



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL CASE (MURDER) NO. 6 OF 2014**

*(Formerly Nakuru HC.CR.C. No. 92 of 2012)*

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**JOSEPH KUNYAMAL MZEKENYA.....ACCUSED**

**J U D G M E N T**

1. **Joseph Kunyamal Mzekeny**a was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 20<sup>th</sup> December 2012, at Ngerende Airstrip in Narok South, Narok County, he jointly with others not before court he murdered **Neratia Ole Nkonyo**. He denied the charge and was represented by Mr. Morintat initially and subsequently by Mr. Kamwaro.

2. The prosecution case was as follows. The deceased was an employee or business partner of **Kiletuan Ole Kindi (PW1)** a resident of Uaso, Ngong. **PW1** kept and traded in cattle in different parts of the Rift Valley area. **Joseph Kunyamal** the Accused herein, a resident of Enkutoto, Transmara had an arrangement with **PW1** and the deceased, to hold the cattle for safekeeping as the deceased sought buyers in that area.

3. Sometimes in October or November 2012, the deceased left Uaso with a herd of about 11 cattle, majority of which belonged to **PW1**. The deceased stayed in touch with **PW1**, updating him on his movement by phone. In mid December 2012 while in Transmara, he communicated to **PW1** that some cows were missing and that he and the Accused were going in search of them. **PW1** also learned that one cow had died while two had been sold. The last phone conversation between **PW1** and the deceased happened on or about 20/12/2012. Thereafter, his phone went unanswered, forcing **PW1** to call and seek the help of **John Konongoi (PW2)** another cattle trader and a neighbour to the Accused and who knew the deceased. That was on 24/12/2012.

4. Meanwhile the chief Ntulele, Transmara, **Letui Sipei (PW4)** was visiting **PW2**. He had previously received information from an elder known as **Msekenya** to the effect that a male body had been spotted in river Olongata near Mara Airstrip. Upon hearing **PW2's** conversation with **PW1**, he told him what he already knew. Although **PW1** rushed to the scene the body had been removed. **PW2** duly notified **PW1**.

5. Information then came through to **PW4**, following which **PW4** proceeded with Administration Police to the home of the Accused on 25<sup>th</sup> December 2012. With him was Administration Police **CPL Edwin Odhiambo (PW5)** and one **Daniel Olongishu Sumei (PW10)**. They arrested the Accused. He was found in possession of Shs 35,000/= and two phones. He was later handed over to **CPL Daniel Gatimu (PW11)** the investigating officer who, with **CPL Kiboma (PW6)** and others had retrieved the body of the

deceased on 24/12/2012 from the river bank.

6. On 26<sup>th</sup> December 2016, the Accused led the investigating team to the home of **Johnstone Oloshuru Kimojino alias Malimu (PW8)** where one bull (**Image in Exhibit 1F**) was recovered. The said bull had been sold to **PW8** by the Accused on 10<sup>th</sup> December 2012. Also visited was the home of **Samson Ronkoe (PW9)**, where two bulls (**Image in Exhibit 1E**) were recovered. **PW9** said the Accused had sold the bulls to him on 24/12/2012. The recovered bulls were identified by **PW1** as part of the herd taken by the deceased from Uaso for the purpose of trade.

7. The post mortem examination on the body of the deceased, identified by **Mopel Ole Maleyon (PW3)** and **PW1**, revealed that the deceased died a violent death. He had sustained a combination of severe head and neck injuries, both sharp and blunt accompanied by massive haemorrhage. Death was estimated to have occurred about 5 days prior to the post mortem as the body had started to swell.

8. When the Accused was placed on his defence, he elected to give an unsworn statement, and called his wife, **Noomeshuki Msekenya (DW1)**, as a witness. He testified that he was a farmer and pastoralist residing at Olsakwani in Kilgoris. He denied that he knew the deceased or that he received any of his cows for safe custody in the material period. Or that he sold the bulls in **Exhibit 1E** and **F** to the prosecution witnesses **PW8** and **9**. He however admitted having sold cattle to **PW8** and **PW9** at the market, but insisted that these were his own. He said that during the arrest, police took his phone and Shs. 35,000/=. He claimed that he was framed for the deceased's murder.

