



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 51 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILLIAM KOECH.....ACCUSED**

**JUDGEMENT**

The accused **WILLIAM KOECH** 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 1<sup>st</sup> day of May 2013 at Kamukunji Solai in Rongai District murdered ALBERT AJAYE UKUVI alias MBURA MBURA”***

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 13/12/2016. The prosecution called a total of five (5) witnesses in support of the charge.

**PW1 ESTHER TAPRANDICH** was the sister to the accused and girlfriend to the deceased. The accused lived with **PW1** in her home in Kamukunji Village. The witness told the court that on 15/5/2013 she prepared lunch and then she took the meal together with the accused and the deceased. After the meal **PW1** left to go to the shops. She heard a commotion from her home and rushed back. **PW1** found the deceased lying dead at the door. He was bleeding from a wound to the back of his head **PW1** says she asked the accused why he had hit the deceased whereupon the accused jumped on her and began to strangle her. **PW1** shouted for help and neighbours came. The matter was reported to police.

**PW2 SIMON MWANGI** was the Assistant Chief of Solai Division. He told the court that on 15/2/2013 at 5.00pm one ‘**Sarah Maina**’ phoned to inform him of a fight in Kamukunji Village. **PW2** went to the scene and found the body of the deceased lying on the ground. He phoned police to alert them of the incident.

Later **PW2** and other villagers began to search for the accused. They found the accused inside the Bomet River having thrown himself into the river to escape detection. The accused was fished out of the river and was then taken to the police station. He was eventually charged with murder.

At 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 killed the deceased. The court must now analyse the evidence on record to determine whether this charge of murder has been proved beyond reasonable doubt as required in law.

Section 203 of the Penal Code, Cap 63, Laws of Kenya defined the offence of murder thus

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

In this case the fact of the death of the deceased is not in any doubt. **PW1** who was a girlfriend to the deceased told the court that she saw his body lying dead at her door **PW3 JOHN MUDAVE** was a nephew to the deceased. He told the court that he went to the mortuary where he identified the body of deceased to the doctor. Both witnesses who knew the deceased well identify him as ‘**Gilbert Anjenga**’

**PW5 DR. TITUS NGULUNGU** was the pathologist who conducted the autopsy on the body of the deceased. **PW5** told the court that he noted that the deceased had sustained a skull fracture as well as lacerations and bruises on the head. The doctor opined that the cause of death was ‘**severe head injury attended by skull fracture, brain contusion and lacerations with severe haematoma caused by blunt force trauma to the head in keeping with homicide**’. This was expert medical opinion evidence and was not challenged nor controverted by the

defence. I therefore find that the fact as well as the cause of death of the deceased have been proved beyond reasonable doubt.

Having proved the fact and cause of death, the prosecution is required to go further and tender evidence to prove that it was the accused who hit the deceased on the head and caused his death.

There was no eyewitness to the events leading to the death of the deceased. **PW1** did not witness any fight between the two men. She only stated that she heard a commotion which caused her to return to her house only to find the deceased lying dead at the door. Suspicion immediately fell upon the accused because **PW1** said that she left the deceased alone in the house with the accused.

The prosecution thus seeks to rely on circumstantial evidence in order to implicate the accused in this murder. In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009]eKLR** the Court of Appeal 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”.***

As stated earlier in this case nobody saw the accused hit the deceased on the head or at all. All the witness can state is that she left the accused and deceased together in the house when she left to the shops. **PW1** has no way of knowing whether a third person or persons went to her house after she left. In her evidence **PW1** says

***“I did not witness the assault on the deceased.....”***

Under cross-examination **PW1** reiterates

***“I cannot tell who hit the deceased.....”***

Likewise **PW2** who was the village chief did not witness the assault on the deceased.

**PW2** told the court that one ‘Sarah Maina’ phoned him and told him that people were fighting. Presumably this ‘Sarah Maina’ was at the scene and was witnessing the fight. This person was not called as a witness to testify firstly to what she had seen and secondly to confirm who the persons fighting were. She was a crucial witness and her failure to testify greatly weakens the prosecution case.

**PW4 CORPORAL BENARD KOECH** was the investigating officer. He told the court that he visited the scene and collected a blood stained fork jembe. I note that this exhibit was not shown to **PW1** for purposes of identification which was an omission on the part of the prosecution. **PW4** told the court that he took this fork jembe together with a sample of the deceased’s blood to the government chemist for analysis. The government chemist did not testify in this case thus the results of any analysis done on the exhibit were not submitted to this court. This again is a serious omission by the prosecution. A fork jembe is a common farming tool and is to be found in virtually every rural home in Kenya. There is no proof that this fork jembe was the weapon used to inflict the fatal injury on the deceased.

In his defence the accused denied having attacked and fatally injured the deceased. The accused pleaded that he is a disabled man and could not have had the strength to tackle and overpower the deceased. The accused told the court that he sustained the injuries resulting to the disability in the year 2002. From that time his sister **PW1** invited the accused to live with her in her home, so that he could be properly cared for. I was able to see and note the condition of the accused who was before me in court. He was indeed disabled and has to use two crutches to move about. I saw that the accused’s left leg is amputated just below the knee. I also noted that the accused’s right hand is withered and accused told the court that he is not able to hold anything with that hand. I find it difficult to conceive how the accused in his current state could have lifted a heavy object to hit the deceased with. It is also difficult to conceive how accused could have run to the river and thrown himself into the water. Without his crutches it is unlikely that the accused would have been able to move at all.

Certainly the fact that the accused was the last person known to be with the deceased before he met his death, raises a suspicion that the accused may have been involved in the crime. However it is well and settled law that suspicion no matter how strong cannot form the basis for a conviction (see **SAWE Vs REPUBLIC [1989] KLR**. This court harbours real doubt as to whether it was accused who fatally attacked the deceased. Legally such doubt must be settled in favour of the accused. I find that the actus reus for murder has not been proved beyond reasonable doubt. I therefore 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 3<sup>rd</sup> day of August, 2017.**

Ms Kerubo for accused

**MAUREEN A. ODERO**

**JUDGE**