



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 6 of 2002

REPUBLICPROSECUTOR

VERSUS

1. MASIA MUTISYA

2. MWENDE MUTISYA

3. NZINWA MAVINDI

4. JOHN MUSEE MUTISYAACCUSED

J U D G E M E N T

Masia Mutisya, Mwendu Mutisya, Nzinwa Mavindi and John Musee Mutisya, were jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 6th and 7th November, 2000, at Mang'alu village, Kitoo sub-location, Mtitu location of Kitui district jointly murdered Mwema Mutisya Mulatya. The accused persons denied the charge.

The prosecution called a total of 8 witnesses in respect of their case. Accused 4 was acquitted as the court found that there was insufficient evidence to warrant him being called upon to defend himself. Accused 1 and 2 gave unsworn statements in their defence while accused 3 gave a sworn statement.

Nzembi Musee (PW1), testified that she is the daughter of accused 2 and that accused 1 is the mother of accused 2 and therefore her grandmother. Accused 3 is her brother in law having married accused 2's daughter, who is her sister. She recalled that she arrived back home on 3/11/00 from Nairobi when accused 2 told her and brothers and sisters that they had planned to kill Mwema who was a step brother accused 2 and step son to accused 1. The reason accused 2 gave was that he used to make noise when drunk. PW1 slept with accused 2 in the same house whereas accused 1 feared involvement and left the home to go and spent the night at accused 3's home. PW1 recalled that on the same night at about 1.00 a.m – 2.00 a.m accused 2 was called out of the house by accused 3. Later she heard Mwema scream. She stood at the door and saw accused 3 and another person carrying the body of the deceased to the cattle shed where it was buried. There was moonlight on that night. After the burial they went to sleep and accused 1 came back to the home next day. On same day accused 3 came with the boy who helped in the murder and burial and were given the deceased's cattle to go and sell. All the children were sworn to secrecy by accused 2 regarding the events of 4/11/00. Later PW1 was arrested and only recorded her statement as to what happened after police beat her. PW1 told the court that police were told of the murder by one Nduku, a witchdoctor who treated them after the murder but was not paid for his work.

They were treated so that the matter could not be found out.

Jacob Kithambo (PW2), was a cousin of the deceased. He recalled that PW8 Administration Police Corporal Joshua Muyanga approached him and asked if he knew where Peter Mwema (deceased) was. This was on 15/3/01. PW2 informed PW8 that Mwema was in Nairobi but PW8 said that Mwema had been killed and buried. They met at the District Officer's office next day where accused 1 was locked up.

Kivusu Mulatya (PW3), an uncle to the deceased recalled meeting PW8 on 15/3/01 who asked for Mwema. PW3 had last met Mwema on 15th November 2000. It is PW8 who informed him that Mwema had been killed.

James Malonza Musyoka (PW4), received information that he was wanted by PW8. He found PW8 at accused 1's house. PW8 asked if PW4 knew where Mwema was, and PW4 said Mwema was in Nairobi where he worked. Mwema was the son of PW4's cousin. He later met the three accused with one Nduku Kimanthi as he went to enquire what had happened. Later he witnessed when the deceased's body was exhumed from the cowshed where accused 1 had pointed out. PW4 helped carry the body from the grave and the body was in a polythene bag but the head had protruded out. He was able to see the beard as that of Mwema. Otherwise, the body had no clothes.

Postmortem was carried out on the remains that were found in the cowshed by Doctor Kirasi Olumbe, who had migrated to Australia at the time of hearing of this case and could not be traced without unnecessary delay or expense. Doctor Jane Wasike (PW5) who had worked with him produced the postmortem report as exhibit 1, Doctor Olumbe found the body to have decomposed extensively, there were fractures of the bone at the front joint of the ear, and chin, hyoid bone was missing, haematome on left temple. He opined that the cause of death was head injury caused by a blunt trauma. He was not able to establish whether there were other injuries to the soft tissues which had decomposed. He noted that the beard was still attached to decomposed tissue and could help in identification.