**9. DW1** said she resided with her husband at Ematiti, Enkutoto. She said that her husband has been falsely implicated in the murder and that the bulls in **Exhibit 1E** and **F** are not the property of the couple. She said that no cattle had been kept at their home for a third party in December 2012.

10. There is no dispute that the deceased was an itinerate cattle trader. And that in the material period he travelled from Uaso, Ngong with a herd of cattle, some of them owned by his employer **PW1**. There is no dispute that the deceased travelled all the way to Transmara and that on 24<sup>th</sup> December 2012, his naked body was found in the Olongata River with severe injuries.

11. That two days later the Accused who was in police custody led police to the homes of **PW8** and **PW9**. And that in the homes of the respective witnesses a total of 3 bulls identified as **PW1's** property which left Uaso with the deceased, were recovered. The cause of the deceased's death is not in dispute.

12. The court must determine whether, with malice aforethought the Accused inflicted the injuries leading to the death of the deceased. In this regard, the prosecution evidence is primarily circumstantial. Two key pieces of evidence were relied on by the prosecution. The first is that the Accused, **PW1** and the deceased had a standing arrangement whereby, the former would hold cattle on behalf of the deceased while the deceased sought buyers within Transmara. The second piece of evidence is that the Accused herein sold the cattle shown in photographs marked **Exhibit 1E** and **1F** to **PW9** and **8** on different dates in December 2012; and subsequent to his arrest he led police to the homes of **PW8** and **PW9** where the bulls were recovered.

13. The principles applicable to the consideration of circumstantial evidence were crystallized in the case of **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** where the Court of Appeal stated that:

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable 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.”**

And further these were refined in the case of **Simoni Musoke -Vs- Uganda (1958) EA 715** where quoting from the case of **Teper -Vs- Regina [1952] 2 ALLER 447** the Court stated:

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

14. The three bulls recovered on 26/12/2012 from **PW8** and **PW9** were identified through visible marks on the ears by **PW1** who was the deceased’s employer and asserted owner of the bulls in question. **PW1** said the entire herd of cattle was intended to be sold in Transmara but some were sold on the way. It is true that **PW1** had obvious difficulty recalling events in the material period and particularly the dates thereof. That is hardly surprising given that he testified almost two years since the events. Memory lapses do occur due to passage of time, and I think that his choice to go by his earlier recorded police statement, when questioned about how many cattle were sold before the death of the deceased, and whether the total herd of what left Uaso had belonged to him exclusively, is an honest response.

15. These discrepancies arising in **PW1**’s testimony in my view do not go to the gist of his evidence, namely, that the deceased left Uaso for Transmara with a herd of cattle majority, of which belonged to **PW1**. Not every contradiction is fatal to the evidence of a witness. In the case of **Twehangane Alfred – Vs- Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** the court stated regarding contradictions that as follows:

**“with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”**

This decision was quoted with approval by the Court of Appeal Kenya, in **Erick Onyango Ondeng – Versus- Republic (2014) eKLR:**

16. The witness (**PW1**) to my mind was consistent regarding the main thrust of his evidence. His identification of the three bulls found in the homes of **PW8** and **PW9** was not in any way challenged during cross-examination. And for his part, the Accused denied that the bulls recovered at the home of **PW8** and **PW9** were in any way connected with him, while admitting to have sold cattle to the two witnesses. This court therefore, has no doubt that the three recovered bulls identified by **PW1** were the property of **PW1** being some of the cattle which the deceased took with him from Uaso with the intention of selling them in Transmara. It matters not that some of the cows taken initially belonged to other persons in Uaso.

