



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL CASE NO. 14 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MUTHEE SAA.....ACCUSED

J U D G M E N T

1. **Muthee Saa**, 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 **28th** day of **January, 2010** at **Makauru Village, Tseikuru Location, Tseikuru District** within **Eastern Province**, murdered **Daniel Marigu Kiryamutu** (deceased).

2. Facts of the case as presented by the Prosecution are that on the **28th January, 2010**, at about **6.00 p.m.** the Accused and other villagers including **Manthi Nyaga, Syengo Mbwana Nyaga Saa** and **Musembi Ngomo** were partaking traditional liquor at the home of **Musembi Ngomo**. In the course of drinking the Accused disagreed with PW1, **Syengo Mbwana**, a brother to the Deceased and assaulted him. His action prompted the Deceased to intervene. His act of protecting PW1 made the Accused turn against him. They fought and were separated by **Musembi**. The Accused uttered threats to the effect that he would kill either the Deceased or PW1 and left. PW1, the Deceased, **Nyaga Saa** and **Kimanthi Nyaga** left at about **8.00 p.m.** At about **9.00 p.m.** the Accused went to the home of the Deceased while armed with a bow and arrow and sought to know from his wife PW7 **Nginu Marigu** of his whereabouts. He stayed and waited of him. Thereafter they heard the Deceased singing as he approached his home. The Accused decided to go and meet him. A short while later PW7 heard the Deceased state that the Accused had shot him with an arrow. She ran to where the Deceased was and found him injured on the left leg. He was bleeding profusely. She called her son, PW4 **Mwangi Marigu** whom she sent to call PW1. They moved the Deceased to the house. The following day he died.

3. On the **4th February, 2010** a postmortem was conducted on the body of the Deceased by **Dr. William Odour**. He formed an opinion that the cause of death was cardio-respiratory arrest secondary to collapse of lungs.

4. When put on his defence, the Accused denied having murdered the Deceased, his cousin. He testified that on the **28th January, 2010** he found PW1's goats having trespassed onto his farm. He removed them and handed them over to his wife. Later on he went to **Musembi's** home to drink alcohol. He found PW1 there but not the Deceased. They disagreed over the trespass issue and he slapped him and other patrons/revelers ordered him to leave. He complied and went home. On reaching at the gate a person hit him from behind. Later **Nthiga** told him that he was hit by the Deceased but he did not see the Deceased hitting him. He went home and slept. The following morning the Deceased's child went to seek his assistance but he could not go immediately as his wife was away. He later went to his home and found

him injured. They carried him on a wheelbarrow but the Deceased died prior to being taken to hospital.

5. Further, he stated that when he left the place where they were drinking alcohol he was with **Peter Mukau** and **Nthiga Nyagah** and they walked until his home. He stayed with them until **11.30 p.m.** and he slept at home with his wife **Tabitha** only to be woken up in the morning by the child who was knocking the door. It was after his arrest that he heard of the allegation that he had murdered someone.

6. He called a witness, DW2, **Julius Maangi**, his son who stated that on **28th January, 2010** the Accused was at home with the Deceased, **Nthiga Nyaga** and **Peter Mungau**. They drunk alcohol until **11.00 p.m.** when the two (2) left the Accused went to sleep.

7. Issues to be determined are:

- Whether death occurred.
- Whether it was caused by the Accused.
- Whether the act committed was with malice aforethought.

8. The Deceased was found bleeding profusely. He died prior to being attended to by the Doctor. An autopsy carried out on his body revealed that indeed the Deceased died on the **28th January, 2010**. Therefore the fact of death was not in doubt.

9. The Deceased had been drinking alcohol at the home of **Musembi**. According to PW1 the last person that was left with the Deceased after the drinking spree was **Kimanthi**. PW2 **Kimanthi Nyaga's** evidence was silent on the issue of having been drinking with the Deceased or Accused and having been the last person with the Deceased. He only related how he was called by the son of the Deceased on the material date that he passed on.

10. None of the witnesses who testified saw the person who committed the act that resulted into the death of the Deceased. Evidence adduced against the Accused is therefore circumstantial in nature.

11. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal held that:

“1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

12. Evidence adduced by PW7 the wife of the Deceased was that prior to the Deceased being injured the Accused went in search of him at his house. The Accused and Deceased were cousins hence well known to the witness. She stated that there was moonlight which enabled her to recognize the Accused and they interacted. On being told that the Deceased was not at home he waited for him. He left on hearing the Deceased singing. He left going towards the direction the sound emanated from. According to PW7 he stated that it were better they met. A short while later according to the witness she heard the Deceased say:

“Muthee you have shot me with an arrow.”

