



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 95 OF 2014
(FORMERLY KISII HCCR NO. 30 OF 2013)

BETWEEN

REPUBLIC..... PROSECUTION

AND

JOSEPH MANYANKI MWITA..... 1st ACCUSED

ROSELYNE ROBI MWITA..... 2nd ACCUSED

JUDGMENT

1. On 23rd March 2013, the **JOSEPH MWITA MUNIKO** (“deceased”) was found hanging by his neck on a tree near his home in Boherera Village, Bugumbe North Location, Kuria West District, Migori County. On 25th March 2013, this court was informed that **JOSEPH MANYANKI MWITA** and **ROSELYNE ROBI MWITA** had murdered the deceased on the night of 22nd and 23rd March 2013 jointly with others not before the court contrary to **section 203** and **204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. They denied the charges against them and the trial commenced.
2. The 2nd accused was the deceased’s wife and they lived in the same homestead with their children. The 2nd accused and the deceased slept in separate houses about five metres apart. The 2nd accused also served *chang’aa* within the compound. The principal witness, Mary Nyakenda Mwita (PW 1), their 17 year old daughter recalled the events of the night of 22nd March 2013. She testified that she made dinner for the family. She had supper with her mother and the other children as her father had left earlier stating that he was going to report certain people selling alcohol to the police.
3. After supper, the 1st accused came outside the house and the 2nd accused went to talk to him outside. She heard the 1st accused requesting her mother to go for a funeral. Her mother came back into the house. A while later, the deceased came back home, knocked and PW 1 opened the door for him. He asked her why she opened the door yet her mother was in the house. PW 1 served him food and he went to his house to eat. After serving him she went to sleep.
4. PW 1 testified that as she was sleeping she heard her father say in Kikuria, “*Mosani wane tiga kunyita*” which means, “*my friend stop killing me.*” She used to sleep with her mother but when she got up her mother was not there. She went to her father’s house where she found her mother

and the 1st accused. The 1st accused was beating her father with a metal rod. Her father was seated on the floor while her mother was holding his hand. Both accused saw her and threatened to kill her if she screamed. Although it was dark, the 1st accused had a phone which he used as a torch. She saw her mother get a rope which they both used to tie the deceased by the neck, drag him outside and hang him to a tree. Thereafter the 1st accused left while PW 1 and her mother went back to the house.

5. In the morning, PW 1 testified that her mother told her and her brother Moses Mwita (PW 2) to go to the shamba. Their uncle, Peter Mwita Ngoga (PW 3), passed by while they were in the shamba. Her mother called him and told him she had something to tell him. She told him that his brother, the deceased, had left with a rope at about 11.00 pm to go to the nearby thicket and that he should go and look where he went. When PW 3 went there he raised alarm causing people to come.
6. PW 1 stated that she went there and saw that her father, now deceased, had been tied by the neck and was hanging with his knees touching the ground. He was wearing a cap and shoes and had injuries on his private parts. PW 1 identified that clothes he was wearing as those he had seen him wearing while being dragged by the accused.
7. Moses Mwita (PW 2), the younger brother to PW 1, testified that he used to sleep in the same house with his father, the deceased. He recalled in the evening he had supper with the family but his father had left before they started eating. He went to sleep after supper. He saw the 1st accused, who had been drinking with his uncle Nyankore (PW 4) earlier, when he went out for a short call. When the 1st accused saw him, he sat down. Nevertheless, after the short call he went back to sleep and was awoken by his mother in the morning and told to go to the shamba with PW 1. He testified that his uncle, PW 3, passed by and his mother told him that he should go and check if her brother was there as he had left previous night with a rope and had not returned. He heard PW 3 raise alarm and proceeded to the scene where he saw his father hanging from a tree wearing the clothes he had been wearing on the previous day.
8. On 23rd March 2013 at about 6.00am, Peter Mwita Ngoga (PW 3), the deceased's cousin, was going home from his shamba at about 9.00am. He passed by the 2nd accused's shamba where she was with her children. The 2nd accused called him and after chatting for a while, the 2nd accused told him that the deceased had a disagreement with one Petro Kakune and that he went to report to Police at Masaba. She told him that he did not reach the police station and come back to the house took rope and went to the nearby thicket. She told him that she did not follow her husband as they had quarreled and that he had bitten her finger. She told him to go and look for him. When he went to the thicket, he found the deceased hanging by the neck from the tree with his knees touching the ground. The deceased private parts were bleeding and insects had began to crawl on his body.
9. PW 3 immediately called the 2nd accused. PW 1 and PW 2 came to the scene as did other people. He went to call his brothers Charles and Paul Mosenda. He came back with Charles to the scene and found that many people had gathered following the alarm raised. The Chief and Assistant Chief came to the scene together with Administration Police (AP) officers from Masaba. Police Officers from Kehancha Police Station came to the scene and collected him and the 2nd accused from the Station. As the crowd threatened to lynch the 2nd accused, the police left with her. On 24th March 2013, he and the 1st accused were requested to report to Kehancha Police Station to record statement. He proceeded there with the 1st accused whom he left at the station.
10. Nyankore Chacha (PW 4), a cousin to the deceased, recalled that the 2nd accused had come to see him on 22nd March 2013 at about 4.00pm on her way to the Posho mill. She stated that she was going to report her husband to the Women's office at Kehancha. The 2nd accused told him to go a take *chang'aa* at her place. When he went there, he found Paul Mosenda and the deceased having *chang'aa*. He also saw PW 1 in the homestead. There were also other people drinking and who

