



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL CASE NO. 23 OF 2006

REPUBLIC.....PROSECUTOR.

VERSUS

JEREMIAH KIBET MWOK.....ACCUSED.

J U D G M E N T.

1. The accused person **Jeremiah Kibet Mwok** was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence stated that on 15th day of May, 2006 at Kamwino Reserve in West Pokot within the Rift Valley province jointly with others not before the court he murdered **Wasike Wekulo**. The prosecution called a total of 11 witnesses who gave evidence to support the charge of murder. The accused person was put on his defence; he gave unsworn statement of defence and he did not call any witnesses.

2. The late **Wasike Wekulo** (hereinafter referred to as deceased) was an employee of the retired Senior Chief **John Mwok Kamuniet (PW4)** who is also the father of the accused person. The deceased was employed as a herdsman and used to look after PW4's farm at Komwoni area. PW4 is a polygamist; he has 3 wives and 3 homesteads. Where the deceased was working PW4's wife had passed away so he was staying with the accused person. The deceased had his own hut and the accused person was living in another hut. On 17th May, 2006, the accused person reported to PW4 that the deceased was picked by his sons at 5.00 a.m. on the 15th May 2006, the accused person said he heard them talking from outside.

3. On the 17th May, 2006 **Beatrice Nasimiyu Wanjala (PW1)** who was the wife of the deceased's son came to PW4's home. She was looking for the deceased to deliver a message from her husband. PW1 had been sent by her husband **Moses Wandela Masasambi (PW2)** to inform the deceased that they needed iron sheets to roof a house that PW2 was constructing for the deceased. On 15th May, 2006 PW2 had sent his daughter also to look for the deceased but when she didn't return, PW2 decided to send PW1. PW1 and PW2 were informed by the accused person that the deceased had travelled home with his sons. The two witnesses were surprised because the deceased had not reached home.

4. The mater was reported at the local police station at Makutano of a missing person. PW4 told the court that when the accused person reported about the deceased, he became suspicious because it was not usual for the deceased to leave his place of work without notifying him. Moreover, the accused person was seen with the deceased's radio which was also unusual because there was bad blood between the deceased and the accused person. The deceased person had given evidence against the accused person regarding a case involving theft of a radio from PW4's farm.

5. When the deceased disappeared, the accused person was out on bond and the case of theft was going on at the Senior Principal Magistrate at Kapenguria. When the matter was reported, the police helped the members of public to comb the area looking for the deceased. According to PW4, the search on 17th May, 2006 did not yield any result but on 19th May, 2006, it is the accused person who reported to PW4 that he had found the body of the deceased near the river in a thicket. The accused person took PW4 to the scene. Police were called and **Charles Mwangi (PW7)** together with the OCS and the Scene of Crime personnel removed the body to Kapenguria District Hospital Mortuary.

6. **Dr. James Kipsogei Kipchirchir (PW8)** produced the post mortem report on behalf of his colleague Dr. Kiprono who could not attend court without unnecessary delay. PW8 said he was familiar with the handwriting of Dr. Kiprono because they used to work together for a period of 1 year at Kapenguria District Hospital. The body of the deceased had cut wounds on the frontal side of the head about 4 cm x 4 cm extending deep into the skull about 3 cm x 0.5 cm. There was another cut wound on the face 2 cm on the left area with a fracture of the left orbital fosse. There was also a cut wound on the left hip just midway between pelvis and the left iliac crest. The size of the wound was 4 cm x 3 cm and it was penetrating up to the exterior. There was cut wound on the pubic area 4 cm x 8 cm extending through the penis and the fen oral triangle.

7. As a result of the examination **Dr. Kiprono** came to a conclusion that the deceased died of cardio respiratory arrest due to severe hemorrhage from the femoral vessels and possible brain injury. PW8 also produced the medical examination report of the accused person which was carried out by **Dr. Kimei**. The accused person was found mentally sound to stand trial of the charge of murder. The body of the deceased was identified to the doctor by **Corporal Philips Ripis (PW9)**. He also escorted the accused person to Kapenguria District Hospital for the age and mental assessment.

8. **Corporal Ayub Kirumba (PW10)** recorded a report of a missing person on 17th May, 2006 which was made by PW4. When the body of the deceased was found PW9 with **Inspector Kosgei** and other police officers went to the scene and found the body of the deceased wrapped in a blanket and the head was covered with a sisal sack. The scene of crime personnel from Kitale police station photographed the scene and drew the sketch plan of the scene. The body was found about 800 meters from the homestead where the deceased was staying with the accused person. The accused person had another criminal matter before the Kapenguria PM Court Case No. 624 of 2005. In that case the accused person was charged with stealing PW4's radio. He was eventually convicted and sentenced to 3 years imprisonment.

9. PW10 further told the court that they decided to prefer a charge of murder against the accused person because he had differed with the deceased who gave evidence against him. Moreover, the accused misled PW4 that the deceased was collected by his relatives in the wee hours of 15th May, 2006 which turned out not to be true. It is also the accused person who discovered the body on 19th May, 2006 and reported the matter to PW4. **PC David Kibet (PW11)** was transferred to West Pokot and took over from the former DCIO, **Mrs. Esther Mukamba** who subsequently retired from the service in July, 2007. Esther Mukamba was in charge of investigations in this matter, she handed over to PW11 a radio model No. R234 which was covered with a torn grey cover. Esther Mukamba could not attend court because she relocated to America. The radio was handed by PW4 who said he had recovered it from the accused person and it was kept as an exhibit.

