



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 5 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS-

FELIX MUCHITI.....ACCUSED

JUDGMENT

Introduction

1. The accused herein FELIX MUCHITI is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Particulars of the offence are that *on the 29<sup>th</sup> day of December 2009 at SHIAVIGE VILLAGE in Kakamega South District within Western Province he murdered IBRAHIM MUCHITI.*

The Prosecution Case

2. In this case the Prosecution called a total of nine (9) witnesses. PW1, WASHINGTON ASUTSI MADEGWA from Makhokho Sub-Location told the court that on the 29/12/2009 he saw the accused person herein who is his uncle at about 5 p.m. coming from his house which is 50 meters away from his walking towards the house of COSMAS ASUTSI his grandfather. The accused then went to him accompanied by his grandmother ANGELINE ASUTSI PW2 and told him “**come and see Mzee he has fallen**”. He followed the accused and PW2 to the deceased's house and found that the deceased had a broken right leg and was on the bed unable to talk. PW1 testified that he then told ANGELINA that the old man had told him earlier at about 8.00 a.m. that the accused herein had beaten him the whole night. He also testified that he had already informed Angelina's husband Cosmas Asutsi of the injury. He identified the injured mzee as IBRAHIM MUCHITI MADEGWA. He remained at the deceased's home for a while and then went home and left the injured man. At 10 p.m. he heard the accused person's voice calling out to DAN MUYONGA telling him “**wake up as the old man has died**”. Dan came and told him (PW1) that the accused had told him that the old man had died. This was in the presence of his wife METRINE KHANGU. PW1 and his wife then went to the deceased's house and found that he was dead. They stayed in that house until 2 a.m. as it was raining and then went to his house. In the morning he made a report to the Assistant Chief FREDRICK MUGAIZI who came with Police Officers who took the deceased's body to Kakamega P.G.H. On the 31.12.2009 he attended the post mortem.

3. **PW2 ANGELINA INDECHE** also from Makhokho testified that on the 29/12/2009 at about 6 a.m. Felix the accused person herein asked her to go and check on his father the deceased herein. She went and found that the father was not breathing or talking. She told the accused who was with her that his father was not breathing but instead of answering, the accused left. She followed him and asked him what had

happened since he (accused) was the only one who used to live with the deceased but the accused told her that he did not know what had happened to the deceased. She then started crying and went to call PW1 to whom she narrated what she had found. She went with PW1 to see the deceased and thereafter PW1 made a report to the sub-chief who came with the Police and started their investigation. On cross examination by Mr. Amasakha advocate for the accused PW2 testified that she had seen the deceased for the first time when the accused called her to go and see him (deceased). She did not know what had happened to the deceased who was her brother-in-law.

4. **PW3 AUGUSTINE MUYONGA** testified that on the 29/12/2009 at 10p.m the accused knocked on his door and when he opened the accused told him **“mzee is dead. Tell Washington too”**. That he refused to do so but since the accused was insistent, he went and told Washington. They went to the deceased house together with his wife and Washington and stayed there until 2 a.m. PW3 testified that the accused was not with them during that period. The accused came back the next morning at 11 a.m. when he was arrested by the Police officers who had been called to the scene. PW3 also told the court that he had seen the deceased on his bed nursing a broken leg which was bleeding slightly. On cross examination he told the court that though his house is about 60 meters from the deceased's house he never heard anything from the deceased's house.

5. **PW4 DR.DICKSON MUCHANA** a pathologist based in Western Province since May 2010 told the Court that he had worked with Dr. Nyikuli for one year before Dr. Nyikuli left the Government and joined the N.G.O. He testified that on the 30/12/2009 the body of IBRAHIM MUCHITI MADEGWA was brought to the attention of Dr. Nyikuli under the escort of Police Officers S. Kingori for post mortem purposes. The body was identified by Washington Madegwa, PW1 and Alice Kahenda, PW5. He explained the findings of the post mortem report and the opinion Dr. Nyikuli had made being that the cause of death was severe neck injury. He produced the Postmortem Report as” Pex I”

6. **PW 5 ALICE KAHENDA MATEGWA** from Huruma Estate Nairobi testified that she was born in Idakho Kakamega. She told the court that on the 31/12/2009 she received a telephone call informing her that her father had been killed. The following day she traveled to Kakamega Provincial General Hospital where the body was lying and identified the same at the mortuary. She also said that the Doctor wanted her to identify the body for post mortem purposes and she did so. She further told the court that she knew the accused who was her last born brother.

