



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL CASE NO. 72 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

PATRICK MUNDIA MUIRU.....ACCUSED

JUDGMENT

BACKGROUND AND INTRODUCTION

1. The accused **PATRICK MUNDIA MUIRU** was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 27th day of April, 2009 at Kangoo village, Thika District within the then Central Province murdered **JOSEPH MUNDIA MUIRU**.

2. He first appeared before Lesiit J on 16th September, 2010 when his plea was deferred to 23rd September, 2010 when he pleaded not guilty to the charges and a plea of not guilty entered and the accused remanded in custody. On 4th October, 2011 his trial commenced before N.R.O Ombija, J (as he then was) who took the evidence of all six (6) prosecution witnesses and put the accused on his defence and called for final submissions which were fixed for 17th December, 2015 and adjourned to 10th March, 2016 but the trial judge retired from the Judiciary before the said date.

3. On 27th April, 2016 Justice Lesiit ordered that the proceedings be typed and on 18th May, 2016 Kimaru J after complying with Section 200 of Criminal Procedure Code fixed the matter for highlighting of submissions for 22nd June, 2016 on which date the accused sought for one month to enable him go through the proceedings before the final submissions are made and the same was fixed for 26th July, 2016 at which the accused stated that he had rejected his Advocate then on record and requested for a new one and on 15th September, 2016 Mr. Wamwayi came on record for the accused person.

4. On 5th October, 2016 Mr. Wamwayi informed the court that he had instructions for the matter to start de novo on the basis that he did not take part in the trial and that Mr. Njau who then represented the accused was not appointed by him. The court (Lesiit, J) then directed the accused to file a formal application and on 26th October, 2016 the matter was placed before me. On 19th January, 2017 the said application was heard and in a ruling dated 7th February, 2017 the same was dismissed and matter fixed for highlighting of submissions for 28th February, 2017.

5. On 3rd May, 2017 the accused filed an application for Review of the ruling on the application for the

matter to start de novo and sought an alternative prayer that the Defence be allowed to reopen their defence and call as a witness one **JOHN KAMAU** which application was allowed and on 9th October, 2017 the said witness testified before me as DW2 and final submissions thereon heard on 15th November, 2017.

6. For record purposes it must be stated that I did not have the advantage of hearing any witnesses in this matter save for DW2 and the final submissions herein as reflected in the history of this matter. The same was exclusively heard by Justice Ombija (as he then was) and directions thereon issued by Kimaru J. I have however read and analyzed the recorded evidence for purposes of this judgment as required under the provisions of Section 200 (1) (b) and 201 (2) of CPC.

PROSECUTION CASE

7. **PW1 TN** a minor aged 15 years at the time testified that on 27th April, 2009 at about 8.30 p.m. the accused who is her step brother came into their kitchen and said that he had left some of his things at the cemetery where his mother was buried and wanted the deceased and PW3 their mother to assist him pick them up. The accused proceeded with the deceased but later on came back alone and when told that PW3 had gone to talk to their father the accused took off. It was her evidence that they searched for the deceased until 30th April, 2009 when his body was found inside the family borehole.

8. **PW3 CHRISTINE WANJIKU MUIRU** corroborated the evidence of PW1 and stated that she accompanied the deceased and the accused and on the way the accused suggested that they go for a gunny bag so the accused proceeded with the deceased while she went back to the kitchen to prepare supper. After fifteen minutes the accused and the deceased did not come back so they started the search for them. The following day they went to the accused place of work and were informed that he had asked for two days off to go to Ruiru and had been paid part salary. She proceeded to Gatundu police station but did not find the accused and the deceased at the cell. On 30th April, 2009 the body of the deceased was found in the family borehole.

9. **PW2 JOHN WAINAINA KABUBI** stated that on 28th April, 2009 he received a report of the disappearance of the deceased and went to their home where the father of the deceased briefed him and while the father went to Naivasha where the accused had allegedly been seen he mobilized the search of the deceased starting from the borehole where the body was found with several cuts on the head.

