



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 48 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

CONSOLATA NKONO MURUNGI 1ST ACCUSED

JAMES KINYUA MURUNGI 2ND ACCUSED

JUDGMENT

By an information dated 30/8/2011, the two accused namely, **Consolata Nkono Murungi** and **James Kinyua Murungi** were charged with the offence of murder. The particulars of the charge are that on the night of 25th and 26th August, 2011 at Tasho Village, Igane Sub-location, Mwangathia Location of Meru County, with others not before the court, murdered Henry Koome. The accused denied the offence and the case proceeded to full trial. The prosecution called a total of 6 witnesses. At the close of the prosecution case, the accused were called upon to enter their defences. The accused were represented by Mr. Kiogora whereas the State was represented by Mr. Musyoka.

Briefly, the prosecution case is as follows; PW1 **Joseph Mwiti Mbwiria**, the Sub Area of Kiiija Sub-location was walking home about 4.00 p.m. on 25/8/2011 when he heard noises as if people were quarrelling. He approached the place and found a crowd of people with 4 boys quarreling, telling one of them to go home to show them where their mother's money was. On enquiring, he was informed that the boy who was referred to as 'Kirori' had taken the mother's money and ran away. PW1 did not know the 4 people before and was informed the boys were brothers and that they were the sons of Fabian Rukungi of Igane. He called the Assistant Chief of the area one Gikunda, and informed him of the incident. The Assistant Chief told PW1 to take them to the Chief's Camp and PW1 handed the 4 people to Kinyua, (PW3) another Area Manager, to take them. Next day, about 11.00 a.m., a police officer went to PW1's home and asked him to go and record a statement at Muujwa Police Station because the boy who was being asked about money had been killed. He identified Accused 2 as one of the 4 boys he saw along the road but denied seeing Accused 1 at the scene.

PW2 Peter Mutembei, recalled that on 25/8/2011 he was with Koome his brother-in-law, at Kiiija; He said Koome was married to his sister; that Koome bought him liquor till about 1.30 p.m. when they parted. He learned of his death next day. He went to Koome's home and saw blood stains in the compound and that police recovered sticks in the toilet which he identified in court. He said the body was still at the door to Koome's house. PW2 also said that when taking alcohol, he noticed that Koome had a

bundle of 1000/= notes.

PW3 Luigino Kinyua Kiraithe from Ngandume testified that on 25/8/2011, he was coming from Kijja going home, when he saw a crowd of people and went near to find out what was happening. He found 4 boys quarrelling alleging that one of them had taken his mother's money and the Sub Area present asked PW3 to take the boys to the AP Camp which he did. Next day, Police went to his home and requested him to record a statement on what he did, because one of the boys whom he knew by the name 'Kirori' had been murdered. He identified Accused 2 as one of the people he found quarrelling. He did not see Accused 1 at the scene.

PW4 Jacob Nkonge of Igane Sub-location testified that on 26/8/2011 at about 5.30 a.m. 1st Accused went to his home and informed him that her son had died. He accompanied her to her home and confirmed that Koome had died; that the body was outside his house. He reported to the Assistant Chief of the area and then Muujwa Police Station. He went back to the scene with police officers. They found 2 sticks in the latrine and a piece of timber outside his house. He also found blood outside Accused 1's door, on the wall and on the window. He was not aware of any bad blood between the Accused and the deceased. He said that in Accused 1's home, there are 2 houses, a big one and a kitchen belonging to Accused 1 while Accused 2's home was about 50 metres away but they shared one compound; that the body was outside his house. He observed deceased body which had injuries to the forehead and left hand and blood where the body lay. He said that at Accused 1's house there was blood on the ground and some splashed on the door and window.

PW5 Jane Kanungu is a neighbor of Accused 1. She recalled that on 25/8/2012 about 8.30 a.m., she heard Accused 1 screaming and went near to observe. When about 40-50 metres away, she saw Koome holding Accused 1, he took something from Accused 1's *leso*. She heard Koome say that he had taken the money and whoever wanted could go to the police and he walked away. PW5 went to ask Accused 1 what was happening and she informed her that Koome had taken her KShs.15,000/= proceeds from the sale of a cow. PW5 left and went to work on another farm and on returning, next day in the evening, she heard that Koome had died but did not know how he died.