7. PW6 ALFRED MUKAISI the assistant chief from Makhokho sub-location testified that on the 30/12/2009 at about 6.30 a.m. he got a phone call from PW1 who informed him that his grandfather Ibrahim Muchiti had been killed. He went to the A.P. Camp at Iguhu and took police officers to the scene where he found the deceased's daughter and the accused. That the accused tried to run away but was warned by the police and he surrendered. They entered the deceased's bedroom and found that he had died, his right leg was broken and the neck was swollen. He identified the accused in court and told the court that they took him to the A.P. Camp at Iguhu where they called Kakamega Police Station who came and took away both the accused and the deceased's body.

8. On cross examination PW6 told the court that he had known the accused for 15 years and that he went to the scene of crime together with Sgt. Muraya and APC Mr. Dulo and another A.P. Officer whose name he could not re-call. He further told the court that the deceased and the accused were not living peacefully and that the accused was brought to his office on the 23/09/09 having assaulted the deceased and attempting to throw the deceased into the toilet. That he warned the accused who promised not to repeat the same. He added that the dispute between the accused and the deceased who was aged about 80 years was over food. He told the court that the accused used to return home asking for food from the deceased. He also testified that the accused went to the mosque that same day to ask for a funeral permit to bury his father. He maintained that the deceased and accused were living together in the same house.

9. **PW7 AP.C DANIEL DULO No.2007111373** stationed at Khayega Police Station testified that on the 30/12/2009 at about 7.00 a.m. while he was at the A.P. Camp they received a call from PW6 who informed them that the deceased had been killed by his son Felix. Together with Sgt. Murage and APC Amos they went to the scene of crime accompanied by PW6. They arrested the accused and took him to

Iguhu A.P Camp and thereafter the accused was taken to Kakamega Police Station. He identified the accused in court.

10. **PW8 SGT. STEPHEN KIMULU No. 40584** stationed at Kakamega Police Station Crime Branch was the Investigating Officer in this case. He testified that on the 30/12/2009 at about 2.00 p.m. he was at the Police Station when the O.C.S Chief Inspector Aruba got a call from P.W.6 who informed him of the murder of the deceased. He further stated that the OCS instructed him to go to the scene with the station's vehicle. Accompanied by Driver Maiyo and CPL Bii they went to Iguhu A.P Camp where they met Sgt. Muraya and other officers. PW6 and the accused were also at the A.P. Camp. All of them went back to the scene where they found the deceased's body on the bed covered with a blanket. He checked the body and found the right leg broken and the neck which was swollen had some marks. They then took the body to Kakamega PGH Mortuary for Post Mortem. The Post Mortem was done by Dr. Nyikuli at Kakamega PGH and the Doctor filed the Postmortem report. He later recorded witness statements and charged the accused.

11. On cross examination PW8 confirmed that he was the Investigating Officer and that he did not get anyone who witnessed the incident, though there were neighbours in the vicinity. He also said there were some two houses in the vicinity, but none of the neighbors volunteered to talk to them. He added that the deceased's compound had only one house, though there was another house nearby belonging to the deceased's brother. PW8 testified that he established from his investigations that the deceased used to live in the same house with the accused.