10. **PW4 DANIEL NDACHA NGAYAYI SOMBA** conducted post mortem examination on the body of the deceased on 8th May, 2009 at Gatundu district Hospital which had a deep cut on the face, two cuts on the occipital area, two cuts on the frontal area and cut on the left big toe. Internally there was blood on the chest, liver had lacerations and gall bladder has ruptured. There was subluxation of the atlas and the axis with bone dislocation. He formed opinion that the cause of death was cardio-respiratory failure due to external and internal bleeding. The cuts were caused by sharp object while the chest injuries were caused by blunt object.

11. **PW5 PC CHRIS MANDA** on 30th April, 2009 proceeded to the scene of crime and observed the body of the deceased. He commenced investigations and subsequently arrested the accused at Kiandutu village Thika and that nobody told him that there was a grudge between the mother of the deceased and the accused. **PW6 LILIAN MWAURA** confirmed that the accused was fit to stand trial.

DEFENCE CASE

12. **DW1 PATRICK MUNDIA MUIRU** stated that he had been living in Naivasha from 2005 – 2008. On 27th April, 2009 he left Naivasha for Gatundu to take some food to his family reaching there at 8.30 a.m. and found his step mother PW3 and step sister PW1 together with I.N.M and the deceased. He went with them to the shopping centre to buy some sugar and the deceased told him that he was very annoyed with his mother who did not give him money for circumcison and he promised to give him money in April. They proceeded to see their grandmother together with the deceased who later on escorted him to

the road where he was supposed to take a vehicle to Naivasha and that it had rained on that day. He woke up in Naivasha on 28th April, 2009 and was sent to Voi district for 1 year and 8 months as a store man until 30th September, 2010 when he was given leave to go home but decided to go to Thika from where he was arrested. He denied committing the offence.

13. DW2 JOHN KAMAU MUIRU stated that on 27th April, 2009 he was living at Nyamagara where he had a business one kilometer away from home while the accused was living in Naivasha where he was living in their father's plot while working at a quarry and that on the said date the accused was in Naivasha. He stated that though he removed the body from the borehole there is nobody who knows how the deceased died. He stated that on 27th April, 2009 the deceased was living with their father at home and that he accused was working in Naivasha.

SUBMISSIONS

14. On behalf of the prosecution it was submitted that the accused in the defence confirmed that he was the last person to be seen in the company of the deceased and that his defence was untruthful because of his inconsistency as to where he went after the incident and how he was arrested. It was submitted that the accused defence was an afterthought as he never cross examined the prosecution witnesses on the allegation of the anger of the deceased against his mother. It was submitted that the accused left immediately after the incident and therefore his conduct can be deemed to be that of a guilty person.

15. On behalf of the accused it was submitted that the prosecution failed to call very crucial witnesses without giving reasons behind it. This included the employer of the accused. It was submitted that there was a possibility of the deceased having fell into the borehole on his own motion the accused having given an account on how they parted way with the deceased. It was submitted that the evidence of PW1 was not consistent with PW3 and that DW2 stated that he knew where the accused was working and could not be said to had disappeared and that there is no evidence that the accused deposited the body in the borehole and should be given the benefit of doubt.

ANALYSIS AND DETERMINATION

16. To sustain a conviction on the charge of murder the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:-

a) The fact and cause of death

b) That the said death was caused by unlawful act or omission or commission on the part of the accused person.

c) That the said unlawful act of omission or commission was caused by malice aforethought.

17. The fact and the cause of death of the deceased was proved beyond any reasonable doubt by the evidence of PW1, PW2, PW3 and PW5 all who witnessed the body of the deceased being retrieved from the borehole by **DW1 JOHN KAMAU**. The cause of the said death was established by the evidence of **PW4 DANIEL NDACHA NGAYAYI SOMBA** who performed post mortem examination and confirmed the cause of death as cardio-respiratory failure due to external and internal bleeding.

