



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 83 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS MATWETWE AKU.....ACCUSED

J U D G M E N T

The accused, **THOMAS MATWETWE AKUMA**, was charged with the offence of Murder **contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on 3rd of September 2008, at Dam Area of Kiserian Trading Centre in Kajiado District, the accused murdered ALEX MELKIORI KAVISHAE.

The prosecution called a total of eleven (11) witnesses. Thereafter, when the accused was put to his defence, he gave an unsworn testimony. He did not call any other witness.

Having received all the evidence in the case, and also having received the submissions from both the prosecution and the defence, I now put together the judgment.

PW 1, DR. ODUOR JOHANSEN, is a pathologist. He conducted the post mortem examination on the body of the deceased (Alex Melkior Kavishe), at the City Mortuary, Nairobi.

Externally, the body had no physical injuries. However, when **PW 1** opened up the body, he noted that the liver was injured, resulting in bleeding in the abdominal cavity.

PW 1 testified that the cause of death was the injury to the liver and the resultant bleeding from that injury.

The doctor made it clear that the liver was not ruptured. It simply had widespread bleeding from an injury which was on its right side.

During cross-examination, the doctor attributed the injury to blunt trauma. He added that the injury was caused by a blunt object.

The doctor also explained that a liver cannot rupture spontaneously, on its own. Therefore, the injury was caused by an external force, such as a blow by a fist.

PW 2, MASSELINA MUTHONI GITAU, testified that she was a neighbour to the accused.

On 3rd September 2008, **PW 2** heard “very loud noises” emanating from the neighbour’s house. **PW 2** specifically recalled hearing the accused saying;

“Nitakuua Leo,; Toka. Nitakuua.”

That means;

“ I will kill you today. Get out. I will kill you.”

After the said loud noise, there was silence, and **PW 2** went to sleep.

On the next day, at about 12.30p.m, **PW 2** saw the accused cutting some branches of a tree. The accused carried the branches to his house, and then he began sweeping from the door, towards the gate.

During the period of 6 to 7 months when the accused had been **PW 2**'s neighbour, she had never seen him sweep in the way he did on the material day. She therefore found it unusual.

About 5 hours later (at 5.30p.m.) **PW 2** noted that a police vehicle arrived at the scene. When **PW 2** went to the said scene, she saw the body of a dead person. The witness did not identify the deceased.

On the following day, **PW 2** saw the accused packing. She concluded that the accused was trying to run away. **PW 2** alerted other people.

During cross-examination, **PW 2** said that the accused used to work as the caretaker of his uncle's home. Whilst doing so, the accused had also done some work for **PW 2**.

PW 2 recalled that in June 2008 the accused assisted Kyalo to plant arrow roots for **PW 2**.

When **PW 2** and her husband paid only Kyalo, the accused demanded that he too should be paid. The said demand degenerated into an argument, culminating in **PW 3** slapping the accused.

PW 3, PATRICK GITAU MWANGI, is the husband to **PW 2**.

PW 3 even took away from the accused, the panga and jembe which the accused had used on that day. Those implements belonged to the accused, but **PW 3** retained them at his house.

PW 2 testified that the accused also went to her house in October, and harassed her. Because the accused insulted her, **PW 2** concluded that the accused was not a good person.

When questioned about whether or not she or her husband went out of their house to find out what was happening on the night when they heard the loud noises from the house occupied by the accused, the answer was in the negative.

Finally, **PW 2** estimated the distance from her house to the house occupied by the accused as being about 20 metres; whilst the body was recovered about 90 metres from **PW 2**' house.

PW 3 testified that on the night of 3rd September 2008 he heard noise from Momanyi's house. The person who spoke said;

“I will kill you; Ghasia”

PW 3 also heard “punching noises” for the next 15 minutes, after the accused had threatened to kill whoever he was talking to. **PW 3** did not see the person whom the accused was addressing, as the person was inside the neighbour's house.

On the next day, **PW 3** learnt that a person had been killed. He went to the scene, after the police had come. However, he did not identify the deceased.

PW 3 explained that he did not pay the accused because he and his wife (**PW 2**) never engaged the accused to work for them. **PW 3** said that he used to only engage Kyalo, who would then ask the accused to help him.

PW 3 got infuriated when his wife informed him that the accused had called her a prostitute. He therefore slapped the accused, and then took away the panga and jembe which the accused had been using to weed the shamba belonging to **PW 3**.