12. **PW9 Snr. Sgt. JACKSON MORAYA No. 82046595** previously attached to Iguhu A.P Post but posted to Kirinyaga County testified that on the 30/09/2009 he was at Iguhu A.P. Post. At about 6 p.m. the area Assistant Chief (PW6) reported that someone had been killed and the suspect was his (deceased's) son. The court notes that the date 30/09/2009 cannot possibly be correct in relation to this case. PW9 testified further that he ordered three officers Cpl. Echege, APC Makori and APC Dulo to accompany him to the scene together with the Assistant Chief. At the scene they found the suspect outside the house and they arrested him and asked him about his father. The suspect took them inside the house where the deceased body was. PW9 then liaised with the nearby Police Station and the Officers there agreed to go for the body .They kept the suspect until when the Police collected him. He identified the accused in court.

### **Case to Answer**

13. On the 9/07/2014 after going through the evidence on record and the written submissions by the Defence Counsel this court (though differently constituted) found that the prosecution had established a prima facie case against the accused person and placed him on his defense.

### **The Defence Case**

14. The accused gave sworn evidence but did not call any witness. He testified as DW1, telling the court that he hails from Shiavihiga area Ikolomani Location in Kakamega County. He testified that the deceased IBRAHIM MUCHITI was his father and he was his last born son. He denied that he murdered him on the 30/12/2009. He explained that before that date on the 28/12/2009 he stayed with his father in peace at their home in Shiavihiga. That on the 29/12/2009 he left his father at home praying at about 5.00 a.m. when he woke up on that day to go to work at Shitoli at a construction site where he was told to offload materials because of rains. He then went to Khayega market to look for cow pea seeds as agreed with his father. After the market he told the court that he did not go back home directly but he passed through Eluhya where he stayed until around 6.00 p.m. before he went home.

15. He continued his testimony by saying that on reaching home at about 7.00 p.m., he entered the house through the rear door which was open. He observed that it was not normal for that door to be open at that time. On entering the house he called out for his father because he had not seen him since morning but his father did not respond prompting him to go to his father's bedroom where he found him under the bed and in a bad shape. He stated that though there was no light in the bedroom, he tried to lift his father up as he

was still breathing though not able to talk. He managed to lift him up and placed him on his bed. He then went to his uncles COSMAS SHIKOLI but found the wife PW2 who was outside attending to her cows. He told her that all was not well at their home and that his father was in bad condition.

16. The accused stated further that PW2 accompanied him to where the deceased was and told him that Washington Madegwa, PW1, the son of his brother David Madegwa was the one who had been at their home all day long that day. That while PW2 went to PW1's house he went to his uncle CHARLES SHIKOLI's house to inform him of the deceased's death but he found his uncle with his family having supper and explained to him the situation on the ground. His uncle told him to go back home and that they would follow him. Back to his father's house he lit the tin lamp and saw his father struggling. Again he went to PW2's house but this time he found that they had locked the door and what PW2 told him from inside the house that PW1 had chased her and warned her against involving him in the goings on at his father's place. He then went back to his father's house before again going to his Uncle Charles' house. He stated that he did not get any help to take his father to Hospital. He told the court that it was raining that night and he was not able to take his father to the Hospital. At about 10 p.m. that same night his father died in his hands.

17. He also testified that he then started wailing as he went to PW2's house then to PW1's house then to Charles home. He stated that on that night PW1 went to deceased's house, lit his torch at his father and then went back to his home. It was the accused's further testimony that he remained in the home until 5 a.m. when he went to the mosque which was his father's worship place to inform the Imam of his father's death. The Imam then sent him to Mzee Mugoma's home which is some distance from the mosque. Mzee Mugoma then sent him ahead with instructions to ensure that nobody else handled his father's body but when he arrived home he found many people there before the mosque elders came. On arrival home he was asked where he had been because the people thought he had run away.

18. That soon thereafter the Assistant Chief, PW6 came to the home with 5 A.P's who arrested him that morning of 30/12/2009 and took him to Iguhu Police Post and with no word on why he was being arrested he was then put in the cells. At 11.00 a.m. he was driven back to his father's home before the deceased's body was taken to the mortuary. He was taken to Kakamega Police Station where he was detained for 6 days before being brought to court to answer to the charge of murder. He told the court that that he did not know who killed his father and that he did not himself kill his father. He asked the court to dismiss the charge against him for he is not guilty.

