



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 45 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BENARD MWANGI NJOROGE.....ACCUSED

JUDGMENT

The accused **BERNARD MWANGI NJOROGE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 1st day of June, 2015 at Kivulini Area in Molo District within Nakuru County murdered MICHAEL MUNGAI”.

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced before me on 13/4/2016. The prosecution led by the learned State Counsel called a total of six (6) witnesses in support of their case. **MS KERUBO** learned Counsel appeared for the accused.

PW1 CECILIA MUTHONI was the mother of the deceased. She told the court that on 15/6/2015 the accused came to her home and called the deceased to go and assist him to cut napier grass. The accused and deceased left together. However the deceased did not return to his home that night **PW1** began to search for her son and also called other relatives to enquire if he had gone to their homes.

On 17/7/2015 **PW1** decided to go to ask the accused where her son was. She went to the home of the accused and found him there. Upon enquiring the whereabouts of the deceased the accused told her that after they had collected napier grass together he parted ways with the deceased in the evening.

PW2 EUNICE WAMBUI told the court that on 15/6/2015 she saw the accused and the deceased together on a motor cycle. She was later told that the deceased had gone missing. **PW2** was one of the neighbours who joined in the search for the deceased. They went to the farm where the napier grass was being cut. As they searched the area **PW2** noticed a body floating in the river. She raised the alarm and others came. They realized it was the body of the deceased which had a cut on the head.

The matter was reported to the police who came the next day and removed the body. Upon completion of police investigations the accused was arrested and charged.

Upon the close of the prosecution case the accused was found to have a case to answer and was placed

onto his defence. The accused gave a sworn defence in which he denied having any involvement in the death of the deceased.

This court must now analyse the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code of Kenya Cap 63 defines the offence of murder in the following terms

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

In order to prove the charge of murder the prosecution is required to adduce evidence sufficient to prove beyond reasonable doubt the following ingredients of that offence.

- (i) Proof of the fact as well as the cause of death of the deceased
- (ii) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused.
- (iii) Proof that said unlawful act or omission was committed with malice aforethought

In this case the fact of the death of the deceased is not in any doubt. **PW2** told the court that she is the one who spotted the body of the deceased floating in the river. **PW1** the mother of the deceased confirms his death. **PW5 MICHAEL KIHANYA**, the father of the deceased identified his son’s body to the pathologist. All these witnesses who knew the deceased well identified him as ‘**Michael Mungai**’.

During the course of this hearing the doctors in Kenya were on a nationwide strike. This court took judicial notice of the nationwide doctor’s strike. The investigating officer explained how his efforts to bond the doctor was in vain as no doctor was willing to appear in court to testify. For that reason although the doctor who conducted the autopsy did not give evidence the post-mortem report was produced by consent as an exhibit **P. exb 1**. This report clearly indicated that the cause of the deceased’s death was ‘**intracranial haemorrhage due to head injury sustained from a sharp object**’. The report is duly signed and bears the official stamp from Molo District Hospital which is a government facility. On this basis I do find that the accused died due to a head injury inflicted by some sharp object.

Having proved the fact as well as the cause of the death of the deceased, the prosecution must go further and tender evidence to prove that it was the accused who killed the deceased. Since there was no eyewitness to the events leading to the death of the deceased the prosecution sought to rely on circumstantial evidence to prove the guilt of the accused. Circumstantial evidence is that evidence which though not direct is sufficient to implicate an accused person in a given offence.

In **KARIUKI KARANJA Vs REPUBLIC [1986] KLR** the court held

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”.

Similarly in the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR** the court held that:-

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

- (i) ***The circumstances from which the 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 the 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”.

In this case there is no doubt that on 15/6/2015 the accused went and collected the deceased from his home. The accused requested the deceased to accompany him to cut napier grass. The deceased obliged and the two left together. **PW2** told the court that on that date she saw the accused and deceased aboard a motor bike. **PW3 FLORENCE MUTHONI** was the owner of the farm from which the two were to collect the napier grass. **PW3** confirmed to the court that on 15/6/2015 the accused came to her and requested for her panga to use in cutting the grass.

The accused in his defence concedes that he did indeed collect the deceased from his home on the material day and that he and the deceased went to cut napier grass. That was the last time the deceased was seen alive.

The fact that the deceased was last seen in the company of the accused is not sufficient proof that the deceased has a hand in the death of the deceased. The altitude of the prosecution appears to be that it is up to the accused to explain what happened to the deceased. This is an erroneous supposition. The law places the burden wholly on the prosecution to prove the guilt of the accused beyond reasonable doubt. At no time does the burden ever shift to require the accused to explain anything at all. The accused cannot be called upon to fill the gaps in the prosecution case. Thus it is upon the prosecution to prove that the deceased met his death as a direct consequences of an act or omission on the part of the accused. The accused has no duty at all to explain what could have happened to the deceased.

No witness saw the accused assault or attack the deceased in any manner whatsoever. Nobody knows who cut the deceased and nobody known's how his body ended up in the river.

The accused was seen with the deceased on 15/6/2015. The accused conceded that he and deceased did go to cut napier grass but in his defence the accused states that after cutting the napier grass, he loaded the grass onto his motor bike. He then rode back to his home leaving the deceased in the farm since he was not able to carry the deceased on the motor bike together with the napier grass.

At no time did the accused run away or abscond after the deceased went missing. The accused remained in his home. Indeed **PW1** the mother of the deceased told the court that when she went to enquire about the whereabouts of her son she found the accused in his home. The accused told **PW1** that he had parted with the deceased in the farm. This is exactly what the accused told the court in his defence. Thus the accused has at all times maintained the same story. His defence cannot be termed as an afterthought.

The defence given by the accused is feasible and there is nothing to discount his defence. There is no evidence of any possible reason or motive that would lead the accused to kill the deceased. The evidence from all the witnesses is that the two were friends. No doubt that is why accused sought out the deceased to help him in cutting the grass and the deceased willingly obliged.

As stated earlier in order for circumstantial evidence to prove the guilt of an accused that evidence must point exclusively at the accused alone as the perpetrator of the crime. Any other possible explanation must be excluded. If as stated by accused he left the accused in the farm, the possibility that some other person met the deceased there and attacked him had not been ruled out.

The prosecution made much of the fact that the panga which the accused borrowed from **PW3** was never returned to her. The court is being invited to assume that that panga was the murder weapon. The panga was ever recovered. The accused admitted that he did borrow a panga from **PW3** but states that he forgot

to return it to her. Again there is nothing to discount or discredit this defence. I wish to reiterate here that the law places no obligation on an accused person to explain or prove any fact. An accused is under no obligation to prove his innocence. In this case I find that the police adopted the all too common and **'lazy'** approach to investigations. They simply zero in on a suspect and do not bother to investigate any other angle. The evidence adduced certainly raises suspicion against the accused but as has been stated severally suspicion on its own is not sufficient to prove a charge of murder.

I find that the prosecution have failed to prove beyond reasonable doubt that it was the accused who killed the deceased. The possibility that a third party may have fatally assaulted the deceased has not been discounted. The defence raised by the deceased places a doubt on the prosecution case. The benefit of such doubt must be accorded to the accused. I therefore enter a verdict of **'Not Guilty'** and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 28th day of July, 2017.

Mr. Oumo holding brief for Kerubo

Mr. Motende for State

Maureen A. Odero

Judge