10. Placed on his defence, the accused person denied the offence, he gave unsworn evidence. He stated that the deceased acted as his father and in return he treated him as such because PW4 was ever absent. From 2002 it was the deceased person who used to look after them. On the fateful day, the accused person said he had drunk illicit brew and came home after the deceased had slept. He went to sleep in his house and early in the morning on 15/5/2006, he heard the deceased knocking on the door. The deceased told the accused person that he should look after the cows because he had been called at his home urgently.

11. The following day on 17/5/2006, the accused person reported the matter to PW4, PW1 also came looking for the deceased and she said the deceased was not at home and she was sent to look for him. This is when the matter was reported to the police. The police advised that a search should be mounted to look for the deceased. On 19th May, 2006, the accused person saw the body of the deceased after he saw people running from a thicket near the river. He reported the matter to PW4 and the police took away the body of the deceased which was badly mutilated and he was charged with his murder. He denied the offence.

12. Counsel for the accused person made submissions that the circumstantial evidence that was the basis of the charge against the accused person was not proved. According to **Mr. Tigogo**, learned counsel for the accused person, he submitted that the only link between the accused person and the death of the deceased was a radio that was allegedly found in possession of the accused person, it was the property of the deceased. He went on to submit that there was no evidence to show the radio actually

belonged to the deceased, because it was brought to the police station by PW4. The evidence by PW4 did not prove there was bad blood between the deceased and accused person. Indeed, it is PW4 who was hostile against the accused person. The evidence of PW4 was not corroborated that the accused person was trying to sell his animals and the deceased used to protest. Thus the prosecution's case was based on mere suspicion.

13. The above submissions were countered by the State. **M/s. Bartoo**, the learned State Counsel submitted that the circumstantial evidence before court proved to the required standard that it was the accused person and none other that murdered the deceased. There was motive, based on the grudge that the deceased gave evidence against the accused person in a criminal case before Kapenguria Principal Magistrate. A radio belonging to the deceased was recovered from the accused person. Lastly the accused person misled PW4 and the relatives of the deceased that the deceased was collected by his sons to go home so as to divert their attention. After a search mounted by members of the public turned futile, it is the accused person who discovered the body of the deceased. Counsel urged the court to find that the prosecution proved its case beyond reasonable doubts.

14. Regarding the evidence on record, what connects the accused person with the death of the deceased is circumstantial evidence. Firstly, the accused person used to live with the deceased at PW4's homestead at Komoni. It would appear there was another son of PW4 who used to live with accused person but on the material day he was said to have gone at another farm which is 10 kms away. No doubt if this witness was called to testify, his evidence would have been useful to the court. For the prosecution to succeed with a charge of murder based on circumstantial evidence, the facts in support of the case must be incompatible with the accused person's innocence and incapable of any other explanation or hypothesis other than, it is the accused person, and no other, was responsible for the death of the deceased. (See the case of **SIMON MUSOKE VS. R. [1958] EA 715**) where the Court of Appeal held:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

See also the case of **REPUBLIC VS. KIPKERING ARAP KOSKEI & ANOTHER 16 E.A.C.A 135.**

“In order to justify, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

15. In this case, the accused person was suspected because he used to live with the deceased and for reasons that;

(i) There were allegations of bad blood between the deceased and accused person because the deceased testified against the accused person when he was charged with the offence of theft.

To me, this was mere suspicion because there was no evidence that the accused threatened the deceased at all. There was no evidence that the accused person previously quarreled or even fought with the deceased; they had lived together for 4 years. This has to be taken against the backdrop of the accused person's defence that he treated the deceased as a father figure. The other reasons put forward were that;

(ii) The accused person was found with the deceased radio and he did not offer a plausible explanation how he came to be in its possession.

This radio was not positively identified as the property of the deceased. It was taken to the police station by PW4. There is no cogent evidence to show that it belonged to the deceased.

(iii) The accused person misled PW4 and the deceased relatives that the deceased was collected by his relatives on the wee hours of 15/5/2006 in order to divert their attention.

16. It is the accused person who reported to PW4 about the absence of the deceased. It is also the accused person who

discovered the body of the deceased; this in my opinion is too remote and cannot be a ground of finding the accused person guilty. There is doubt in my mind whether the deceased left with a relative(s) or other people and then met his death or that he was killed by the accused person. There is doubt in my mind whether it is the accused person and none other murdered the deceased person. The police did not carry out thorough investigations to rule out the possibility that there could have been other people, and so as to put the accused person as the only person who was at the homestead with the deceased at the material time.

17. For the above reasons, I find there are several gaps as pointed out in the above analysis. Taking the totality of the evidence before court, the accused person should be acquitted of the charge of murder and I so order.

Judgment read and signed on 22nd September, 2011.

M. KOOME.

JUDGE.