19. On being examined by the court he told the court that he was the only one who lived with his father in the same house and that there were no other houses in the compound.

20. During the cross examination he was affirmative that he recorded a statement after his arrest although he did not know how to read and write. He testified that the moment he discovered his father was ill he went to PW2's house who accompanied him back to his father's house. That PW2 tried to speak to his father but he could not speak. The accused denied the allegation that his father told PW2 he had beaten him. He admitted on cross examination that PW1 was his brother's son and that he went to his house (PW1) at about 9 p.m. though none of his nephews accompanied him to his father's house. He told the court that he did not have a grudge with PW2 but with PW1 because of a dispute over land.

### **Duty of the Prosecution and the Law**

21. The prosecution is under a duty to prove the guilt of the accused beyond all reasonable doubt. As no witness testified that he saw the person who murdered the deceased, the prosecution case is therefore dependent on circumstantial evidence. It was stated in **Simoni Musoke -VS- R [1958] EA 715** at holding number (iii) that:

**“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”**

21. It is therefore necessary that before drawing the inference of guilt based on circumstantial evidence, care must be taken to ensure that there are no other co-existing circumstances which would weaken or destroy the inference. In **Ndurya –vs- Republic [2005] KLR 135**, the Court of Appeal held inter alia that:-

**“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”**

22. It was also held in the case of **Mwathi –vs- Republic [2007] 2EA 334** that *“in the absence of eye witnesses, the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis that that of guilt”*, and further that *“the fact that there was a dead body inside the house of the appellant, and the appellant was the only person present there, called for an explanation from the appellant, if no adverse conclusion could be drawn.”*

23. In the slightly earlier case of **Mwendwa –vs- Republic [2006] 1KLR 133**, the Court of Appeal held, inter alia that *“to prove a case based on circumstantial evidence only every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly, as is now settled law, the chain must never be broken at any stage.”* I entirely agree with the law as stated above.

### **Analysis of the Evidence**

24. PW1, Washington Asutsi Madegwa told the court that at about 5.00 p.m. on the fateful day, he saw the accused some out of the house where accused and deceased lived alone and go to the house of PW2. According to PW2, the accused went to her house at about 6.00 p.m. while the accused gave the time as 7.00 p.m. The difference in time notwithstanding it is clear from the evidence that the accused was seen walking out of the house he shared with his father and going to PW2’s house and told her *“to go and check on his father”*. According to the testimony of PW1, the accused also asked her to *“come and see mzee, he has fallen.”*

25. PW2 further testified that after she saw the condition of the deceased, she sought an explanation from the accused but the accused did not give her any satisfactory explanation, thereby prompting her to go to PW1’s house. Both PW1 and PW2 testified that when they saw the deceased after the accused had summoned him to the house, the deceased could not speak. PW1 added that the deceased’s right leg was broken and that his (deceased’s) left leg had been broken before.

26. Further, PW1 testified that that same evening at about 10.00 p.m. he heard the accused calling out the name of Dan Muyonga, while saying *“wake up as the old man has died.”* PW1 went to the deceased’s house and confirmed that the deceased had indeed died.

27. PW3, Augustine Muyonga testified that at about 10.00 p.m. on 29/12/2009 the accused knocked on his door and told him *“Mzee is dead. Tell Washington too.”* PW3 told the court that when he went to the deceased’s house and observed his body, he noticed that his (deceased’s) leg was broken and was bleeding slightly.

28. PW6 testified that before the deceased died on 29/12/2009, he (PW6) was privy to information that the deceased and the accused who shared a house were not living in peace. He further testified that on the 23/09/2009 the accused was taken to his office where he (PW6) worked as Assistant Chief, after the accused had assaulted the deceased and attempted to throw the deceased into a toilet. PW6 stated that he warned the accused who promised not to repeat the assault on the deceased.

