



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 51 OF 2011

REPUBLIC.....RESPONDENT

V E R S U S

JOSEPH MEME M'ANMPIU.....1ST ACCUSED

EDWARD MURIKI STANLEY 2ND ACCUSED

JUDGMENT

Joseph Meme M'Anampiu and **Edward Muriki Stanley** are jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204 of Penal Code**. The particulars of the charge are that on 11/9/2011 at Ndunyu Village, Nkadone Sub Location, they jointly murdered **Naftali Muriithi**. They denied the offence. The case proceeded to full trial with the prosecution calling a total of four witnesses. In their defence, the accused testified on oath. The accused were represented by Mr. Gichunge Advocate. The prosecuted was led by Mr. Mulochi, Learned State Counsel.

PW3 Julius Michubu testified that on 11/9/2011 about 8.00 a.m., he was going home from a canteen when he found the two accused and the deceased, Naftali Muriithi; that Naftali was lying down beside the road and that Muriki, Accused 2 was cutting a stick to cane Naftali. He said it is Accused 2 who called him and told him to go and see a thief, and he was referring to Naftali; that the said Naftali had been beaten on the head, legs and hands; that accused 2 told him that he found Naftali harvesting his *miraa*. PW3 said he told accused 2 not to beat Naftali any more but instead call the owner of the *miraa* farm; that accused 2 went to call the owner of the land, Joseph Meme (Accused 1) while he went to call the mother of Naftali but that the mother refused to go where Naftali was saying she gave him work to do but he refused; that Naftali had asked PW3 for water, and PW3 told the mother to take to him water; that Naftali's mother gave him some porridge to take to Naftali and together with deceased's brother Mwenda, they went back where Naftali was; that accused 1 and 2 arrived there too; that Naftali was not able to take his porridge and he sent Mwenda to go back and tell Naftali's mother (PW4) what they had found. PW3 later saw PW4 crying that they had called her to go see a dead person. PW3 denied seeing anybody beat Naftali but that Naftali told him Edward (Accused 2) beat him in the presence of accused 2 and that it is accused 2 who had been guarding the said *miraa*.

PW4, Veronica Mwothiru, Naftali's mother, told the court that on 11/9/2011, her son Naftali Muriithi left at 6.00 a.m. to go and look for casual jobs of picking *miraa*. After making porridge for the other children, Julius (PW3) came to inform her that Naftali had been seriously injured by Meme and Muriki and needed water; that she went with PW3 with water and porridge but Naftali was not able to take it and could not support himself or get up. PW4 maintained that it is PW3 who told him that accused

1 and 2 beat deceased and that the deceased also told her who had beaten him.

PW2 Philip Mutuma, an uncle to Naftali received a call that Naftali had been injured at the hill at Chemalai. He went to the scene and got a vehicle to take the body to the mortuary. He was also present when post mortem was conducted. The post mortem was conducted by Dr. Grace Nguyo and the report was produced in court by PW1 Dr. Paul Wambugu. The Doctor found that Naftali had bruises on left lower limb, right leg, on right parietal skull, wound 3 cm and right sided lower radial fracture; internally there was intracranial and subdural haematoma. The cause of death was said to be head injury secondary to head trauma and that the wound was caused by a sharp object.

In his defence, accused 1 stated that he knows accused 2 with whom they attended the same church and that accused 2 had been staying at his for three weeks preceding this incident. He said that on that day, he was at home at 7.00 a.m. when a lady was sent to him by accused 2, who informed him that Muriki (accused 2) had found people harvesting his *miraa* and that he had detained one person and the person had been beaten up. Before leaving to go to the farm, accused 2 arrived at his home and confirmed what he had been told about thieves in his *miraa* farm and together with his wife (DW3) and children they went to the *miraa* farm; that indeed, they found Naftali had been injured. He denied seeing anybody assault Naftali and that by then he could not talk or walk; that he arrived at the scene with Julius (PW3) and Naftali's brother. He went to report to the chief. He was only informed that Naftali was one of *miraa* thieves but he did not know who beat Naftali. DW1 further told court that his father used to guard his *miraa* but on that that day he was not there; that Muriki who had been staying with him for 3 months had gone to cut fodder for cattle when he found the thieves in the *miraa* and that he had a *panga* with which he was cutting the fodder.

Accused 2 (DW2) testified that accused 1 was his employer and he had lived with accused 1 for three months; that on 19/9/2011 he was going to look for fodder for animals when he reached the farm and saw some clothes and he raised alarm because he knew that somebody was stealing the *miraa*. He did not see anybody and he went ahead to look for fodder; that when PW3 was passing by, he called him; he showed him the clothes and he went to inform accused 1 together with PW3 what they had seen. He denied ever calling PW3 to go and see the thief. He said that when he screamed, they ran away. He denied having arrested the deceased or telling DW1 that the *miraa* thief had been beaten.

DW3 Jacinta Kagwiria, the wife of DW1 told the court that accused 2 was staying at their home and on 11/9/2011, she sent him to get fodder for the goats from the farm at about 6.00 a.m. to 7.00 a.m.; that a lady came to inform them that accused 2 had sent her to tell them that people were fighting on the farm; that just then accused 2 appeared and reported to them; they went to the farm and found the deceased but did not know who assaulted him. She told court that accused 2 had been living with them and used to assist her at home and had sent him to the same *miraa* farm; she confirmed that accused 2 informed them that he found deceased and 2 others stealing the *miraa*. She further told court that the person by name Akou told her she had left accused fighting with deceased.

At the close of the defence case, Mr. Gichunge submitted that the prosecution had failed to prove the case to the required standard because nobody witnessed the offence; that all the evidence is hearsay; that PW3 and 4 contradicted each other as to who delivered porridge to deceased; that circumstantial evidence is not safe to found a conviction.

Mr. Mulochi on the other hand had urged that the offence took place at 7.00 a.m.; that PW3 saw accused at the scene; pleaded with accused 2 not to beat Naftali; that it was in broad daylight; that PW3's evidence is materially corroborated by that of PW1.

An offence of murder is committed if the prosecution proves that:

1. **The accused committed the act that caused the death (*actus reus*).**
2. **The accused had the intention to cause grievous harm or cause death (*mens rea*).**

The intention is also referred to as malice aforethought (**Section 206 of PC**).

Accused 1 is the owner of the *miraa* farm that thieves were allegedly found stealing from. Accused 2 told the court that he is an employee of accused 1. Though accused 1 and DW3 seemed to deny that he was their employee, they did accept that he was working for them. DW3 said they had employed accused 2 to help with work at their home and did further admit that she had sent him to that particular farm to get fodder on that morning. Accused 1 told the court that it is his father who used to guard his *miraa* but had not done so on that day. Accused 2 said the same. PW3 a neighbor and brother of accused 1 said that on that day, it was accused 2 who was guarding accused 1's *miraa*. PW3 further told the court that accused 2 invited him to come and see the thief he had caught stealing the *miraa*. DW3 did confirm that accused 2 had found people stealing *miraa*, fought with them and she was informed that it is accused 2 who fought with the deceased. Even accused 1 admitted it is accused 2 who caught the thieves.

From the evidence on record, there is no doubt that accused 2 was at the scene where Naftali met his death and was working for accused 1 and DW3, guarding his *miraa* that morning. I am also satisfied that PW3 was a credible witness. Apart from accused 2 inviting him to see the thief, he said that he spoke with Naftali who sent him for water and Naftali also told him that accused 2 had assaulted him and that he is the one who prevailed on accused 2 not to beat Naftali further because he was getting a stick to beat him further. At that time Accused 1 was not at the scene. I find that there is overwhelming evidence on record placing Accused 2 at the scene of crime and he was involved in assaulting the deceased.

PW3 on observing Naftali, found that he was injured on the hands, legs and head which was consistent with the findings of the Doctor. Apart from bruises on the body, there was a fracture to the head which was inflicted by a sharp object. PW3 said that accused 2 was armed with a *panga* and accused 1 did confirm that accused 2 had a *panga* which he was using to cut fodder. Having found that accused 2 was at the scene and was armed with a sharp object that must be the object that caused the injury to Naftali's head.

It was the defence's contention that there was contradictory evidence regarding who delivered porridge to Naftali. PW3 said that it is Naftali's brother and him who first took porridge to Naftali but he could not drink it; that thereafter PW4 went to the scene. PW4 however said she is the one who did take the porridge to Naftali. I find there to be no contradiction because PW4 later went to the scene and tried to give Naftali the same porridge but he was too weak to take it. Even if there is contradiction, it is peripheral to the issues at hand because it does not go to the root of the case since it was not in regard to the assailant or his identity. It is a minor contradiction if at all.

Circumstantial evidence will be relied upon in the instances described in the case of *Abang'a alias Onyango v Rep CRA 32/1990*, where 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.”***

In the case of *Rep V Taylor Weaver & Donovan (1928) 21 Criminal Revision 20*, the court observed that circumstantial evidence is the best evidence. The court said:

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination is capable of proving the proposition with the

accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

In this case the evidence placed accused 2 at the scene; he was armed with a *panga*; he was guarding accused 1's *miraa*; he is the one who admitted to Accused 2 to having fought with Naftali after he found him allegedly stealing the *miraa*. I find that the evidence directly points at Accused 2 as the assailant.

Accused 1 is the owner of the *miraa* that was allegedly stolen. I have found that accused 2 was in fact his employee guarding the *miraa*. At first PW3 said accused 1 was at the scene where Naftali lay injured, but later stated that accused 2 was alone with Naftali and that it is him who sent accused 2 to call accused 1 to the scene. PW4 also alleged that PW3 alleged to have found Accused 1 and 2 where Naftali lay. So far there is no evidence placing accused 1 at the scene of the assault save that the *miraa* which was allegedly stolen was his. The circumstantial evidence does not irresistibly point at him as the assailant but he is a prime suspect. There is not sufficient evidence on record to connect accused 1 with the offence and for that reason I will give him the benefit of doubt and acquit him of the charge.

After careful consideration of the evidence on record in its totality, I am satisfied that accused 2 inflicted the fatal injuries on the deceased. Even if Naftali was stealing, the accused 2 had no right to take the law into his own hands. He should have arrested Naftali who was only a young boy of about 15 years old and handed him over to the authorities. Naftali suffered multiple injuries on his body and a fracture to his skull. The injuries were inflicted on very vital parts of his body with the intent of causing him grievous harm or death and that is evidence of malice aforethought. The prosecution has discharged its burden to prove its case beyond any reasonable doubt. Accused 2 is found guilty as charged and convicted under Section 322 of CPC.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

7/12/2015

PRESENT

Mr. Mulochi for State

Ms Nelima Holding Brief for Mr. Cichunge for Accused

Peninah, Court Assistant

Accused 1 and 2, Present