PW6 PC Daniel Kiplangat, is the Investigation Officer in this case. He recalled that on 26/8/2011, he was assigned to go to the scene of murder by the OCS. With other officers, they went to the home of Accused 1 where they found the wife of deceased who was mentally challenged and could not tell them anything. They also found Accused 1 who only understood Kimeru. Before they left, Accused 1 arrived and appeared drunk. They found stones near the body and 2 sticks thrown in a nearby pit latrine (Ex. 2) and a piece of timber (Ex. 1); that the sticks and timber had blood stains. PW6 also said that they found blood stains on Accused 1's door steps and window.

In her defence, **Accused 1** told the court that on 24/8/2011, she told Koome, that they should sell her cow which was sickly and they did sell it; that she gave the money, KShs.15,000/= to Koome and that he went away with the money. She saw his body at his house after the Sub Area informed her of it. She denied having had any problem with Koome, and denied knowing how he died. She denied having fought with Koome or that there was any blood near her door step. She denied seeing Accused 2 that day because he works far away in the quarry. She denied that the other sons ran away but that they were in Nairobi and Mombasa.

Accused 2 told the court that he used to work in a quarry and had left home on 20/6/2011 and went back on 26/8/2011 after he received a call from Stanley Nkonge (PW4) who told him that he was required at home because of some problem. He got money and went home about 10.00 a.m. and found a police vehicle leaving the home. He stopped it, saw Nkonge and found a body covered which he later found to be Koome's; that Koome's wife told him that deceased had been drinking with Mutembei. He denied killing his brother. He also denied seeing Luigino (PW3) leaving on the day before the deceased's death.

At the close of the defence case, Mr. Kiogora, Counsel for the Accused, submitted that the prosecution had not proved its case to the required standard because there were no photographs of the scene; the exhibits found at the scene were never taken for analysis and that there was no eye witness to the murder.

Mr. Musyoka, Counsel for the State on the other hand submitted that there was evidence that Accused 2 was seen with the deceased on the day before his murder with two other brothers; that they were the last people to be seen with the deceased; that PW4, and 6 saw blood at Accused 2's door step and that they must have taken part in the murder.

To establish an offence of murder, the prosecution has to prove two elements, namely;

1. That the accused committed the act that led to the death of the deceased (*actus reus*).

2. That the accused had the intention to cause the death of deceased (*mens rea*).

The intention to cause death is also known as malice aforethought. It is defined in **Section 206 of the PC** as an intention to do grievous harm or cause death. The questions that beg to be answered are therefore, whether it is the Accused persons who caused Koome's death and whether they had malice aforethought?

Nobody witnessed the murder of Koome and the case rests entirely on circumstantial evidence. In the case of ***Abang'a alias Onyango v Rep CRA 32/1990***, the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them 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 fully established;

(ii). These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances taken cumulatively should form a complete 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."

PW1 and PW3 told the court that on 25/8/2011 they found four people quarrelling along the road with three alleging that one had taken the mother's money which was proceeds from the sale of a cow. PW1 and 3 learnt that all the 4 people who were quarreling were brothers. PW1 said they referred to the person had taken the money as 'Kirori'. PW1 did not know the four people but because he is a Sub Area who is in charge of security in the area, he made inquiries into the matter. He identified Accused 2 as one of the 4 brothers he met on that day. PW3 also a Sub Area, corroborated PW1's evidence that, since that was his area, PW1 asked him to take the 4 brothers who were quarrelling to the AP Camp which he did and left them at Police Station. PW3 knew Koome by the nickname of 'Kirori' but knew the brothers and their mother by appearance. PW3 also identified Accused 2 as one of the 4 who were quarrelling on 25/8/2011. PW1 and 3 had no reason to lie to the court. It is the police who looked for them the next day after Koome's death and informed them of the death. I am satisfied that they were truthful witnesses as to what they witnessed.

Accused 2 raised an alibi that he was away from home and was only called after Koome's death. In the case of ***Uganda v Sabyala & Others (1969) EA 204***, the Learned Judge quoted CJ of Tanzania in ***CRA 12D 68/1969*** where his Lordship said:

"the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. Where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts."

Guided by the above persuasive authority, the principle of testing an alibi defence is analyzing the entire evidence adduced by both sides and satisfying oneself as to whether the story given by the accused creates doubt in the veracity of the prosecution case. In the instant case, I am satisfied that Accused 2

was seen with Koome and his 2 other brothers on 25/8/2011 by PW1 and 3 when they were quarrelling that Koome had taken the Accused 1's proceeds from sale of a cow. The witnesses PW1 and 3 were consistent. I find that Accused 2 is not truthful in claiming to have been away from home. Besides, PW6 told the court that Accused 2 arrived at the home looking drunk after they had been called to the scene. I find that Accused 2 was one of the last people to be seen with Koome a day before he was found dead. Accused's alibi is dislodged by the evidence of PW1, 3 and 6.