29. In his defence, the accused stated that he did not see his father on the morning of the day in question though he heard him praying at about 5.00 a.m. as he (accused) left for work. He stated that when he returned home in the evening, he found the deceased injured and lying under the bed unable to speak. According to the accused, it was not true that the deceased had told PW2 that the accused had beaten him. During cross-examination, the accused conceded that he knew all the witnesses, especially the civilian witnesses and that he had no grudge with them except with PW1 because of a land dispute between them.

### **Issues for Determination**

30. Upon careful analysis of all the evidence as above outlined, the issues for determination are as follows:-

- a. Whether the deceased died and the cause of the death;
- b. Whether the deceased died as a result of the unlawful act or omission on the part of the accused;
- c. Whether in committing the unlawful act or omission the accused acted with malice aforethought.

31. In other words, the prosecution must satisfy this court that the ingredients of murder as set out in Section 203 of the Penal Code are met. Section 203 of the Penal Code defines murder as follows:-

“203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. Thus the central ingredients of the murder are:

- i. malice aforethought; and
- ii. an unlawful act or omission on the part of the accused.”

32. **Section 206** of the Penal Code defines malice aforethought in the following terms:-

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

- **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;**
- **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;**
- **an intent to commit a felony;**
- **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.”**

33. In other words, the prosecution must prove any one of the following:- that the accused person herein had the intention to cause the death of or to do grievous harm to any person, or that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who has committed or attempted to commit a felony.

34. The question that now arises for determination is whether the prosecution proved any of the circumstances set out under **section 206** of the Penal Code tending to establish malice aforethought

against the accused person. In my considered view the prosecution has proved that the accused by his acts or omission intended to cause the death of or to do grievous harm to the deceased. In the first instance, there is the evidence of PW6 who testified that on 23/09/2009, the accused person was taken to the office with a report that he (accused) had assaulted the deceased and had also attempted to throw him into a pit latrine. I find that piece of evidence by PW6 to be worthy of belief and remained unchallenged by the accused's long story that he was not present at home on 29/12/2009 when the deceased was grievously injured, and subsequently succumbed to death at 10.00 p.m. that same day.

35. I also believe the testimony of PW6 to the effect that the accused who shared a house with his father always returned home and asked his 80 year father for food, a habit that made the pair not to live in peace. On the particular day, the accused alleged to have left his father in the house when he went out at 5.00 a.m. I personally took the evidence of the accused and carefully observed his demeanor. He completely avoided eye contact with the court and angrily reacted to questions put to him during cross-examination. The inference I draw from the observation is that the accused did not tell the court the truth.

36. It may be true that the accused went out to work, but I do not believe that he left his father in a good stead health wise. I find that since the accused and the deceased lived in the same house all by themselves, and the accused having been the last person to see the deceased alive on the fateful day, I am satisfied that he was the one who inflicted the right leg and neck injuries on the deceased.

37. I have noted with care the apparent hustle with which the accused went about reporting to other family members the state of his father on that fateful day. In my considered view that conduct on the part of the accused was a façade intended to hide his unlawful acts of inflicting the kind of injuries the deceased suffered on that day. I also find that the accused knew that the act of twisting and breaking the deceased's neck and breaking the deceased's leg would probably cause the death of or grievous harm to the deceased, although such knowledge may have been accompanied by indifference whether death or grievous bodily harm was caused or not.

38. I also believe the testimony of PW2 to the extent that when she enquired from the accused what had actually happened to the deceased, the accused was unable to give satisfactory answers. In my humble view the accused could not give any satisfactory answers because of his involvement in the deceased's death.

39. For the reasons above given, I am satisfied that the prosecution has proved its case against the accused person on the charge of murder beyond any reasonable doubt. I therefore find him guilty as charged and convict him accordingly under **section 322 (1)** of the Criminal Procedure Code.

40. Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 18<sup>th</sup> day of February 2015

**RUTH N. SITATI**

**J U D G E**

In the presence of

Mr. Ngetich (present) for State

Mr. Kundu for Mr. Amasakha (present) for Accused

Mr. F. Juma - Court Assistant