17. Both **PW8** and **PW9** were admittedly traced through information given by the Accused to police upon arrest. I understand the Accused’s defence to be that while he had sold cattle to **PW8** and **PW9**, he did not sell them the cattle in photographs **Exhibit 1E** to **F** which were recovered in their respective homes. The evidence by **PW8** and **9** is that on 10/12/2012 and 24/12/2012 the Accused sold to them, one bull (**Exhibit 1F**) and two bulls (**Exhibit 1E**) respectively.

18. Both men were well known to the Accused and said they bought the cows at the Chemulu or (Chebunyo) cow market in Bomet. None of the two men had any prior disagreement or cause to make false allegations against the Accused person. The defence in cross-examination appeared to suggest to them that they were accomplices but this suggestion was seemingly dropped, as the Accused testified that the cows in question were not sold to the witnesses by the him. In that regard the defence submitted that:

**“The cows allegedly sold to two prosecution’s witnesses could not be linked to the death of the deceased because even the prosecution witnesses proved that the Accused is a person who possess livestock of his own at his homestead.”**

19. The submission in my humble view is correct as regards the fact that the Accused also kept cows. However the evidence of **PW8** and **9** linked the Accused not to any cattle but specifically to the three bulls which **PW1** had identified as his own. The circumstances in which the bulls were sold were

admittedly an open market in Bomet and the Accused was paid for the same. Indeed **PW9** tendered evidence of withdrawal of cash on 24/12/2012 from his account at Equity Bank, Bomet (**Exhibit 6**) in this regard. He also produced two “cattle sale” fee receipts issued by the Bomet County Council in respect of the transactions (**Exhibit 5A and B**).

**20. PW9** explained that Bomet county workers issued such receipts to authenticate cattle sales transacted at the market. The description in the two receipts – red bull and Khaki bull-match with the bulls in photographs (**Exhibit 1E**). The receipts contain the respective names of the seller as **Joseph Kunyamal Msekenya** and the buyer as **Samson Rongoe**, respectively. This independent evidence is in my view strong corroboration of the testimony by **PW9**, and also by **PW8**.

21. During their cross-examination of **PW8** and **9**, the defence did not put to them the suggestion that infact the Accused sold them different bulls from those identified in the photographs. If it is true that the Accused had sold a different set of cows which were his own to the witnesses, that was the best time to canvass the defence with **PW8** and **9**. It is my considered view most unlikely that the Accused’s defence in that regard can be true. And his denial in the circumstances of this case speaks volumes regarding his guilty knowledge as will further become evident. Ditto his denial that he knew the deceased at all. Infact during his testimony, the Accused struck me as a man with little regard for truth. He asserted to reside at Olsakwani and denied that he knows a place called Enkutoto the latter which **DW1** described to be the couple’s residence.

22. The recovery of Shs 35,000/= by police on the date of the Accused’s arrest, was not denied. The arrest occurred one day since Christmas day which is only two days since the transaction between **PW9** and the Accused. According to **PW9** the Accused collected the sum of Shs 47,000/= from his home on the morning of 25/12/2012 having allowed **PW9** to take the bulls home on the previous day. **PW5** told the court that the Accused explained on his arrest, which occurred on the night of 25/12/2012 that the money was proceeds from the sale of a cow.

23. In his defence the Accused was vague on the date of sale of his alleged “other” cows to **PW8** and **9**. He said that he had no opportunity to show the actual cattle he sold but as I have said, he did not put that line of defence to **PW8** and **9** in cross-examination. Nevertheless, he said that when police questioned him, he told them that he had sold two cattle at the market on the previous day. The Accused, despite asserting that police took Shs 35,000/= from him, did not at any time in his defence attempt to explain the source of the said sum of money or explicitly connect it with the admitted sale of “other” cows to **PW8** or **PW9**. He however admitted that he knew **PW8** and **PW9** as fellow villagers and had no dispute with them. I must say however that the police failure to tender as exhibits the phones recovered from the Accused on arrest is as baffling as their failure to obtain the phone data thereof.