18. On whether the said death was caused by unlawful act of omission or commission on the part of the accused, the prosecution evidence against the same is purely circumstantial. Nobody witnessed the accused kill or throw the deceased in the family borehole. The circumstances where a court may convict on circumstantial evidence was stated in the case of **REPUBLIC v KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135** as by the Court of Appeal as follows:-

“In order to justify 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

19. In the case of **ABANGA alias ONYANGO v REPUBLIC CR APP. NO. 32 OF 1990 UR** the Court of Appeal set up the principles which must be met as follows:-

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

i) The circumstances from which an 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 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 possibility the crime was committed by the accused and none else.”

20. The accused was the last person to had been seen with the deceased on 27th April, 2009. This was confirmed by PW1 and PW3 and the accused in his defence stated that he was with the deceased when the same allegedly took him to the road side where he was supposed to take a vehicle to Naivasha. PW1 and PW3 confirmed that the accused was at home on the material date at 8.30 p.m. and that the accused who had left earlier with the deceased came back at 9.00 without the deceased and when PW1 told him that PW3 had gone to call their father he took off. It is worth noting that the accused had taken two days off from his place of work and thereafter took all his belonging and left Mangu where he was residing at that time.

21. I have taken into account the conduct of the accused person who immediately left the area and did not come back even when his father died as per the evidence of PW2 and agree with the submissions of the prosecution that the conduct of the accused persons herein pointed to that of a guilty mind and that the accused defence herein taken against the prosecution witnesses cannot be said to be convincing and or trustworthy.

22. The only people who were with the deceased at home on the material day were the sister PW1, mother PW3 and L. N who were in the kitchen and their father who was in the house of the accused deceased mother when the accused came and went away with the deceased. The only evidence tendered which stands unchallenged is that the accused was left with the deceased by PW3 and therefore the accused evidence that they thereafter went to the shop is but an afterthought. The accused brother DW2 John Kamau confirmed that he was not at home when the accused came visiting and had not seen the same for some time and therefore dismiss his account that the accused was in Naivasha and could have been traced taken against PW2's evidence.

23. There is no evidence tendered to support the accused's submissions that the deceased might have fallen into the family borehole as the evidence on record shows that the same was never sent to the borehole on the said date but left with the accused to go and collect the accused items and was never seen again until his lifeless body was retrieved by DW2 from the said borehole.

24. I am therefore satisfied and find that the circumstantial evidence tendered herein urgently and firmly points to the guilt of the accused persons herein and find that the death of the accused was caused by unlawful act of omission or commission on the part of the accused person.

25. On whether the said death was caused by malice aforethought on the part of the accused person whereas the prosecution hasn't established any motive which might have led the accused to cause the death of the deceased, malice aforethought is defined as follows:-

S. 206. "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 whet her that person is the person actually killed or not.

b) Knowledge that the act or omission causing death will probably cause the death or a grievous harm to some person, whet her 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 intention 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."

26. I have taken into account the post mortem report which indicated that the deceased had physical injuries and further the fact that the body was thereafter found in the family borehole and find that the accused had the necessary malice aforethought in causing the death of the deceased and indeed the same succeeded in causing the said death.

27. It must be said for record purposes that failure to call the accused former employer Mama Ciku was not fatal to the prosecution case as the accused did not deny having been employed by the said Mama Ciku and neither did the same challenge that evidence by way of cross examination. I have further taken into account the accused contention that the deceased was not happy with the mother for not giving him money for circumcision and find this a mere allegation and an afterthought which I hereby dismiss.

28. Having taken into account the totality of the prosecution evidence and the accused defence I find and hold that the prosecution has proved beyond any reasonable doubt the charge of murder against the accused person contrary to **Section 203** of the **Penal Code** and hereby find the same guilty and convict the same accordingly and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 11th day of December, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Wamwayi for the accused

Accused present

Court clerk Tabitha