- left at about 6.30pm when the *chang'aa* got finished. As they were leaving they met the 2nd accused with whom they returned and more *chang'aa* was brought. The 1st accused joined them at about 8.30pm and they continued drinking with the deceased. PW 4 testified that the deceased and 1st accused quarreled over the fact that the deceased accused the 1st accused of seducing his brother's daughters. He did not intervene as he knew the deceased and 1st accused were good friends.
11. PW 4 further testified that the 1st accused asked him to accompany him to a funeral but he declined. The 1st accused also told him that the 2nd accused had quarreled with her husband and that they should leave but when PW 4 stood to leave, he did not see the 1st accused following him. When he looked back he saw him talking to the 2nd accused. He also saw the deceased quarrel with the 2nd accused and the deceased saying that he was going to Masaba to call AP's to report her for brewing *chang'aa*. He went home and remarked to his wife that it was strange that the deceased was going to report to the police yet it is the *chang'aa* his wife brewed that fed him. On the morning of 23rd March 2013, he was called and told that the deceased has committed suicide. He went to the scene. He found the deceased hanging from a tree with his knees touching the ground and his private parts bleeding.
12. Moses Ngoga (PW 5) was at home in Bohorera Village on the morning of 23rd March 2013. He was talking to a friend when he heard alarm that someone had died. He proceeded where the alarm was coming from and found that it was the deceased, whom he knew, who had died. He saw the body in a thicket and found the body hanging from a mango tree by the neck. He noted that the rope was not tight and his private parts were bleeding. PW 5 recalled that the police officers came and arrested the 2nd accused as people wanted to lynch her. He testified that the police officers came and took the deceased's body to Pastor Machage Hospital. He later attended the post mortem where he identified the body of the deceased.
13. Inspector Osman Said (PW 8), the officer in charge of the crime office at the Kehancha Police Station, recalled that on 23rd March 2013 at around 10.00 am, he received a phone call from Senior Sgt AP Marara, who was in charge of Masaba AP Camp, informing him that a deceased person was found hanging on a tree within Masaba location. He booked the report and proceeded to the scene with Sgt. Kazomba Williston Kadzomba (PW 8), the investigating officer, where they arrived at about 11.30am.
14. On arrival they found the deceased hanging from a tree by with a rope tied around his neck. The rope was loose and the deceased's knees were touching the ground. He had a cap on his head and sandals. They observed that the body had bruises especially on the private parts, the penis was bleeding and the trousers had blood stains. PW 8 recovered the rope, deceased's cap and sandals and organized for the deceased's body to be taken Pastor Machage Hospital for post mortem. He proceeded with his investigation and caused the accused to be arrested.
15. The post mortem was conducted by Dr. Aggrey Idagiza Akidiva (PW 6) at Pastor Machage Memorial Hospital on 27th March 2013 in instructions from Kehancha Police Station. He observed extensive bruises over the pubic and genital region. The deceased's penis was bleeding and he had extensive bruises over the abdomen on the armpits. He had deep bruises at the back of the neck and front part of the chest. He was bleeding from both ears. He observed that there were rope marks around the neck but that the marks were not enough to cause strangulation. The deceased also multiple deep bruises at the back of the head. He also observed that the spinal column was severed at the base of the skull. He certified the cause of death as brain stem damage with neurogenic shock due to multiple deep body bruises. He opined that blunt objects were used to inflict the injuries that led to death.
16. When put on his defence, the 1st accused elected to give sworn testimony. He testified he was peasant farmer and a village elder and on the night of 22nd and 23rd March 2013, he was at his

home asleep. On 23rd March 2013, he went to work in his shamba as usual and went to sleep on that night. On the following day, police officers came to his home and asked him to accompany them to Kehancha Police Station where he was interrogated and in the course learnt that he was being blamed for the murder of the deceased. He denied that he had anything to do with the deceased's death.

17. The 2nd accused gave an unsworn statement. She stated that on 22nd March 2013, PW 4 came to her house in the evening while she was cooking and asked her husband to accompany him to a funeral in Getonganya. The two left together and she went to sleep. When she woke up, she asked PW 1 to clean the house and fetch water while she went to the shamba. When she was in the shamba weeding, PW 3, passed by and asked her whether she had seen the deceased and she informed him that he had left for a funeral with PW 4 on the night before. PW 3 then informed her that her husband had not gone to for the funeral but had hanged himself. She started crying and when she went to see where the deceased was she was so distraught. She accompanied Paul Mosenda, her brother in law, to the police station. She did not know what she had done and why she was arrested and denied that she knew anything about the deceased's death. She added that what PW 1 stated was not true.

