers of the deceased and the scarf of Mwangangi. They then proceeded to Mitamisi Police Station and the police came and took the body to Mwingi District Hospital. All this time he did not see Mwangangi. He did not know why Mwangangi was in a habit of wearing a head scarf. He identified the accused in court.

14. In cross examination, he stated that he had not forgotten what he recorded to the police. He said he met Titus at about 5 pm and they parted ways at about 6 pm. He maintained that on 29th November 2012 Mwangangi wore the head scarf.

15. In re-examination, he maintained that the accused was his brother.

16. PW4 was Francis Mutunga Kimanzi from Maturumbe village, Ndetani Sub-Location, Kitui County an uncle of the deceased Mutinda Kimanzi. He also knew the accused and Titus and Muniyithya were his cousins. His evidence was that on 29th November 2012 at 8 pm while at home Beth Kimanzi arrived and said that her son had disappeared while grazing and that he had been chased by Mwangangi. They then held a meeting at the home of Mbuve Mwosia. When they inquired about Mutinda, they were told that Titus had said that Mutinda was chased by someone. They then went to Muniyithya's house, and Muniyithya said that he was not involved in the chase. Because it was late at night they proceed back home and slept.

17. On 30th November 2012 in the morning, they proceed to the home of Kimanzi Muniyithya and then went to the grazing place where they met Mwaniki Kimanzi, Mayani Musyoka and Muniyithya Musyoka. They saw a metal plate on the ground and blue slippers. They were led by Mwaniki who screamed that he had seen the dead body of Mutinda. They went there, saw the body and near the body was a blue piece of cloth hanging on a tree. They then left and went home. According to him, the body lay face upwards with a slit in the front of the throat with a cut in a shape of a cross at the forehead. He identified the piece of cloth in court. He also identified the accused. He said the accused was arrested on 3rd December 2012 in Tseikuru area about 20kms away.

18. In cross examination, he said he was not present when the body was taken to the mortuary. He also left the scarf hanging on the tree.

19. PW5 was Christine Mayali Musyoka the grandmother of the deceased Mutinda Kimanzi and the mother of Mwangangi Musyoka the accused.

20. It was her evidence that on 29th November 2012 at 9 pm the mother of Mutinda and other elders came home and asked if she had seen Mutinda and Mwangangi and she said she had not seen them. They then left. Next day at 8 am, they came out as a family and made a search where Mutinda herded the animals and found his shoes and shoe prints. A short distance away they found the body of Mutinda under trees with his neck cut with a knife and a cut in the shape of a cross on the forehead. They also saw a piece of cloth hanging from a tree.

21. On seeing this, she ran to Ndetani where her husband had gone and explained about what she had seen and also conveyed the information to the Assistant Chief and the Chief. She went back to the scene with the Chief and the Assistant Chief. She did not know where Mwangangi was but was aware that the piece of cloth was a headscarf used by Mwangangi. She did not know why Mwangangi wore that piece of cloth. She was aware that Mwangangi was arrested far away at Kaningo. She identified the accused in court.

22. In cross examination, she maintained that the accused was arrested at Kaningo a place where he had never gone before.

23. PW6 was Justus Munuve Kimanzi an uncle of the deceased Mutinda Kimanzi and a cousin of the accused. On 30th November 2012 at 10 am, he was called on the phone while at Ngomeni market and informed that Mutinda had disappeared. He was called by the grandmother of Mutinda by the name Regina Kimanzi. He slept at Ngomeni and the next day proceeded to Mitamisi about 8kms away. He found that the body had already been discovered and taken away. They followed footmarks to track down the accused and at Mulangoni they were informed that Mwangangi had just passed there. They were joined by a person called Kilonzo and they proceeded to Katumbi where they were informed that the accused had left the main road and followed a side road. They followed on and they met an old man who said he had seen him that morning. They continued with the search and near a fence of a homestead they saw Mwangangi sitting on a chair. They entered

the homestead and inspected him and found two knives around his wrist which they took and tied him with a rope. The owner of the homestead then made a telephone call to the police and the police arrived at the gate of the homestead and they handed the accused to them. He did not know the owner of the homestead. He stated that the accused also had a machete and he identified it and the two knives in court.

24. In cross examination, he said that he could not be sure if the machete was the one they recovered but maintained that the machete and knives resembled those they had recovered. He maintained that the accused was a stranger where he was arrested.

25. PW7 was Mwaniki Kimanzi a brother of the deceased. He also knew Mwangangi Musyoka as an uncle. On 29th November 2012 he was at home until 4 pm when he was sent to the shop by his grandmother. When he came back, the deceased had not arrived and he went with another brother to look for him until 10 pm but they did not find him or the cows. Then accompanied by others, they went to inquire from other homesteads but did not get information and they went back home and slept. They work up at 4 am and started the search. They went to where children were grazing animals and saw one shoe of the deceased and then a plate, and then a piece of cloth and a little ahead they saw the deceased lying on the ground. He did not go near as he was shocked. He identified a pair of slippers of the deceased and a piece of cloth which they found in court. He did not participate in the arrest of the accused. He identified the accused in court.