PW 3 detained the jembe and panga at his house because the accused had used them to harass his family.

Both **PW 2** and **PW 3** said that the body of the deceased was recovered from the shamba of a neighbour who had no nexus with the accused.

According to **PW 3**, the uncle of the accused was named Momanyi, whilst the body was recovered from the shamba of Njenga.

PW 4, PETER NJENGA HUNJA, verified that the body of the deceased was recovered on his land. After he found the body

there, when he had gone to harvest some maize, **PW 4** reported to the police.

Thereafter, the police arrested him together with another neighbour called Kibui (**PW 5**).

PW 5, GEORGE KIBUI, was a neighbour to **PW 4**. He worked as a cobbler.

On 4th September 2008, at about 3.00p.m, **PW 4** told him that he (**PW 4**) had found a body on his land.

When he got to the scene, he was arrested by the police.

Both **PW 4** and **PW 5** were held in custody for 3 days. Thereafter, both of them were set free.

Whereas **PW 4** and **PW 5** estimated that the body was recovered about 600 metres from their respective houses, they estimated that the house in which the appellants lived was only about 50 metres from the scene of recovery.

PW 6, JUMANNE KIMANI RAJAB, testified that the sister of the deceased was married to his neighbour. As the deceased lived together with the said sister, **PW 6** had known him for over one year.

As the sister of the deceased did not go to the mortuary, **PW 6** volunteered to identify the body.

By the estimates of **PW 6**, the body was recovered about 30 to 40 metres away from the house in which the accused used to live.

PW 7, PC PATRICK LANGAT, was summoned by the OCS Kiserian Police Station after the OCS received a report about a murder.

PW 7 went to the scene where the body had been discovered. They were led to the scene by **PW 4**, who had reported the incident at the police station.

According to **PW 7**, the body appears to have been dragged to the place where it was found. The police followed the signs of dragging, but the same disappeared upon reaching the busy road.

PW 8, CPL. MIKE OPICHO, was at the Kiserian Police Station when the accused was escorted thereto, under arrest. The persons who escorted the accused to the station were members of the public.

PW 8 testified that the accused had suffered injuries, which had been inflicted by those members of the public who had originally arrested him.

One of those who escorted the accused to the police station was named Joseph Imeta. The said Joseph Imeta informed the police that the accused had been connected to the murder of the deceased.

PW 8 re-arrested the accused and placed him in custody.

PW 9, SGT. MARTIN THUO MAINA, was the Duty-Officer on 4th September 2008, when **PW 4** reported having found a body on his farm. The report was recorded in the O.B.

Thereafter **PW 9** went with **PW 7** to the scene. After the initial investigations, the police arrested **PW 4** and **PW 5**.

PW 9 also testified that the marks which showed that the body had been dragged to the place where it was recovered, led backwards upto the house where the accused resided. The said house was about 70 metres away from the scene where the body was found.

Whilst **PW 9** and **PW 7** (who are police officers) arrested **PW 4** and **PW 5**, the accused was later arrested by members of the public.

During cross-examination **PW 9** said that he arrested **PW 4** and **PW 5** as the first suspects because one was the owner of the land where the body was found, whilst the other was a neighbour. Secondly, the marks showing where the body had been dragged were on **PW 4's** land.

Later, **PW 9** saw signs of an attempt to get rid of the dragging marks; he learnt that **PW 2** had seen the accused sweeping from his house towards the road.

PW 9 said that the accused used to share the house with the deceased, although the deceased only used to stay there on occasions.

But **PW 9** also conceded, during cross-examination, that **PW 2** reportedly saw another man at the said house, on 5th September 2008. **PW 2** did not disclose the identity of that other person, and **PW 9** did not ascertain the said person's identity.

PW 10, DR. ZEPHANIA KAMAU, examined the accused on 17th September 2008. He verified his age as being 24 years.

The accused complained of being assaulted on 5th September 2008. **PW 10** verified that the accused was the victim of assault using blunt objects. He classified the degree of injury as harm.

Finally, **PW 10** verified that the accused was mentally fit, to undergo a trial.

The accused had told **PW 10** that the injuries were inflicted on him by a mob.

PW 11, JOSEPH BERNARD IGWETA NJENJERI, testified that on 5th September 2008, Mercy went to a shop situated at Kiserian, and found him there. The said shop was being operated by **PW 11's** brother-in-law, whom **PW 11** had gone to visit.

