



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 18 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

NICHOLAS MUU KITENG'E.....ACCUSED

JUDGMENT

1. **Nicholas Muu Kiteng'e** the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars are that on 9th August 2018 at Muatinene Village of Muani location in Mukaa sub-county within Makueni County the accused jointly with others not before Court murdered Dennis Kimathi Mbungo.

2. The prosecution called ten (10) witnesses in support of it's case, while the accused gave a sworn defence and called 2 witnesses.

3. **PW1 Mary Mueni Mbungo**, testified that on 09/08/2018 at 11:50am, she was at Sultan Hamud market when she received a call from her son Christopher Mutuku, telling her that he had been called by his cousin Joseph Kioko and informed that their cows had been driven to Sultan Hamud by an unknown person. PW1 took a motor bike and headed to the cattle market but before getting there, she met someone with the six cows she was looking for. She arrested the person with the help of the rider and tied his hands with a rope. She identified the accused as the person who was arrested with the cows.

4. She called her husband Paul Malonza (PW6) and explained to him. Together with the people who had gathered, they took the suspect to the police station. The rider was not known to her. The cows were driven to the police station by Justus Muli who was grazing next to her cows.

5. He husband had called home and advised the children to check on the herds boy and to also confirm whether the goats were 13. It was her further testimony that she had a total of seven cows and 13 goats. Her daughter Irene (PW2) called and informed her that there was only one cow and 13 goats. She also told her that the herds boy had been murdered. They proceeded to the scene with police and found a crowd there. The suspect was unknown to her and he was wearing a white checked shirt which she identified. The herds boy was her son, Dennis Kimathi Mbungo and was aged 10 years. A post mortem was conducted but she did not attend.

6. In cross examination by Mr. Muli she said that Dennis's mother died when he was only seven months old and she (PW1) breast fed him for two years. On that day she met the accused near the new railway on the road to Maasai Kajiado. She denied knowing what the accused had told the police about a place called Kambo. She said she found the accused with her cows but did not know whether the cows had been given to him by another person. She did not scream when they caught the accused who never answered the questions put to him. From the scene to where they recovered the cows is about three kilometers away.

7. The deceased's body was found in their shamba near the river and he had been strangled with a rope. There are no trees in the shamba. Justus Maweo is a neighbour and he found her and the rest at the recovery scene. The rider was one Willy (PW5).

8. **PW2 Irene Mwongeli Mugo**, is the daughter of PW1 and a student at Mt. Kenya University-Thika campus. Her evidence was that on 09/08/2018 at noon, she was at home in Sultan Hamud when she received a call from her father. She was instructed to go to the shamba and check if the deceased was there as there was information that the cows had been stolen. She proceeded in the company of their shamba boy Joseph Kimathi and arrived after 10 minutes.

9. She called out the deceased's name loudly but there was no response. She ran along the river but did not find him. She then went to the other side of the shamba and found the deceased lying on his stomach. She turned him and realized that he was dead though the body was still hot. She screamed and people arrived including the manager (village elder) and Wanja.

10. She called her father (PW6), mother (PW1) and brother and gave them the report. The village elder called the assistant chief and PW1 arrived with the police. She accompanied them to the mortuary.

11. There was a small rope on the deceased's neck as well as a black mark. The rope was not around the neck. The deceased was their cousin and his mother died when he was seven months old.

12. In cross examination, she confirmed having recorded a statement which was read to her and it stated that the rope was beside the deceased. She however insisted that the rope was on the neck. There were shrubs at the scene and the deceased was herding six cows and ten goats alone as he loved grazing. She agreed that some of her siblings were at home as schools had closed. Grazing was the work of the shamba boy and the deceased was only assisting. The deceased never had any exchange with PW1 over his grazing.

13. After reporting the deceased's death, PW1 told her about the recovery of the cows with the accused. Further, PW2 said that there was a 16 year old boy at a nearby farm who did not witness anything. The cows never strayed to any other place. In re-examination, she said that the deceased was old enough to take care of the cows and goats.