Having believed PW1 and 3 that Accused 2 was seen quarrelling with Koome on 25/8/2011 and being one of the last people to be seen with Koome, **Section 112 of the Evidence Act** places a duty on the Accused to explain what happened to Koome and that it is no way shifting the burden of proof on Accused 2, because that duty always remains on the prosecution to prove its case beyond any reasonable doubt. All that accused 2 needed to do is give a plausible explanation as to what happened to Koome after he was seen by PW1 and 3 and his other brothers quarrelling with Koome over money and PW3 left them at APs Camp. Accused 2 did not offer this explanation.

Koome was found murdered with the body dumped outside his house on the next day 26/8/2011. PW1 and 3 said that when they sought an explanation as to why the 4 brothers were quarrelling, they were informed that Koome had taken off with the mother's money being proceeds from sale of a cow. Accused 1 did confirm in her testimony that indeed, Koome took off with her money. PW5 a neighbor of Accused 1, also testified to seeing Accused 1 and Koome struggling over something on the morning of 25/8/2011 which she learnt was money, proceeds from sale of a cow. It is untrue for Accused 1 and 2 to say that there was no disagreement with Koome. PW1, 3 and 4 would not have known of these facts. There existed a disagreement over money.

PW4 told the court that it is Accused 1 who went to his home on 26/8/2011 about 5.30 a.m. to 6.00 a.m. and informed him of the death of Koome. On going to the scene, he noticed blood at the door step and window of Accused 1. PW1 is the one who called police and also helped remove the sticks that were blood stained and which had been thrown in a latrine. This evidence was corroborated by PW6 the Investigation Officer, who visited the scene. I have no doubt in my mind that PW4 was truthful that it is Accused 1 who called him and informed him of the death but not vice versa. That being the case, Accused 1 cannot convince this court that she was unaware of the blood at her own door step. She completely steered clear of that allegation. not truthful at all. She should have given a plausible explanation of how the blood came to her door steps and window.

I do agree that the police mishandled the exhibits by failing to take the sticks and piece of timber exhibits recovered from the scene to the Government Analyst for further investigation. That notwithstanding, PW4 and 6 – there is no doubt that Koome's body was found outside his own house in same compound; it is Accused 2 who called PW4 about 40-50 metres from Accused 1's house, coupled with the fact that there were blood stained sticks thrown in a nearby latrine, I am satisfied that the evidence points to the fact that the deceased was assaulted at this home. Accused 1's house is in the same compound with Accused 2's, about 40-50 metres apart and blood was at her door. I find that Accused 1 knew how Koome met his death. It is Accused 1 who was first aggrieved by the fact that Koome had taken off with her money. The demand that Accused 2 and others were making from Koome were on her behalf. Under Section 112 of the Evidence Act, she had a duty placed on her to explain to the court information that was peculiar to her knowledge. She did not offer any and instead gave a general denial. The only conclusion is that she was part of the group that assaulted deceased.

Whether malice aforethought was proved; the post mortem was done by Dr. Njuguna at Meru Hospital. The following injuries were found on the deceased: a large bruise on the posterior and compound fracture on the left tibia and fibula, fractures of the 3rd and 4th ribs, slight haemothorax, on the head, there was occipital bone fracture with intracranial haemotoma and there was intracranial haemotoma in the nervous system. The Doctor formed the opinion that the cause of death was cardiorespiratory arrest due to severe head injury. The deceased did not sustain one blow or two but suffered multiple injuries to the head and body which is evidence that the person/people inflicting the injury meant to cause his death or cause him grievous harm. The injuries suffered are evidence of malice aforethought

In the end I am satisfied beyond any doubt, that both accused took part in the murder of Koome. The circumstantial evidence unerringly points at both Accused 1 and 2 as the culprits.

I am guided by the decision in *Miller v Minister of Pensions (1947) 2 ALL ER 372, 373* where Lord Denning said:

“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed by a sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short will suffice.”

I find both Accused guilty of the offence as charged and they are convicted accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF OCTOBER, 2015.

R.P.V. WENDOH

JUDGE

30/10/2015

PRESENT:

Mr. Mulochi for State

Mr. Gitonga for Accused

Peninah, Court Assistant

Both Present, Accused