Police Constable Samuel Mutua, of Kitui Police Station attended postmortem on 15/4/01 at Nairobi City Mortuary. The relatives did not attend postmortem as they arrived late.

Police Constable Reuben Nyaudi accompanied Inspector Namachanja to Mungaru village where exhumation of the body was done from a cattle shed. He was present when Jacob PW4 identified the body as that of his cousin.

Joshua Munyenge, recalled that on 12/3/01, he was at Mutitu trading centre when Nduku Kimanzi, now deceased, asked to have an appointment with him. They met on 14/3/01 when Nduku informed PW8 that Mwema Mutisya was killed by his relatives in November 2000 and buried in a cowshed. The said Nduku gave the name of Nzinwa and two others and Nduku went to point out Nzinwa who had been hired by accused 2 to commit the murder. Nduku also mentioned Musee Mutisya and Mwendwa Makesa. On 16/3/01 accused 1 led them to the grave in a cow shed. There were signs that there was a grave at the site. The site of the grave was guarded till 22/3/01 when the body was exhumed.

In her unsworn defence, accused 1 said that in October she went to visit accused 2 in Garissa as accused 2 was sick and admitted in hospital. She remained there till March of the next year. She denied knowing when Mwema was murdered or that she knew where he was buried.

Accused 2 said that she did not know accused 3 till she was arrested and that as of 6th and 7th October, 2000, she was admitted in hospital at Garissa and that accused 1 visited her in October. She denied knowing when Mwema died nor did she know where he was buried. Accused 3 in his sworn defence said that he knew accused 2 on 15/3/01 and that it is Nduku Kimanzi, who told police that accused 3 was involved in the murder. He denied knowing the deceased. He recalled that he had opposed his father from selling land to Nduku Kimanzi and denied that he was related to either accused 1 or 2 and was not at the scene on 6th and 7th October, 2000.

The charge facing the accused persons indicates that the deceased was murdered on the night of 6th and 7th November, 2000. PW1, the key witness in this case was not sure of the exact date of the murder. She talks of leaving Nairobi on 3rd November, 2000, was informed of the plan to kill and the plan occurred next day. She then talked of having arrived home on 2nd November, 2000. She later admitted that she was not sure of the exact date of the murder. All she recalls is arriving home from Nairobi on either 2nd or 3rd November, 2000. PW4 recalled that the deceased had gone to PW4's home on 5/11/00. That is the last he saw him. The deceased's death having been concealed for such a long time, it can only be estimated when it happened as the only witness cannot recall exactly when it occurred but it was in the early part of November 2000.

The deceased's death might never have been known had it not been for one Ndotu who informed PW8 about the alleged murder. PW1 corroborated PW8's evidence that it is Ndotu who made the report about the deceased's death. PW1 said that it is Ndotu who was a medicine man who administered treatment on PW1 and her family so that they could not be found out. Accused 3 did confirm that it is the said Ndotu who told police that he was involved in the murder. It is unfortunate the said Ndotu died before his testimony was taken.

It is only PW1 who was present in the homestead when the murder allegedly took place. She did not report to police or anybody else about what she saw. It is after Ndotu revealed the murder that police arrested PW1 and after beating her she recorded a statement which she repeated in court. The question is how much weight the court can give her evidence. PW1 explained the reason why she did not reveal what happened. The culprits were her relatives, her mother, accused 2. She lived in the same home. She was placed in a precarious position. The court will therefore consider this evidence of PW1 with caution.

