



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 39 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PETER KINYAMASYO ISIKA.....ACCUSED

J U D G M E N T

1. Peter Kinyamasyo Isika, 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 dates between the **14th** and **15th** day of **July, 2013** at **Yatta B2 Village, Kilawa Sub-location, Athi Location**, in **Ikutha District** within **Kitui County** murdered **Muthini Mwambu** (deceased).

2. Facts of the case are that on the **14th July, 2013** PW1 **Sila Nzoka** was at home when the Accused returned their family animals that he had gone to graze. Some ropes were missing therefore he was required to go and collect them. On **15th July, 2013**, at **7.45 a.m.** he went to the Accused's house to collect the same. When he knocked the door the Accused responded as if he were intoxicated. Ultimately he opened the door while stark naked. There was faecal matter all over the bed. At his feet was a bottle of Neocidol a drug used to control ectoparasites, bedbugs inclusive. Beside the bottle in the one roomed house was something covered with sacks. On observing he noticed a hand cut at the forearm. He lifted the gunny bag only to find the body of the Deceased. He ran out. The Accused asked him to either light fire and cook for him porridge or buy some milk for him. He gave him the keys to the house. He locked the door from outside and rang his (Accused's) father. He bought milk that the Accused drunk.

3. PW3 **Jones Isika Muasya** arrived and found the village elders having arrived. The police were notified. They found the Accused writhing in pain. They took possession of relevant exhibits, and arrested the Accused. They took the body of the Deceased to the mortuary. A postmortem was conducted by PW2 **Dr. Patrick Mutuku** who concluded that the cause of death was cardio-pulmonary collapse due to cardiac tamponade and left haemothorax. Hence this case.

4. When put on his defence, the Accused who gave sworn evidence stated that the Deceased was his girlfriend of **23 years**. They were friends before he got married and their friendship continued such that she used to visit him. He denied the allegation that the Deceased went to his house on the **14th – 15th July, 2013** night. It was his testimony that on the **13th July, 2013** some thieves invaded his home and demanded for money at about **1.00 a.m.** They threatened to kill him when he said that he had no money. They made him go outside. They took away his two (2) oxen. He reported the matter to the Assistant Chief **Monica Mwanzia** who promised to inform his father. On the **14th July, 2013** having not seen his father he reported the matter to the Village Elder, **Moses Ntete** who was going to his brother's funeral. He promised to take action on his return. As a result he decided to return the animals to his uncle, the

owner.

5. On the material date at **11.00 p.m.** while asleep, he was woken up by a knock on the door. He opened it to find six (6) people who demanded money from him. The Deceased emerged, she was with the thugs. Two (2) of them threatened her for taking them there for nothing. Two (2) of the people took her outside while four (4) of them remained with him inside the house. They had a soda bottle, one of them produced six (6) tablets. They ordered him to swallow the medicine. He lost consciousness and regained it on the **15th July, 2013**. The door was opened by Administration Police Officers who found him lying on the bed. He was lifted off the bed. He saw a gunny bag he knew nothing about. He was taken to the police station, **Mutomo**. Later he learnt from Police Officers that the gunny bag carried the body of the Deceased. He was in custody for sixteen (16) days. He was charged after he failed to raise **Fifty Thousand Shillings** that was demanded by the police. He denied having any knowledge of the bottle and knife that were produced in Court in evidence but admitted owning the pair of trousers and T-shirt that were adduced in evidence.

6. At the close of the defence case written submissions were filed that I have duly considered.

7. Per the information presented the Accused committed the offence of murder. The offence is provided for in **Section 203** of the **Penal Code** that provides thus:

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

8. Therefore issues to be determined are:

- Whether death occurred.
- Whether it was caused by an unlawful act or omission and by the Accused.
- Whether he acted with malice aforethought.

9. The fact of death of the Deceased is not in dispute. By the time PW1 arrived at the home of the Accused the Deceased had succumbed to injuries she sustained. PW6 **Wilson Mutunga Kioma** the brother-in-law of the Deceased identified her body to the Doctor who performed the postmortem. PW2 **Dr. Mutuku** who performed the postmortem found that the body had multiple stab wounds. He formed the opinion that the cause of death was cardiac temponade. As a result of the blood that built up in the space between the heart muscle and outer covering sac of the heart, it could not function hence the death. This was proof of the fact of death.