26. PW8 Cpl. Ferix Nyaga of Ngomeni Police Post previously of Mitamisi Police Post. He was with the investigating officer C. I. Joseph Mugo who had retired.

27. On 30th November 2012 at 10.30 am he received a report from public about a murder. He got the information that on 29th November 2012 a boy by the name Mutinda Kimanzi who went to graze cattle did not return home and that on 30th November 2012 after a search the body was found in the bush with deep cuts on the head and the neck.

28. Together with the OCS and PC Njeru they proceeded to the scene where they found the body of a boy aged about 6 with a deep cut on the neck and another cut on the forehead. They also saw footprints and footmarks as if somebody was being chased by another who had no shoes. They also saw a piece of cloth hanging on tree branches which they were informed was left by the attacker. They escorted the body to Mwingi Hospital for preservation. They tried to trace the accused from their home but he was not there. On 1st December 2012 they received information that he had been arrested by members of the public in Kaningo area carrying a machete and two knives.

29. On 6th December 2012 at Mwingi District Hospital he witnessed the postmortem examination. He stated that the pair of shoes of the deceased was identified by the father and produced it as an exhibit. He also produced the piece of cloth of the accused as an exhibit. He produced the machete as an exhibit together with the two knives. He stated that the machete had blood stains.

30. In cross examination, he stated that the machete was analysed but no positive results were established because it was interfered with. There was no expert report however. The two knives were not examined as there were no blood stains on them. He agreed that some farm employees carried machetes and knives.

31. After this, the prosecution asked for an adjournment to call Dr. Kiema to testify. He did not come and the prosecution closed their case.

32. In his defence, the accused tendered unsworn testimony. He said that he did not know anything about the case. He left his home and was arrested at Kaningo by some men for a reason he did not know.

33. At the end of the evidence for the prosecution and the defence, the counsel for the defence and counsel for prosecution made their submissions.

34. This is a murder case, and the prosecution is required to prove all the ingredients of the offence beyond any reasonable doubt. The defence has no burden of proving the innocence of the accused person. The prosecution is required to prove firstly whether the deceased died. Secondly, the prosecution is required to prove whether the death was unlawful. Thirdly, the prosecution was required to prove that the death was caused by the accused. Lastly, the prosecution is required to prove that if the death was caused by the accused person, then it was cause with malice aforethought.

35. Did the deceased die? The evidence of prosecution witnesses who saw the body of the deceased on 30th November 2012 was that he lay dead in the bushes with his throat cut like a slaughtered goat. He also had an injury in the shape of a cross on his forehead. The body was taken to the mortuary for postmortem examination. Postmortem examination was conducted by a doctor who formed his opinion but did not attend court.

36. In my view, depending on circumstances, the death of a person can be proved even in the absence of the medical evidence. From the evidence and the circumstances before me, I find that the deceased died and the prosecution thus proved beyond reasonable doubt that Mutinda Kimanzi has died.

37. Was the death unlawful? From the evidence on record and the circumstances under which the deceased died, I find no explanation other than that the deceased death was unlawful. There is no suggestion from anybody including the accused person that the death of the deceased was lawful. I thus find that the death was unlawful.

38. Was the death of the deceased caused by the accused? Nobody saw the accused chasing or killing the deceased. The prosecution witnesses said that they heard the voice of the accused chasing the deceased and asking why he was grazing cows there. They said also that they heard the screams of the deceased which scared them and they went away. The deceased was found the next morning under trees with his neck cut like a slaughtered goat. The accused was arrested two days after the disappearance of the deceased person. He was arrested far away about 20kms from the scene. The accused said he does not know anything about the incident. This is a matter revolving around circumstantial evidence. Though the accused was found with a machete and two knives, no evidence was tendered to indicate that those

items were used in the murder. However, even the accused mother states that the scarf or piece of cloth found on a tree near the deceased belonged to the accused. On that day also, the accused did not return home and was arrested far away. In my view, the evidence on record points to no other conclusion than that the killer of the deceased was the accused person. He was sufficiently connected to the offence. He killed the deceased.

39. Was the killing with malice aforethought? The attack on the deceased was certainly vicious. It was meant to kill. The deceased who was a young man aged about 6 was slaughtered like an animal. In my view, malice aforethought was proved against the accused person.

40. For the above reasons, I find that the prosecution has proved the offence of murder contrary to section 203 as read with section 204 of the Penal Code against the accused person beyond any reasonable doubt. I thus find him guilty of murder and convict him accordingly.

Dated and delivered at Garissa this 20th day of December, 2018.

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George Dulu

JUDGE