



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 33 OF 2011

REPUBLICPROSECUTOR

VERSUS

ANTHONY MUTINDA WAMBUA.....1ST ACCUSED

RICHARD MUTINDA MUTUA.....2ND ACCUSED

JUDGMENT

On 17th May 2011, Fredrick Mumo Nzuki (PW1) was on his way home at 1.00 am from his bar at Kalulunani Market, in the company of Ndunda Evans and Kyalo Ndile. They were riding on Kyalo’s motorbike, and on the way they found a motor vehicle on the road, and a person tied to an electric pole next to the said motor vehicle. They recognized the person tied to the electric phone as the son of the owner of the motor vehicle, and upon reaching Ndunda’s house, called relatives of the said owner of the motor vehicle known as Wambua. They then decided to go back to the scene, and found that the person who was tied to the electric pole was able to talk.

Among the people who received telephone calls that night about this incident were Boniface Musyoka Nthenge(PW2), Benard Kyalo Nzioka (PW4), Joseph Mumo(PW7) and Jackson Kasyoka Mutua (PW8). They all testified that they went to the scene and indeed found the person tied to the electric pole.

The person who was tied to the electric pole was Anthony Mutinda, the 1st Accused person. Upon being queried by the above stated witnesses, the 1st Accused told the witnesses that he had been driving home to Kathiani with his father, when a vehicle blocked their way, and two people came out of the said vehicle, removed his father from their car, cut him in the head, put him in their vehicle and drove with him towards Machakos town. He also stated that the said people are also the ones who tied him to the post and that they also hit him on his abdomen. The witnesses observed that the 1st Accused shirt was bloodstained, and he informed them that the blood was his father’s and his shirt was stained when he tried to hold his father to rescue him from the attackers.

The father of the 1st Accused, Wambua Nthenge (hereinafter referred to as “the deceased”) was later found dead a short distance from where the 1st Accused was found tied to a pole. The above stated witnesses testified to being called with this news, and that they went to view the body of the deceased. The report of the deceased’s death was received by PC Benard Onjula (PW9) at Machakos Police Station, and he went to the Machakos –Kathiani Road where he found the deceased who had a head injury. He also recovered a blood stained shirt that was dropped near a fence within Kathiani market, which he stated had been worn by the 1st Accused before he removed it and threw it away.

Anthony Mutinda Wambua and Richard Mutinda Mutua (the 1st and 2nd Accused persons respectively), were subsequently charged with murder contrary to section 203 as read with Section 204 of the Penal Code. According to the information filed in Court on 19th May 2011 by the Director of Public Prosecutions, it was alleged that on 16th May 2011 at Kiuma village of Kaliluni Sub-location, Iveti Location, within Kathiani District of Machakos County, they jointly with others not before the Court murdered Amos Wambua Nthenge. The 1st and 2nd Accused pleaded not guilty to the offence.

The hearing of the trial commenced before Hon. Mutende J. on 17th January 2013, and the learned Judge heard all the eight prosecution witnesses. On 19th May 2015, the learned judge delivered a ruling wherein she found that there was no evidence adduced as against the 2nd Accused, who therefore had no case to answer, and acquitted him. The 1st Accused was on the other hand found to have a case to answer and he was put on his defence. The learned Judge heard the Defence case, and gave directions as to filing of the final submissions. I took over the hearing of this case on 24th May 2016, after the transfer of Mutende J., and complied with the provisions of section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya). The 1st Accused person indicated in this regard that he would like to proceed from where the case stopped.

The learned counsel for the Accused, Mutua Makau Advocates, filed final written submissions dated 7th December 2015, while Ms. Rita Rono, the learned Prosecution Counsel, relied on the record.

I have read the original record of the trial as well as the typed proceedings of the same, and submissions made by the 1st Accused person that are on record. I am mindful that section 203 of the Penal Code defines the offence of murder as follows:

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

Therefore in order to establish and to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Evidence of the fact and cause of the death of the deceased.
- b. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
- c. Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- ii. 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.
- iii. Intent to commit a felony.
- iv. 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.