18. In order to secure a conviction for the offence of murder under the provisions of **section 203 and 204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.

19. It is not in doubt that the deceased's body was found on the morning of 23rd March 2013. All the prosecution witnesses who went to the scene on that day confirm that the deceased was hanging on a tree having been severely assaulted. The deceased had multiple bruises particularly around the groin area and penis. The trouser the deceased was wearing, which was produced in evidence as Exhibit 1A, was blood stained and the injuries observed by the witnesses confirmed by the autopsy performed by PW 6.

20. From the testimony of PW 3, the 2nd accused suggested that the deceased could have committed suicide by hanging himself. The evidence does not support any notion of suicide. PW 3, PW 4 and PW 5, who saw the deceased's body, testified that deceased was hanging by his neck with his knees on the ground. PW 5, PW 7 and PW 8 all noticed that the rope around the neck was loose. If indeed the deceased committed suicide by hanging himself, the rope around the neck would have been tight and he would have died from strangulation. Furthermore, the fact that that the deceased's knees were touching the ground excludes the possibility that he could have hanged himself. PW 6 concluded that the rope marks on the deceased's neck could not have resulted in strangulation. Besides, the deceased's other injuries particularly those injuries inflicted on his private parts could not have been self-inflicted and were clearly inconsistent with suicide. I therefore reject any suggestion that the deceased could have committed suicide and I agree with the findings of PW 6 as to the cause of death.

21. The next question for consideration is who inflicted the injuries that led to the deceased's death. In his submissions, counsel for the accused, Mr Nyagesoa, contended that there was no evidence connecting the accused with the death of the deceased as there was no direct evidence implicating the accused.

22. The testimony of PW 1 was clear and direct in implicating the accused. She testified how she woke up and went to her father's house and found both the accused with her father who had been assaulted. She narrated how the rope was tied on her father's neck and how he was dragged to the

shamba and hanged to make it look like he committed suicide. I heard PW 1 testify and observed her demeanour and I was left with no doubt in my mind that she was telling the truth and I believe her testimony. There was no reason for her to implicate her mother in such a horrendous act.

23. PW 1 testified that when she left her bed her mother, with whom she used to sleep, was not present. She heard her father pleading with his friend not to kill him. When she went to the house, she found the two accused there with her father having been severely assaulted. The two accused were not merely strangers but were persons known to her. As the two accused were present in that house, they alone could explain what could have happened if indeed they did not assault the deceased. The fact that PW 1 did not report what happened immediately thereafter is easily explained by PW 1 who testified that she was threatened by the accused if she screamed she would be killed. Considering that she was barely an adult who had witnessed such a gruesome act committed by her own mother, she must have been overcome with fear to the extent that she could not report the matter that night.

24. When put on their defence, the accused denied knowledge of the act. The 1st accused stated that he was at home on 22nd and 23rd March 2013 and was only arrested on 24th March 2013. Although, he lived a bit far from the deceased's home, several witnesses put him at the deceased home on the material night. The 1st accused was not a stranger to PW 1 and PW 2. He was a friend to their father. PW 1 saw him at the homestead that evening where he had been drinking *chang'aa* with her uncle. He also came to talk to the 2nd accused later when he requested her to go with him to attend a funeral. PW 2 also testified that he saw the 1st accused when he went to make a short call. Likewise PW 4 recalled that on the previous day the 1st accused joined him for a drink at the deceased's homestead at about 8.30pm. He also testified how the 1st accused quarreled with the deceased over an accusation levelled against him and when PW 4 left the deceased's homestead, he left the 1st accused behind. The totality of this evidence proves beyond reasonable doubt that the 1st accused was at the deceased's homestead on the material night when the deceased was murdered.

25. I have warned myself of the dangers of convicting the accused on the basis of a single witness respecting identification in difficult circumstances. I am satisfied that there is no likelihood of mistaken identity. The accused were well known to the PW 1 and the length of time and circumstances of the incident were such as to exclude the possibility of mistaken identity. I therefore find that that the 1st and 2nd accused were present in the deceased's house and they assaulted him and in order to cover their tracks, tied his neck with a rope, dragged him and hanged him to make it appear that he had committed suicide. The suicide cover-up was further fortified when the 2nd accused tried to divert attention from the murderous act by suggesting to PW 3 that the deceased could have committed suicide as a result of a disagreement between her and the deceased.

26. All in all the evidence is clear and it points to the accused as the persons who assaulted the deceased leading to his death. Their respective defences cannot withstand the weight of the prosecution evidence. It follows therefore that the assault which they inflicted on the deceased was of such magnitude as to constitute malice aforethought within the meaning of **section 206(a)** of the **Penal Code**. The gravity of the injuries leaves no doubt that the injuries were inflicted with the clear intention of causing grievous harm and indeed caused death.

27. I therefore find **JOSEPH MANYANKI MWITA** and **ROSELYN ROBI MWITA** guilty of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and convict them accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015.

D.S. MAJANJA

JUDGE

Mr Nyagesoa instructed by Nyagesoa and Company Advocates for the accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.