24. This omission notwithstanding, based on available evidence, my considered view is that the possession by the Accused of a relatively large sum of money, whose actual source he is shy to state, only two days since the sale of **PW1**’s two bulls to **PW9** is a strong pointer to the culpability of the Accused. I am convinced that the Accused was on 24<sup>th</sup> December, 2012 in possession of two of the bulls earlier entrusted to the deceased. This possession in my view adds credibility to the evidence by **PW1** that prior to his disappearance and death, the deceased has told **PW1** that he was in the company of the Accused. Evidently, by 24<sup>th</sup> December 2012, the deceased had been dead several days as evidenced by the bloatedness and peeling skin seen on the body. This in my view confirms evidence by **PW1** that the deceased could not be raised by phone after 20<sup>th</sup> December, 2012. And further that the Accused was the person who ordinarily kept the cattle for the deceased while awaiting sale within Transmara.

25. Under Section 111 of the Evidence Act the circumstances of the Accused’s proven possession of the two bulls on 24/12/2012 are matters within his knowledge and upon him to explain. The Court of Appeal has considered the question whether such possession can prove any offence. The Court of Appeal stated in **Odhiambo -Vs- Republic [2002] KLR 241** concerning possession of recently stolen goods being circumstantial evidence:

“Evidence of recent possession is circumstantial evidence which depending on the facts of

**each case may support any charge.”**

26. It is my view that even if the deceased had left Uaso in October or early November 2012, he still had some remaining stock of cattle at least until about 20<sup>th</sup> December 2012. On the face of it, it takes time to sell cattle. They cannot be described as goods that change hands very fast. So that the possession by the Accused of **PW1**'s cattle, particularly those in **Exhibit 1E** on 24/12/2012 requires an explanation as to how he came into possession.

27. In my view, this is a suitable case where the doctrine of recent possession of stolen goods applies. In the case of *Ogembo -Versus- Republic, [2003]1 EA* the court stated that:

***“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”***

Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005 (Koome, Mwera & Otieno-Odek, J.J.A.)* quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.”***  
[Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151*:

***“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”***

28. In this case, the Accused has, against all odds elected to distance himself from the possession of the three bulls while claiming as his the cash amounting to Shs 35,000/= found on him two days after the sale to **PW9**, and for which he seems reluctant to give account. This conduct in my view is reflective of guilty knowledge. The failure to give a reasonable explanation in respect of the bulls in **Exhibit 1E** or the cash, which, on all accounts is part proceeds of the related sale thereof described by **PW9**, strongly suggests that the Accused obtained the said bulls through dubious means.

29. In light of evidence that the said two bulls had been kept with the Accused by the deceased, and in light of the Accused's unlikely denial to have known the deceased, and the duration between his death and the sale of the two bulls, I think the Accused must be deemed to have been involved in the brutal murder of the deceased. The proven pieces of evidence consistently and inerringly point to the Accused as a culpable party in the murder of the deceased. The deceased's throat had been slit while his head had a deep injury extending to the brain. The intention to cause death is self evident. Malice aforethought is demonstrated clearly therefore.

30. In this case, the motive appears strong and is not difficult to find, in view of the Accused's proven sale of the deceased's cattle to **PW8** on 10/12/2012 and to **PW9** on 24/12/2012. Regarding the former **PW1**'s evidence was that in the last conversation with the deceased, he said he was in the company of the

Accused pursuing two cows that had been lost. Quite possibly the Accused had earlier taken the two cows one of which he had sold to **PW8** on 10/12/2012. It would seem that the deceased's body had been dumped in the river to conceal the foul murder and also cover up for the loss of the cows entrusted to the Accused.

31. I am satisfied, upon reviewing the evidence before me that the direct and circumstantial evidence tendered against the Accused is overwhelming. The Accused's defence cannot stand and has been destroyed by the prosecution evidence. I do find that the charge laid against the Accused has been proven beyond reasonable doubt, and I will convict him accordingly.

Delivered and signed in Naivasha this **9<sup>th</sup>** day of **December, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Mburu holding brief for Mr. Kamwaro

Accused : Present

Court Assistant : Barasa

**C. MEOLI**

**JUGDE**