The witness testified that the Accused was armed with a bow and arrow when he went to the home of the

Deceased. Thereafter the Deceased was found with an injury on the left leg but the Accused was not at the scene.

13. PW7 said he went with her son **Mwangi** (PW4) to where the Deceased was and sent him to call his uncles, PW1. PW4 stated that he was woken up by PW7 and sent to call PW1 whom he went with to where his father was.

14. Although PW7 said that the incident occurred at **9.00 p.m.** PW1 stated that he was woken up at **12.00 a.m.** by PW4 who told him that the Deceased had been shot with an arrow. He found the Deceased squatting and in pain. He was assisted by PW1 and PW4 to carry him to his house. Seemingly none of the witnesses sought to know from the Deceased whether he recognized his assailant.

15. PW2 the last person who was with the Deceased stated that he was called at **1.00 a.m.** by PW7 who told him that the Deceased had been shot with an arrow. He went to assist but they were not able to carry the Deceased. Therefore they sought the assistance of PW1. He was silent on whether the Accused was mentioned at all.

16. None of the witnesses found the arrow head embedded in the leg of the Deceased. PW9 **No. 58950 Corporal Mike Maganya** visited the scene and recovered some exhibits. Per his evidence he recovered an arrow that was subsequently marked 'IJ' from where the Deceased lay. It had blood stains. He formed the opinion that it was a murder weapon. On cross examination he said that the wife of the Deceased (PW7) told him that the Deceased pulled it out of his body. This particular arrow was subjected to examination at the Government Chemist. The blood stain on it matched the group sample of the blood of the Deceased. This was proof that it was the arrow that was used to hit the Deceased.

17. In his defence the Accused denied having been at the scene or near the scene of the incident. He stated that he disagreed with PW1 when he confronted him about his goats that trespassed onto his land and illegally grazed thereon. They had an altercation and other patrons asked him to leave. As he approached the gate to **Musembi's** home he was assaulted from behind. He did not see his assailant but **Nthiga** told him it was the Deceased. He went home and slept. At **7.00 a.m.** he was called to assist the Deceased by his son. Later he went to assist him. Prosecution witnesses confirmed that indeed he went to the home of the Deceased to assist in taking him to hospital the fateful morning.

18. PW9 also recovered a bow, arrows and a shirt from the house of the Accused. The shirt marked 'GH' that was recovered from the house of the Accused in the presence of the Accused had blood stains that were found by the Government Analyst to match the blood sample of the Deceased. the Analyst opined that the blood stains could have come from the Deceased after the injury.

19. In his evidence PW9 stated that he recovered a shirt the Accused had been wearing and had just removed. This was after his arrest. In his defence the Accused explained that he was one of the persons who carried the Deceased prior to his brother telling them that he had passed on. Therefore he came into contact with him.

20. at the cause of death, the Doctor who performed the postmortem found that the Deceased Sustained **0.5cm** tear on the left popliteal fossa. And, following the examination he conducted on the body he formed the opinion that the cause of death was cardio respiratory arrest secondary to collapse of lungs. The digestive system had darkening of the liver and the spleen was dark. This made the Doctor question whether it could have been a case of poisoning. On cross examination **Dr. Joseph Oduor** who produced the postmortem on behalf of **Dr. William Oduor** stated that the Doctor did not conclude as to what caused the Deceased's death.

21. The arrow, item IJ was analyzed by the Government Analyst and found to contain Quabine, arrow poison. The arrows that were recovered from the house of the Accused did not have the poison. It was admitted that in that area, ordinarily each household would have bows and arrows. There was nothing peculiar with arrows being found in the house of the Accused.

22. Although the Prosecution in an attempt to prove that the Accused had a motive to kill the Deceased having had an altercation with his brother whereafter the Deceased intervened an act that made the Accused utter threats which he may have fulfilled, medical evidence adduced falls short of proving the actual cause of the collapsed lungs.

23. In the premises circumstances that existed strongly weaken the kind of circumstantial evidence that was relied upon by the Prosecution. Consequently, there is no proof beyond reasonable doubt that the Accused caused the death of the Deceased. therefore, he is acquitted of the charge of murder.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of April, 2017.

L. N. MUTENDE

JUDGE