PW1 did not see the actual murder of her uncle. Before considering the rest of the evidence, the issue to address first is whether there is ample evidence to confirm the death of Mwema Mutisya. Doctor Kirasi Olumbe found that the body had decomposed extensively. He found fractures on the head and found the possible cause of death to be head injury caused by blunt trauma to the head. PW1 said she heard the deceased scream. She later saw accused 3 and another carry the body to the cowshed for burial. It is indeed the place where the body was later exhumed from. In their defences accused 1 and 2 do not deny the death of Mwema. PW4 who was present at the exhumation and had not seen the deceased for sometime said he was able to identify the remains of the deceased from the beard which the doctor said could be able to help in identification. PW7 was also present when PW4 said it was the deceased's body. PW 2, 3 & 4 who are relatives of the deceased had not seen him for a while. They assumed he had gone back to his place of work in Nairobi and PW2, 3 and 4 had not been notified of the deceased's death and yet they are his close relatives. There had been no funeral in the home of Mwema and yet a body was found buried in the deceased's cowshed. The grave was concealed so that it is accused 1 who pointed it out to PW4 and 8 and others present. There was evidence that it would have been possible for a person to know that there was a grave in the cowshed. All the above coupled with the evidence of PW1 that she had been informed of the plan to kill Mwema and that she told it transpired on the night accused 2 was called out and she later heard Mwema screaming, I am satisfied beyond any doubt that Mwema was murdered and the remains found in his cow shed were his. It is not normal for one to be buried in a cowshed. Besides, if it was not concealment at least there would have been a funeral and signs of a grave.

Who murdered Mwema and for what reason? Mwema was a step son of accused 1 and step brother of accused 2. According to PW1, the plot to kill Mwema was because he used to harass the family when drunk and they wanted to kill him before he killed them. According to PW1 accused 1 informed her of the plan. She was with her small brothers and small sister. PW1 witnesses accused 3 call accused 1 from the house on the night of the murder. Even before PW1 disclosed the murder plot to anyone, PW8 learnt of the plot from another source, and arrested accused 1, 2 and 3. Accused 1 and 2 purported to raise alibis in their defences but that came as an afterthought. At no stage was the alibi raised in cross-examination of the prosecution witnesses. Accused 3 denied knowing the other co-accused, the deceased or being related to accused 1 and 2 and PW1. That again comes as an afterthought. PW1 specifically identified accused 3 as a brother in law. PW1 heard him talk to accused 2 on the material night. She also heard him bid accused 2 goodbye on the same night. On the next day accused 3 was given the deceased's cows to go and

sell. I believe PW1's evidence that she did see and hear accused 3 on the night of the murder. There has been no reason alleged as to why PW1 could have framed accused 1, 2 and 3. PW1 knew accused 3 even by voice. Accused 3 seemed to allege a grudge between him and Ndotu over sale of land. That again came as an afterthought. He alleged that his father had given land to Ndotu and he did not like it.

According to PW1, accused 1 did not actively take part in the murder. Infact she left her home to go and sleep elsewhere. According to evidence of PW1, however, accused 1 knew of the plot to murder. She did nothing to stop it. Even after the murder she did not report to the authorities. She later pointed out the site of the grave to PW4 and 8 and others. Did the three have a common intention? A common intention means two people who intent to do a certain act so that if one of them does it with the object of furthering their intention in to action, all are guilty of the offence. In this case, even though accused 1 could not stand the incident and went away from her home on that fateful night, her conduct speaks for itself. She knew of the plot and the murder and never reported to the authorities. Their intention with accused 2 and 3 was the same.

The doctor found that the cause of death was blunt trauma to the head that caused fractures. The head is a vital part of the body and the fact of injuring the head is itself evidence of malice aforethought. The concealment of the deceased's body is evidence of their ill motive.

PW1 claimed that Musee Mutisya, was not present on the night of the murder. There was no other evidence against accused 4. That is why he was acquitted.

In sum, I do find that PW1's evidence is sufficiently corroborated and there is ample evidence and I am satisfied beyond any doubt that accused 1, 2 and 3 did murder Mwema Mutisya and secretly buried him in his cowshed. That is not normal place for burial. They are found guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Criminal Procedure Code and are convicted accordingly.

R.V. WENDOH

JUDGE

Dated at Machakos this 31st day of March, 2006

Read and delivered in the presence of

R.V. WENDOH

JUDGE