Mercy told **PW 11** that the person whom she had heard threatening to kill somebody was then selling-off his things, ready to run away.

PW 11 first rushed to the police station to report. Then he rushed to the house where the accused lived. **PW 11**, together with the other man who had accompanied him, found that the accused was not at home.

They followed the direction which they were told that the accused had taken.

When they caught up with the accused, he was in a bar. He then rushed out, and tried to board a matatu.

The men chased away the matatu which the accused wanted to board. Thereafter, **PW 11** arrested the accused.

According to **PW 11**, he stopped the mob from beating up the accused. He said that the mob was determined to kill the accused, but that he, (**PW 11**) pleaded with the mob. As a consequence, the mob did not attack the accused, said the witness.

PW 11 said, during cross-examination, that he did not know **PW 2's** name. He just recalled that **PW 2** told them that the accused was selling-off his things. However, **PW 11** did not meet any person who had purchased anything from the accused.

According to **PW 11**, the distance from his brother-in-law's house to where the accused lived was 3 kilometres.

That marked the close of the prosecution case.

On his part, the accused said that on 3rd September 2008, he was not at home. He was at Kajiado, where he had gone as a loader on a sand lorry. As there were many vehicles waiting for their turn to get sand, it was not until 12.00 midnight that they got their load.

Thereafter, the accused only got back to Kiserian on the morning of 4th September 2008.

On 5th September 2008, the accused met **PW 2, PW 3** with relatives of **PW 4** and **PW 5** who had been arrested. The accused testified that **PW 2 and PW 3** told him that they would pay the debt which they owed him. **PW 3** then told the relatives of **PW 4** and **PW 5** that it was the accused who would know about the body of the deceased.

At that point, the mob beat up the accused.

Eventually, he was rescued by a police officer from Kiserian.

The accused attributed his problems to the disagreements between him and **PW 2**.

Having evaluated all the evidence on record, I note that there was no eye-witness to the incident. All the evidence made available was circumstantial.

PW 2 and **PW 3** said that they heard the voice of the accused as he was threatening to kill somebody. However, the words attributed to the accused, by the two witnesses were not similar.

As **PW 2** and **PW 3** were together, in the same house, they ought to have largely heard the same words as were being uttered by the accused.

Secondly, I note that although **PW 9** said that the dragging marks led from the scene where the body was found upto the house where the accused used to live, **PW 7** said that the dragging marks got lost along the busy road which cuts across between the residence of the accused and the place where the body was found.

In my considered view, the evidence of **PW 7** was more realistic because if the dragging marks had led back to the residence of the accused, the police would have considered him as the prime suspect immediately. But they did not. They arrested **PW 4** and **PW 5** as the “first suspects”; that is what **PW 9** said.

The court is unable to reconcile the assessment by **PW 9**, that **PW 4** and **PW 5** were the first suspects; with the assertion by the same police officer, that the dragging marks led the police right back to the residence of the accused.

Had the dragging marks led to the house where the accused lived, he would surely have been the primary suspect. As the police arrested other persons first, that suggests that the dragging marks did not lead them back to the residence of the accused.

I have also noted that **PW 2** allegedly saw the accused when he was packing his things.

PW 2 did not explain or elaborate on how it was possible for her to see the accused as he was packing his things behind the walls of the house in which he lived.

Furthermore, **PW 2** testified that the accused was busy selling-off his property, with a view to running away from the area. But there was no witness who bought any item from the accused.

Given the bad blood which existed between the accused on the one hand, and the couple of **PW 2** and **PW 3**, on the other hand, I find that it is possible that the couple made up the story against the accused. That possibility cannot be ruled out.

After all, **PW 2** said that the accused was a bad person, who was capable of anything.

Why do I say so? It is because although the body of the deceased was allegedly dragged on the ground, over a distance of about 70 metres, the body did not have any external injuries!

Also if the accused had swept over the dragging marks, as alleged by **PW 2**, the police (led by **PW 9**) would not have seen the said marks after that.

In sum total, the evidence on record cannot form the foundation for a conviction.

Accordingly, I find that the prosecution has failed to discharge the burden of proving beyond any reasonable doubt, that the accused was guilty of the offence of murder.

The charge is therefore dismissed.

I acquit the accused, and order that he be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 8th day of November, 2012.

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FRED A. OCHIENG

JUDGE