



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 9 OF 2008

REPUBLICPROSECUTOR

VERSUS

PAUL NZIOKA MUNYAO.....1ST ACCUSED

JOHNSTONE MAKAU MUTUA.....2ND ACCUSED

JUDGMENT

1. **Paul Nzioka Munya** (*Accused 1*) and **Johnstone Makau Mutua** (*Accused 2*) are charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on the **14th day of January, 2008** at **Kakalya Village, Kalama Location** in **Machakos District** within **Eastern Province** jointly murdered **Michael Mativo Kiseli** (*deceased*).
2. Facts of the case are that on the **14th January 2008** the deceased and other people attended a meeting of Beekeepers in his capacity as the chairman. PW1, **Ann Nguko Makau** was in attendance. The meeting ended at 1.00pm. People dispersed. At 7.30pm, she encountered the deceased. As they exchanged pleasantries people she identified as the accuseds herein attacked them. They assaulted them. She managed to escape. The body of the deceased was found in the thicket. Investigations were carried out that culminated into the arrest of the accused persons who were charged.
3. To prove the case the prosecution called **ten (10)** witnesses. PW1 who was at the meeting of Beekeepers earlier in the day stated that she encountered the deceased later on at about 7.30pm as she went to collect vegetables from her garden. With aid of moonlight she saw two (2) men who accosted her and the deceased. They assaulted them injuring both of them. The deceased fell down. They picked branches from thorn trees and threw at him. She managed to escape leaving the two (2) assailants behind. The following day she sought treatment at the Machakos District Hospital. She returned home only to be arrested. She was removed from the cells the following day. She led the police to the scene of the incident of assault. She was in police custody for two (2) weeks prior to being released. Identifying their assailants as the accused persons she denied having known them previously.
4. On cross-examination she stated that she told her children and husband that she had fallen down hence sustaining injuries. She denied an allegation that the deceased was her lover but stated that on the material date the deceased declared his love for her and requested her to be his lover. She denied an allegation that she yielded and went out that night to have sexual intercourse with him. Stating that she identified the accused persons on an identification parade she denied the allegation that the police had given her their description. She stated that she had seen Accused 2 previously though she did not know his name. She however knew his father's name as **Mutua Kamutu**.
5. PW2, **Dixon Mbithi Kisalu** a bicycle mechanic was at his place of work when Accused 1 took to

