



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 16 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWASYA MBUGI.....ACCUSED

J U D G M E N T

1. **David Mwasya Mbungi**, 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 **26th day of June, 2015** at **Makotoni Village, Mbarani Sub-location of Kyuso Sub-county** within **Kitui County** he murdered **Mary Kakunyi Mbungi** (Deceased).

2. Facts of the case are that PW1 **David Munyoki** and PW2 **Esther Mbaadi** were on the farm next to their homestead on the **26th June, 2015** at about **6.00 p.m.** when they heard noise. They identified voices of people who were arguing to be for the Accused (PW1's maternal uncle) and that of the Deceased, his grandmother and the Accused's mother. They heard the Accused state that the other person's witchcraft would end on that particular day. All over a sudden they heard the Deceased screaming then the screams went faint. PW1 ran to the scene of the incident to find the Deceased having fallen down while the Accused was walking away armed with a panga. He chased after him but he ran and disappeared into the thicket. They reported the matter to PW3, **Joel Muthui Maanzi** the area Chief. He reported the matter to the police and continued searching for the Accused. Amongst the persons who went in search of the Accused was his stepbrother, PW5, **Kavine Musungi**. They found him at **Kanyo**. He was arrested by members of public and handed over to the police. He was found in possession of his personal effects and a panga. PW6 **Dr. Charles Matheka** conducted an autopsy on the body of the Deceased and concluded that the cause of death was haemorrhage and intracranial haemorrhage due to multiple cuts on the head. The Accused was charged as a result.

3. When put on his defence, the Accused who gave sworn evidence stated that on the material date he woke up and left his mother, the Deceased at home as he went to the trading centre. He returned home at **3.00 p.m.** and left for **Kanzike Village** where he was constructing a house as his house had burnt down. The following day he woke up and went to **Kyuo**. Thereafter he left going to see his friend **Njeru Mwiti** who had promised to get him a job. He was found at **Njeru's** home and arrested by some four (4) individuals. He was accused of killing his mother. He was taken to the shopping centre where he found the police, his area Chief and stepbrother. He was taken to **Kyuso Police Station** and subsequently charged with the offence.

4. At the close of the defence case Counsel for Accused **Mr. D. M. Mutinda** opted not to submit.

5. This being a case of murder the Prosecution was duty bound to prove:

- 1) The fact of death of the Deceased.
- 2) That the death was caused as a result of an unlawful act or omission committed by the Accused.
- 3) And that the act/omission was committed with malice aforethought.

6. The body of the Deceased was identified to the Doctor who performed the postmortem by PW5 his stepson. PW6 performed the postmortem on the body and issued a Death Certificate **No. 220956**. The Deceased had multiple cuts on the head. The cause of death was haemorrhage and intracranial haemorrhage. This was proof of the fact of death.

7. The Accused was not seen committing the act that resulted into the death of the Deceased. Therefore evidence against him is circumstantial in nature. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal stated that:

“(i) 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 his guilt. ...

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

(iii) 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. The burden always remains with the prosecution and never shifts to the Accused.”

8. When PW1 and PW2 heard people arguing they were not in a position to see them. It was therefore a case of voice identification. In the case of **Chege vs. Republic (1985) KLR 1**, the Court of Appeal held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant’s voice and recognized it and that the conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it. This was also stated in the case of **Karani vs. Republic (1985) KLR 290**.

9. PW1 is a nephew to the Accused. He has lived with him all his life. PW2 is also a relative of the Accused, married to PW1. These were people who were familiar with the voice of the Accused. Both of them were categorical that they heard him say that:

“Your witchcraft will end today.”

Soon after the utterance was made there were screams. The voice was recognized to be for the Deceased. When PW1 reached the scene of the incident he saw the Accused and confirmed that indeed he was present at the scene. When PW2 heard the argument, she was approximately **thirty (30) meters** away. It happened in broad daylight when people’s minds were alert. Therefore circumstances that prevailed enabled PW1 and PW2 recognize the voice of the Accused.

10. PW1 found the Deceased having been injured. She lay on the ground. Although he did not see the Accused cutting the Deceased he was walking away armed with a panga. He attempted to chase after him but he escaped. He moved away from **Kyuso in Kitui County** and went towards **Embu**. Investigations carried out led the police to **Kamikui area**. He was found in possession of a panga that PW1 identified as the one he carried when he ran off.

11. In his defence he stated that he went to visit his friend who had promised to find him a job. But he was silent on the issue of having left after he ran away from PW1. In the case of **Roba Galma Wario vs. Republic (2015) eKLR** where the Court of Appeal noted that the Appellant ran away after the incident occurred, it was stated that the conduct of the Appellant was indicative of the fact that he was conscious of what he was doing and that what he had done was wrong.

12. PW1 saw the Accused walking away and when he called him he refused to respond. This action was followed by the act of running away only to be arrested far away from his home. He was placed at the scene of crime. He is the person who was heard threatening to put an end to the Deceased’s alleged witchcraft, an act that came to fruition. Evidence on record adduced by the Prosecution clearly points at the Accused as the person who fatally assaulted and injured the Deceased. The Defence put up did not weaken the Prosecution’s evidence. Therefore, I find that it was the Accused who committed the act that resulted into the death of the Deceased.

13. This brings us to the issue whether he acted of malice aforethought. Malice aforethought is defined in **Section 206** of the **Criminal Procedure Code** thus:

“Malice aforethought shall be deemed to be established by evidence proving any one 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.”

14. There was bad blood between the Accused and Deceased. He was the only son of the Deceased but they differed in opinion over land. PW3 their area Chief presided over their cases. It was his opinion that they had wrangles. Previously, the Accused assaulted the Deceased. The genesis of their differences was land. The Accused opposed the idea of the Deceased leasing out land. He referred the matter to their clan. The elders guided them but the Accused was still aggrieved.

15. From this evidence that was unchallenged there was an unresolved problem between the two. Although the Accused was heard uttering words that suggested that he was disgruntled in his defence he denied having been with his mother when she met her death.

16. Looking at the injuries the Deceased sustained, she had multiple cut wounds on the head. There was a cut on the sagittal plane with the skull fracture; cut wound on the left parietal region above the left ear with the skull fracture; cut wound on the left supra orbital region. Lacerations on the left forearm distal. By occasioning these serious cuts on the head of the Deceased the Accused intended to cause her

death or at least grievous harm. These means that he acted with malice aforethought.

17. Having considered evidence adduced, I find the Prosecution having proved the case against the Accused beyond reasonable doubt. He is guilty and I convict him of the offence of murder as charged.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE

JUDGE