In the present case, as to the first ingredient of required to prove murder, PW2, PW6, PW7, PW8 and PW10 testified that after receiving the news of the deceased's death, they went to the scene and saw the deceased's body on the morning of 17th May 2011 on the Machakos-Kathiani Road. John Mutuku Nthenge, the deceased's younger brother identified the body of the deceased during the post-mortem

undertaken by Dr. Fredrick Okinyi (PW5), a pathologist at Machakos Level 5 Hospital. PW5 in this respect found the cause of death to be a head injury leading to hemorrhagic shock and increased intracranial pressure from blunt trauma. The fact and cause of death of the deceased are therefore not disputed and was proved by the prosecution.

As to the second ingredient as to whether the Accused is the one who caused the deceased's death by an unlawful act, the learned counsel for the 1st Accused submitted that the prosecution relied on circumstantial evidence, and did not carry out any investigations as to who or what caused the death of the deceased, including following up on the leads as to the vehicle the 1st Accused reported they had met on the road. Further, that none of the witnesses saw the accused commit the offence and all their testimonies amounted to hearsay, speculation and mere suspicion.

Reliance was placed on the decisions in **Kipkering Arap Koske & Another v R, [1949] EACA 135** and **R vs John Gichunge Mutie (2013) e KLR**, for the position that the prosecution had not proved the tests required to rely on circumstantial evidence, and that the evidence in this case was incomplete to form the conclusion that it is the 1st Accused who committed the murder.

It is indeed the position that none of the prosecution witnesses testified as to seeing the deceased die, or as to the time of his death. None of the witnesses also saw the 1st Accused cause the injuries observed on the deceased, nor was the murder weapon recovered. The only evidence on record was that the 1st Accused was found tied to an electricity pole near the place where the deceased was later found dead. The 1st Accused was suspected of having caused the death of the deceased by reason of having been with the deceased on the night of his death, having been tied to a post near where the deceased body was found, and also by the evidence that he was seen wearing a bloodstained shirt which was later found to have been thrown away.

As this is a case founded on circumstantial evidence, this court is guided by the dictum laid down in **Kipkering Arap Koske & Another v R, [1949] EACA 135**, the Court of Appeal for Eastern Africa had laid it down:-

“That in order to justify, on the 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 and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused”

It was also held in **R vs Chelestino Kago Nguku, (2013) e KLR** and **Sawe vs Republic (2003) KLR 364** that suspicion however strong, cannot infer guilt which must be proved beyond reasonable doubt.

In the present case I find that the 1st Accused provided an explanation in his testimony as to how he was tied to the electricity pole, and what caused the deceased death, which was that he and the deceased were attacked during a robbery and he lost consciousness, and when he came to he was tied to the pole with wires and a rope. Makau Matheka who was PW6 and a neighbour of the 1st Accused also testified that on 16th May 2011 at midnight he received a call from the 1st Accused who told PW6 to tell his mother that they were attacked by thugs.

The prosecution did not bring any evidence to discount this version of events as provided by the 1st Accused. The prosecution also did not bring any evidence as to any other persons the 1st Accused is alleged to have committed the offence with, or of the murder weapon. To this extent there was doubt created as to whether the 1st Accused was involved in the deceased's death.

As regards the bloodstained shirt which it is alleged the 1st Accused was wearing and threw away, the prosecution called Lawrence Kinyua Muthuri, a Government Analyst with the Government Chemist as PW9. The said witness testified and produced his report that showed PW10 gave him a long sleeved

pinkish shirt heavily stained with human blood indicated as belonging to the 1st Accused and a short-sleeved creamish shirt which was lightly stained with human blood, and he was to determine the source of the bloodstains. He further testified that the DNA generated from the blood stains on the two shirts matched the DNA generated from the blood sample he received from PW10 which was indicated as of the deceased.