- him a bicycle to be repaired. Accused 1 had offered to sell a cellphone to him but he did not have money. Thereafter he witnessed as Accused 1 sold a cellphone to **Muli Makilya (PW5)** that turned out to belong to the deceased.
6. PW3, **Joseph Mbithi Makau** was arrested as a suspect following investigations conducted and taken to where the body of the deceased lay. He was later released.
 7. PW4, **Felix Mutyoka Mativo** the son to the deceased stated that he received a call from the deceased's cellphone on the **15th January, 2008** at about 2.30am but nobody communicated. He communicated with his family members but failed to establish the whereabouts of the deceased. They embarked upon a search and found his body alongside a footpath near Mbooni –Machakos road. He saw a white cap on the tree. He observed the deceased's body and noticed injuries on his face. The neck was swollen. The shirt was torn. He rang the police who moved to a house nearby and arrested its occupants a man and a woman. He also identified the body of the deceased to the doctor who performed the postmortem in the course of investigations. He was dissatisfied with the manner in which investigations were being carried out therefore complained to the CID Headquarters.
 8. Further investigations were carried out which resulted into the arrest of the bicycle mechanic who in turn identified the person who sold off the cellphone that belonged to the deceased. The suspect led them to his home. He entered a grass thatched house and removed a black polythene paper bag that was stashed in the grass thatched roof. It contained a pair of shoes and a watch. He identified the items positively as belonging to the deceased. Accused 1 then led them to the arrest of Accused 2 as his purported accomplice.
 9. PW5, **John Muli Makilya** identified Accused 1 as the person who sold to him the cellphone, Nokia 110 that belonged to the deceased. He also disposed it off. He identified the purchaser as PW6.
 10. PW6, **Andrew Mutuku Mutua** confirmed having purchased the cellphone from PW5. As he used the cellphone he was arrested by the police who required him to disclose how he acquired it. He identified PW5, as the person who had sold it to him.
 11. PW7, **David Munyasia** stated that on the **14th January, 2008** he kept for the accused persons a bicycle at about 5.30pm. They later collected it at 10.30pm. On cross examination he stated that he was also arrested as a suspect in the case but later released.
 12. PW8, **Dr. John Mutunga** performed a postmortem on the body of the deceased and made a report of his findings thereof.
 13. PW9, **Eunice Mbuli Makau** was arrested jointly with his brother. In the course of investigations she was released two (2) days later.
 14. PW10, **No. 30837, P.C. Festus Mwirichia** investigated the case and arrested suspects. With the aid of Safaricom he accessed the cellphone that PW6 was using having purchased it from PW5. Investigations revealed that it belonged to the deceased. PW5 identified the person who had sold to him the same as Accused 1 herein. He was interrogated and he led them to his house where they recovered open shoes and a watch that belonged to the deceased. He also led them to the arrest of Accused 2.
 15. On cross-examination he said the accused said he had no intention of killing the deceased but only intended to punish him. He admitted that the deceased was found sleeping with a woman. Admitting having observed the body of the deceased he said it had injuries on the face, head, both hands, chest and private parts. In particular the penis and foreskin.
 16. In their defence, Accused 1 stated that he was arrested by three (3) CID officers who were in civvies. They found him at Mulalani Market. They did not tell him the reason for his arrest but took him to their homestead and only entered his house. Nothing was recovered from him. Denying having committed the offence he stated that he saw the exhibits in court.
 17. Accused 2 stated that he was arrested by two (2) police officers who found him at his home. He denied having been involved in the murder of the deceased.
 18. Submissions were filed by the state which I have duly considered.
 19. Issues for determination are:-
 - i. Whether the accused persons herein caused the death of the deceased.
 - ii. Whether it was with malice aforethought.

20. Witnesses who found the body of the deceased stated that it was lifeless. To establish the death and the cause thereof the prosecution adduced evidence of a postmortem report made following examination carried out. PW8, **Dr. Mutunga** found the deceased having sustained a skull fracture on the occipital bone. There was massive subdural haematoma on the back of the brain, the spinal column bones 2 and 3 had fractured. The cause of death per his opinion was cardiopulmonary arrest secondary to spinal injury and head injury. This was evidence of death.
21. PW1 stated that as she conversed with the deceased on the fateful night they were attacked by two (2) men. She referred to them as one being 'tall' and the other 'short'. The tall man in particular assaulted them. She sustained injuries. Both of them fell down. When she attempted to stand the taller man twisted her arm but she managed to escape with a dislocated elbow joint, a cut wound on the lower side of the left eye, loss of incisor tooth and a painful left leg. In court he identified Accused 1 as the taller person and Accused 2 as the shorter person.

She went on the state thus:

"I had not known the two (2) before the assault. I had not seen them before. I did not talk to any of them during the attack".

On cross-examination she stated that she identified accused persons on parade.

22. Evidence of identification parades having been conducted in the course of investigations was not led. Courts have been reluctant to accept dock identification especially so when there is no other evidence to confirm the guilt of an accused person.
23. In the case of ***Gabriel Njoroge versus Republic [1982] – 88) 1KAR 1134*** the court held that dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. In the case of ***Mutheri & 2 Others versus Republic*** it was however held that:-

"It cannot be said that all dock identification is worthless. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification."