10. PW5 **Esther Malinda Mwamba**, the daughter of the Deceased parted ways with her at **3.00 p.m.** on the **14th July, 2013**. She told her that she was going to see the Accused. She did not know if they were lovers. The following morning her body was found inside the house of the Deceased. Nobody saw the Accused committing the act/omission that resulted into her death therefore evidence against him is circumstantial.

11. In the cited case of **Teper vs. Republic (1) (1952) AC 480 at 489** the Court stated that:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.”

12. 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 innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

2. Circumstantial evidence can the 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.”

13. PW1 was the first person to go to the Accused’s house. He found him having vomited and defecated on himself. He was so weak such that he could not express himself appropriately. His father, PW3 **Jones Isika Muasya** who went to the scene after being notified by PW1 confirmed that fact. PW8 **No. 69408 P C Benjamin Maundu** could hardly get any information from him as he was writhing in pain. A bottle of Neocidol was recovered on the floor of the house but it was not subjected to forensic examination. Similarly the faecal matter stated to have been found all over on the bed inclusive was not subjected to forensic examination.

14. However, PW1 saw a kitchen knife being recovered from the house. PW5 also saw the police recovering the knife from a basket popularly known as ‘Kiondo’ that was hanging on the wall. Both witnesses stated that the knife was stained with blood. An examination was done at the Government Chemist. The DNA Profile generated from the blood stains on the knife matched the DNA Profile generated from the blood sample indicated as of the Deceased. This was proof beyond doubt that the knife was the murder weapon.

15. In his defence the Accused denied having committed the act that resulted into the death of the Deceased. He stated that people invaded his home and forced him to take some drugs. He became unconscious therefore could not tell what happened. PW5 was categorical that the Deceased told her and her siblings that she was going to see the Accused as she had missed his three (3) calls. There was a relationship between the Accused and the Deceased. She used to go to his home allegedly taking shoes for repair. She parted ways with her children, PW5 inclusive at about **3.00 p.m.** while going to the home of the Accused.

16. When PW1 called out, the door was subsequently opened by the Accused. The door was not broken down. He used keys to open the door which he later handed over to PW1. Per his evidence persons who invaded his home were after animals. In the day he had taken two (2) oxen that he kept for PW1’s father to PW1 stating that they had been stolen but were recovered. On the fateful night there were no oxen at his home. The fact that he did open the door is evidence that he consciously locked the door.

17. At the point of seeing PW1 he alluded to a person and medicine/drug. A person (Deceased) was found in the house dead, PW1 stated that after he mentioned ‘dawa’ that is when he checked and saw a bottle of Neocidal that had no lid and was on the floor.

18. Having locked the door and opened it when PW1 called out is evidence that whatever transpired inside the house was committed by a person who was inside the house. PW3, his father stated that he was living alone at the homestead. Therefore circumstances that prevailed point at the Accused and no other person as the one who committed the act that resulted into the death of the Deceased.

19. This brings us to the issue whether he committed the act with malice aforethought. **Section 206** of the **Criminal Procedure Code** provides thus:

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused

or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a

felony.”

20. On examination the body had two (2) stab wounds that were penetrating on both sides of the neck. Two (2) stab wounds on the posterior side of the left chest. Two (2) stab wounds on the back involving both loins. Two (2) stab wounds on the left side of the back. Two (2) cut wounds on the right forearm near the elbow. As a result of the twelve wounds that were afflicted externally the left lung got punctured. The aorta was injured and the right lobe of the liver was also punctured.

21. These were severe injuries that amounted to grievous harm. Therefore, the Accused acted with the intention to either cause death that ultimately resulted or at least do grievous harm to the Deceased. In the premises he acted with malice aforethought.

22. In the result, I find the Prosecution having proved the case against the Accused beyond any reasonable doubt. He is guilty and I convict him accordingly.

23. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of July, 2017.

L. N. MUTENDE

JUDGE