The Court notes that it is not indicated in the report to whom the short sleeved creamish shirt belonged to. PW10 in his evidence produced a t-shirt as the Prosecution's exhibit 4, which he stated that accused was wearing and which had blood stains. However, PW10 did not give any evidence as to whether he took the said t-shirt or any short sleeved creamish t-shirt to the Government Chemist for examination, and therefore the owner of the short sleeved creamish t-shirt that was examined by PW9 remains unknown.

As regards the long sleeved shirt indicated by PW9 as belonging to the 1st Accused, the Court again notes that PW10 never indicated in his evidence that he took a shirt belonging to the 1st Accused to the Government Chemist, and which shirt was taken. There was also contradicting evidence about the identification of the bloodstained shirt which it is alleged the 1st Accused was wearing. PW10 testified that he recovered the said blood soaked shirt near a fence within Kathiani Market, which he produced as the prosecution's exhibit 1.

PW1 also testified that he was present when the said shirt was recovered after he was informed by the assistant chief that the shirt the 1st Accused was wearing was outside his bar, about 20 metres away on a post. PW1 testified that his bar is in Kalulunani market. The Court recorded the shirt identified by PW1 as a white blood stained shirt.

PW2 who also identified the said shirt produced as exhibit 1 as having been worn by the 1st Accused, did not give any description or identifying marks of the said shirt. PW4 identified the shirt as whitish in colour. PW7 stated that he could not remember the colour but he could identify the shirt. PW8 on the other hand identified the t-shirt the 1st Accused wore (prosecution exhibit 4), but testified that he had never seen the shirt produced by the prosecution as exhibit 1. It is notable that the shirt is described as whitish while the shirt given to the government analyst and indicated to belong to the 1st Accused was described as "long sleeved pinkish shirt"

Lastly, on the said issue of the blood soaked shirt, PW10 who recovered the shirt stated as follows in his evidence:

"We received a report of a blood soaked shirt that was dropped near a fence within Kathiani market. I rushed there. I took possession of it. This is the shirt – MFI 1. The shirt has been worn by Accused 1 prior to being taken for a t-shirt by his mother. He dropped it out of the moving motor vehicle as he was being taken to the police station. His brother Boniface Mutuku is the one who told me"

The said evidence is clearly hearsay and is inadmissible. The said persons named as having taken the shirt or seen it being thrown out of the vehicle were never called as witnesses to verify these facts. Likewise, the Assistant chief who is alleged to have told PW1 that the shirt belonging to the 1st Accused was outside his bar was not called to testify, and that evidence remains hearsay.

The 1st Accused in his defence denied that the said blood soaked shirt belonged to him. The position therefore is that it was not established by the prosecution as to how the shirt ended up in the market where it was recovered, and it has also not been established beyond reasonable doubt that the shirt belonged to the 1st Accused. Likewise, the second short sleeved shirt examined by the Government Analyst was not shown to belong to the 1st Accused. There are therefore doubts and gaps in the prosecution case that can only be construed in favour of the 1st Accused, and the evidence produced cannot lead to watertight conclusion that it is the 1st Accused who killed the deceased.

Lastly, I also agree with the submissions by the 1st Accused's learned counsel that no motive or intention to kill the deceased on the part of the 1st Accused was established. The prosecution during the cross-examination of the 1st Accused alluded to the deceased having sold land, and the 1st Accused being interested in the proceeds of the said sale, but did not call any evidence on any such sale, nor of any friction or misunderstanding between the 1st Accused about the said sale or of any other kind.

Arising from the foregoing findings, I enter a verdict of not guilty and acquit the 1st Accused under section 306(2) of the Criminal Procedure Code.

It is so ordered.

DATED AT MACHAKOS THIS 26th JULY 2016.

P. NYAMWEYA

JUDGE