24. This is a case where I must caution myself at the outset in accepting such evidence. The reason being that PW1 was a prime suspect in this case and a person whose evidence must be taken cautiously as she appeared dishonest right at the outset. She was not honest about circumstances under which she was found with the deceased. She was also not honest as to how she sustained injuries. She alluded it to a fall then changed the story and claimed that she had been assaulted by the accused persons. Her credibility was questioned. What she stated required confirmation.
25. Evidence was however led that Accused 1 sold a cellphone that was identified by PW4 as having belonged to the deceased. PW4 availed a receipt issued for the cellphone to the police which had an Imei Number that enabled them to trace the current user. The prosecution did not adduce evidence from the service provider but called a witness who was traced by the police pursuant to investigations carried out. PW5 identified Accused 1 as the seller of the cellphone. His evidence was corroborated by PW2 who was a witness to the sale. This evidence was not challenged.
26. After the arrest of Accused 1 he led the police and other witnesses to where they recovered a watch and open shoes that belonged to the deceased. In his testimony Accused 1 admitted that a search was carried out in his house but disputed evidence led of recovery. However, he did not dispute the fact that he led the police to where they found his co-accused whom he identified as his accomplice.
27. Items that were recovered were identified as the property of the deceased. This brings in the doctrine of recent possession. In the case of ***Arum versus republic the Court of Appeal (Kisumu)- Criminal appeal No 85 of 2005*** stated that the doctrine of recent possession applied where the stolen property was found with the suspect; the property was positively identified by the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant.
28. Evidence led by the prosecution that items that were stolen from the deceased were found in

possession of the Accused 1 is not challenged. These properties were positively identified by PW4 as having belonged to the deceased. The property that was stolen from the deceased went missing on the night he died. This was evidence of circumstances that confirm evidence of PW1 that Accused 1 was the taller man that assaulted the deceased. Prior to basing a conviction on such evidence I must consider principles applicable to test circumstantial evidence. In the case of *Abanga alias Onyango versus Republic Criminal Appeal No. 32 of 1990(UR)* the court stated thus:-

“... such evidence must satisfy three tests:-

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. Those circumstances should be of a definite tendency unseeingly pointing towards guilt of the accused;**
- iii. The circumstances cumulatively, should form a 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”.**

29. PW1 placed the Accused 1 as one of the persons who assaulted the deceased to an extent that he fell down and some branches were thrown onto his person. Therefore Accused 1 possessed items that the deceased possessed on the fateful night like the cellphone, which he later disposed off. He then led the police to where some other property that belonged to the deceased was recovered, inside his house. This was indeed circumstantial evidence that corroborated evidence of PW1 as to the guilt of Accused 1.

30. With regard to Accused 2, he was identified by Accused 1 as his accomplice. Nothing was recovered in his possession. In the case of *Kinyua versus Republic [2002]1KLR 256-* it was held that it is a firm rule of practice that evidence of an accomplice...requires corroboration and the court may only in appropriate circumstances convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself... on dangers of doing so. It is apparent that in his testimony Accused 1 disowned the allegation of having led the police to where Accused 2 was found and later arrested.

31. Evidence adduced by PW1 that Accused 2 was the shorter man she saw as compared to his co-accused required corroboration that was lacking. Without such confirmation there cannot be proof beyond reasonable doubt that Accused 2 was the one in company of Accused 1.

32. Evidence adduced proves the fact that Accused 1 did cause the death of the deceased. This therefore brings us to the second issue.

33. Malice aforethought is defined by **Section 206** of the **Penal Code** thus:-

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

- a. 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**
- b. Knowledge that the act or omission causing death will probably cause the death 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.**
- c. An intent to commit a felony.”**

34. On cross-examination it was alleged that the deceased had an affair with a woman presumed to be PW1. He had been warned to desist from the illicit affair and the act was intended to punish him not to kill him. Evidence adduced of injuries sustained by the deceased that caused his death were severe.

35. When inflicted the person who fractured his spinal cord definitely knew that the kind of blow inflicted would cause grievous harm. The manner in which the deceased was hit clearly showed some indifference on the part of the assailant. Indeed Accused 1 had malice aforethought. He had

the intention to cause the death of the deceased. The defence put up is a mere denial which is disapproved by the prosecution's evidence.

36. Having considered evidence adduced in totality, I find that the case against Accused 2 is not proved to the required standard. Accordingly, he is acquitted.

37. With regard to Accused 1, I am satisfied that the charge of murder as framed is proved against him beyond any reasonable doubt. He is guilty of the offence and I convict him as charged.

DATED, SIGNED and DELIVERED at MACHAKOS this 29TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE