



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 28 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

1. RHODA NDUTI NZUKI.....1ST ACCUSED

2. DAVID NZUKI.....2ND ACCUSED

3. KIOKO NZUKI.....3RD ACCUSED

J U D G M E N T

1. Rhoda Nduti Mbuvi, David Nzuki and Kioko Nzuki the Accused's Persons herein, are jointly charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. The particulars of the charge as per the information provided are that on the **1st day of December 2016** (herein after to be referred to as the material day) at around **11am** at **Kangondi** Location in **Kitui West, Kitui County**, the three accused persons **murdered** one Mwalimu Nzuki (herein after to be referred to as the deceased for ease of reference.)

2. The Accused persons denied committing the offence and the prosecutions presented a total of six witnesses to prove their case. The prosecutions in this matter basically hinged on circumstantial evidence.

3. Catherine Mbithe David (Prosecution Witness 1), a daughter in law to the 1st accused and a wife to the second accused testified that on the material day **1st December 2016** at around 6:00Am she was sent to buy milk by the 1st accused and that she went to buy milk and when she went back at around 9:30am she found many people gathered at the place the deceased lived. She told this court that she was shocked to see what had happened to the leg of the deceased though she did not describe fully what happened or how the leg was.

4. Corporal Mohamed Bajina (Prosecution Witness 2), an AP Officer attached to Kangodi AP Camp which was near the scene of crime told this that he was at the Camp on the material day when at around 10:25 am, the accused persons reported at the AP Camp. He added that the first accused carried a panga and that he accompanied them to the scene where he found the deceased with cut wound injuries caused by a sharp object. He added that the injured person was naked and unconscious when he found him lying down. He further testified that he went back to the camp with the 3 suspects and placed them in custody and kept the panga as an exhibit. He added that he also carried a hoe he found at the scene of crime and kept it as an exhibit as well and identified the items in court during trial. He added that he called for reinforcement from regular police who arrived at 2PM and that they proceeded to the scene to collect the body.

5. Jane Muthoni Benjamin (Prosecution Witness 3), the Area Chief also summoned to testify and she told the court that she received information from AP Constable Kimanzi from Kangondi AP Camp on the material day that three persons had surrendered at the AP Camp. She testified that she proceeded to the said AP camp and found the three Accused persons herein. She added that she was told that there had been a fight involving the Accused persons and the deceased and that when she proceeded to where the fight was said to have taken place, she found the victim had bled and was dead. She testified where the victim lay, there was a blood-stained stick, hoe and a panga. He added that he arrived at the scene when the victim was already dead and according to her the victim was bleeding from the head and chin.

6. Agnes Kimanzi Mungao (Prosecution Witness 4), a village elder of Kavaleni Village, Kangondi, testified and told this court that on the material day at around 9 am, one Thabitha Munyoki rang her through her mobile phone and informed her that there was a fight at the home of Nduti Nzuki (family of the deceased person) and that she was afar and was not able to reach there immediately. She added that at 11:00 am, the same person called her and told her Mwalimu (deceased) had died. She testified that she proceeded to the scene and found the victim lying down dead with blood stains around where he lay. She further testified that she rang the Area Chief and informed her of what she had seen. She told the court that she remained at the scene until the Police Officers came at around 3:00 PM to collect the body adding that she saw a stick and a hoe near the scene with some dry blood stains.

7. **PC Wachira Kulet (Prosecution Witness 5)** the investigating Officer in this case testified that he collected the exhibits which had been brought and stated that there was a hoe, panga and a wooden rod which he tendered as P. Exhibit 1, 2 and 3 respectively. He added that he charged the 3 accused persons herein because they surrendered to the Police and surrendered the panga as well.

8. **Dr. Edward Kiatu (Prosecution Witness 6)**, the Doctor who conducted Post mortem examination on the body of deceased testified that the deceased had punctured wound on the chin and laceration on the front part of the head with a fractured skull. He also noted some swelling on the neck. He concluded that the cause of death was severe head injury and tendered post mortem report as P. Exhibit 4. He added that the lower right limb had been shattered and fractured as well.

9. When placed on their defence all the 3 accused denied committing the offence. The first Accused (Defence Witness 1) gave her sworn defence and stated she found the deceased who was her son lying down in his shamba and that when she tried calling him, he did not respond. She went closer she noticed that he had injuries on the face and the head and that she was shocked and started screaming. She added after she screamed many people came and that at that time her son (deceased) was still breathing though he was not talking. She added that she was prevailed upon by the crowd that had gathered to go first and report to the police about what had happened and that she went and reported the incident accompanied by her sons the 2nd and 3rd accused persons herein. She further testified that she asked the AP for help to take her son (deceased) to hospital but the help was not forthcoming.

She denied committing the offence adding that she did not know what had happened to the deceased who was her first-born son. She denied having any previous differences with him stating that each of her three sons had their respective parcels of land duly demarcated.

10. **David Nzuki (Defence Witness 2)** on his part testified that on the material day at around 7am, he heard his mother (Defence Witness 1) screaming in the garden and he rushed there to find his brother (deceased) lying down.

11. He testified that he tried lifting him up but the crowd that has gathered stopped him asking him to instead go and report the matter to the police. He added that he went with his mother (1st Accused) and his brother (3rd accused) to report at Kangondi Police Post where they were locked up. He stated that he did not know what happened to his brother (deceased).

12. **Kioko Nzuki (Defence Witness 3)** on his part gave the same narrative as DW2. He stated that he heard his mother scream and upon going to check what was going on he found many people near where his brother (deceased) lay. He added the deceased was breathing when he arrived but was not talking and that his attempt to him taken for treatment was thwarted by the crowd who asked him to first report the matter at the police. He added that they proceeded to AP Camp which was a five minutes' walk away from the scene to report. He testified that when they reported the AP officers locked them up and went back to the scene with their mother (the 1st Accused).

He defended himself stating that he had no idea of what happened to his late brother (deceased).

13. In their joint written submission drawn by their learned Counsel M/s Joan Mati advocate, the accused have submitted that there was no eye witness to the incident called to testify. They have contended that the evidence regarding the exhibits tendered was inconsistent pointing out that it is not clear as to whether the panga was found at the scene as per the evidence of PW3 or it was taken to AP Camp as per the evidence of PW2.

14. The Defence has faulted the police action submitting that the arrest of the accused persons in this case was tainted with presumption of guilt. They argue that the Police did not tender any confessionary statements from any of accused as evidence. It is their submissions that they were required to be presumed innocent.

15. The defence further submit that the evidence tendered by the investigating office indicated that there was doubt regarding the weapon used whether it was a panga, a hoe or a stick and who owned them.

16. The defence submits that the burden of proof in criminal matters is beyond reasonable doubt and that the prosecution had the burden to prove both the elements of **Actus Reus** and **Mens Rea**. They aver that the prosecution has failed to discharge that burden pointing out that the evidence tendered did not link them with the murder. They point out that none of the witnesses saw any of them committing the act.

17. It is also the defence case that the element of **Mens Rea** was not established because the Prosecution never established why the accused persons would have wanted to harm or kill the deceased.

18. They contended that the prosecution's case has relied on circumstantial evidence and in their view for one to succeed in that regard the evidence must be water tight and conclusive without any other interference as to the cause of death. They have cited the following authorities to buttress their contention namely: -

1. (a) **Republic -vs- Daniel Musyoka & 2 Others (2014) eKLR.**

(b) **Musili Tulo -vs-Republic (2014) eKLR and**

(c) **Joan Chebchii Sawe -vs-Republic (2003) eKLR.**

19. This court has considered this case and the evidence tendered by the Prosecution. I have also considered the defence put forward and the written submissions made by the accused persons through their learned counsel M/s Joan Mati Advocate. The three accused persons face a charge of murder contrary **Section 203 of the Penal Code**. Under said Section the offence of murder is defined as: -

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”.

The offence of murder from the above definition can be established if the following elements are established and proved by the prosecution;

i. Fact of death

ii. Cause of death

iii. Actus Reus (proof that act/omission is guilty of murder.)”

iv. Malice aforethought (Mens Rea)

20. It is trite and a cardinal rule of evidence that whoever alleges must prove **(See Section 107 of the Evidence Act Cap 80 Laws of Kenya)**. The Prosecution presented or arraigned the 3 accused persons before this court for the offence of murder and the law placed the burden of proof on them. It is true, as submitted by the defence that in Criminal matters, the standard of proof is usually high because it has to be beyond reasonable doubt and in respect to a charge of murder, the prosecution carries the burden to prove each and every four elements listed above.

21. Having set out the legal position, this court shall now consider the evidence tendered in respect to each and every ingredient of murder. Before I consider that, this court wishes to note that the information presented to this court as far as the particulars of the charge are concerned, appears to have some anomalies. This is because, the charge indicates that the three accused persons murdered the deceased without specifying whether the act was committed jointly or in common. It is usually important where there is more than one accused for the prosecution to state specifically and clearly whether the unlawful action was carried by all the accused persons jointly or the accused persons had a common purpose to commit the act notwithstanding the fact that only one or few of them actually carried out the unlawful act. The information presented by the DPP in this matter is wanting in that regard and apparently that was not the only affliction facing the prosecution in this case as this court shall point out later in this judgement.

22. (i) The fact of death

This court, given the evidence tendered by **Dr. Edward Kiatu** (PW 6) is convinced that one **Mwalimu Nzuki** is deceased and died on **1st December 2016** as per the evidence of the other prosecution witnesses and defence. The doctor indicated that he issued **Death Certificate Number 0987482** that certified the death of the deceased.

23. (ii) Cause of death

This court is also satisfied that the prosecution established beyond doubt that the deceased was murdered as **PW6** clearly indicated in his evidence (post mortem report P. Exhibit 4) that the deceased body had injuries to the neck and punctured wound on the head measuring 3x4 cm. He also noted a fracture of the skull on the left side and multiple injuries on the head and lower limbs. According to the Doctor the death of the deceased was caused by severe head injury. This court from that evidence tendered finds that the deceased was murdered and the only question for determination is who killed him and what was the motive.

24. Actus Reus

This is a crucial element in presenting a charge of murder. The prosecution is required to establish this element and connect it to the person accused of murder. In this case, the prosecution's case has clearly fallen short. There is no evidence that the accused persons committed the act or that the unlawful act could be connected to them either directly or indirectly. It is also trite that where there are no eye witness and the prosecution is relying on circumstantial or facts the same must be so strong and incapable of any other inference other than the guilt of the accused person. This court is well guided by the case cited by the defence in the case of **Joan Chebii Sawe vs. Republic (2003) eKLR** where the court of Appeal stated in part: -

“Before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of accused and incapable of explanation upon any other reasonable hypothesis other than of his guilt.....”

25. In this case the prosecution's case is apparently hinged on suspicion that the accused must have committed the offence because they presented themselves to the police. However, the suspicion is negated by the defence statement in defence because they all stated that they had gone to report the incident upon being prompted by the villagers. One can even pose a question that if the villagers were suspicious of the accused persons and wanted to harm them, why did not they escort them to the police and report that they had killed one of their own. I do find that suspicion alone however strong cannot found a conviction or prove a crucial element such as the element of *actus reus*. To that extent I find that the prosecution did not discharge their burden in that regard. I further agree with the defence that there are doubts as to the connection of the murder weapons tendered because the same were not connected to the accused persons. It is also unclear as to who collected the murder weapons (exhibits) and kept them and where they were collected from by the investigating officer. Looking at the evidence tendered by the investigating officer, **(PW5)** one can easily conclude that, that the officer either did little in the investigation or had little knowledge on the crucial evidence he required to nail the suspects or the accused in this case.

26. Malice Aforethought (Mens Rea)

This court finds that this element is totally missing in the Prosecution's Case. The Investigating Officer should have gone out of his way and establish the motive for the murder and connect it to the accused persons. A person of sound mind cannot just murder another person. He must harbour ill motive and it's upon the prosecution to establish and prove that the accused person was ill motivated to either cause harm or kill. In the absence of malice aforethought like in this instance, a charge of murder cannot be sustained.

In sum, this court finds that the prosecution has failed to prove their case beyond doubt that the three accused persons herein are guilty of the offence of murder. The evidence tendered falls short of the standard required to sustain the charge and this court is left with no option but to find them not guilty. They are hereby acquitted under **Section 215 of Criminal Procedure Code** and shall be set free forthwith unless lawfully held.

Dated, Signed and Delivered at Kitui this 9th day of February, 2021.

HON. JUSTICE R. K. LIMO

JUDGE