14. **PW3 Justus Muli**, stated that on 09/08/2018 he was grazing near Mwuyu farm/St. Stephen when he saw Mbonga Malonza's six cows being driven by someone he did not know. The person had a white vest and on reaching the road, he wore a checked shirt. He identified the shirt and vest as EXB 1 and 2 respectively. He did not get a number for any member of Mbungo's family hence he called Malonza's nephew, Stephen Kioko and notified him.

15. He continued with his work and after about half an hour, Mbungo's son, Mutevu, called and informed him that the person with the cows had been arrested near the standard gauge railway. He went to the police station and the duty officer sent him to get the cows. He was later shown the accused who was still wearing the checked shirt (EXB1). He identified the photos of the six cows (EXB 3a-c) and pointed to the accused as the man he saw with the cows.

16. Upon cross examination, he said that he saw the accused walking with Mbungo's cows while about 30 metres away and he came closer to him. He had never seen him before. His phone did not have the numbers for Mbungo and his wife. He found the accused wearing the same clothes in the cells and so he did not check on other people. The place where the accused was found with the cows was not on the highway.

17. **PW4 Christopher M. Mbungo** is from Sultan Hamud and a boda boda businessman along Sultan/Kaskeu road. He recalled that on 09/08/2018, he was at Usui with a customer when he received a call from Mashur who informed him that their cattle had been seen with unknown people headed to Sultan. He called PW1 who checked the grazing field but did not find the cows. He dropped the customer and left for Sultan to look for them. While on Mombasa road, he was called by PW1 and informed that the cows had been found near the railway. The hands of the person who had the cows had been tied. They took the thief to the station and recovered the cows.

18. While at the station, PW2 called to say that she had gone to the scene and found that the boy herding the cattle had been killed. The police proceeded to the scene and found the deceased lying in a small trench. He witnessed the postmortem on 14/08/2018 and recorded his statement.

19. Upon cross-examination, he said that he found the accused bound and in a checked shirt near the railway on the way to Kajiado. The rider who took his mother to the scene was not known to him. The deceased was aged 10 years and it was his habit to take care of the animals. He was the youngest and his other siblings were there. The body was under a shrub and the rope was on top of the neck but not tied. From the scene to the place of arrest is two kilometers.

20. He denied that the deceased strangled himself and said that there was no tree there. He didn't know why the accused was not charged with theft.

21. **PW5 Willy Mutinda Kisulu**, a farmer and boda boda operator, testified that on 09/08/2018 at 11.00am, he was called by his neighbour Mueni who wanted to be taken to the market as her stolen cows were being taken there. After about 400 meters, they met a young man following Mueni's six cows. Mueni identified them and started screaming. People gathered and the thief was arrested. He was about 23 years and was wearing blue jeans, checked shirt and white vest and PW5 identified the last two as EXB 1 & 2. He said he had never seen the boy before but identified him as the accused.

22. In cross examination, he said that he did not go to the police station but he was the one who first held the accused. When asked where he was taking the cows, the accused did not respond. The accused had a small stick. It was Mueni's husband who called him and not Mueni. He never knew the deceased.

23. **PW6 Paul Mbungo Mwonza**, a lorry driver in Sultan Hamud, testified that on 09/08/2018 at 11.00am, he was in Sultan Hamud when he received a call from his wife, PW1. He was informed that their cows had been stolen and the thief had been arrested at Sultan Hamud. He asked about Dennis and PW1 said that she had not seen him.

24. He called Irene, (PW2), and told her to check for Dennis. After about 30-40 minutes, PW2 called him and reported that Dennis was dead. He went to Sultan Hamud where he was shown the arrested person. He witnessed the post mortem.

25. In cross examination, he said that he said that he was not aware of any stock theft case over this matter.

26. **PW7 Dr. Alex Makau from** Makueni Referral hospital testified stating his qualifications. He produced the post mortem report (EXB4) on behalf of Dr. Loiposha with the consent of the defence. The findings were:

ü Visible bruises on the right side of head, back of head and middle of head 2x2 centimetres.

ü Bruises on neck 17 centimetres (around neck).

ü It was a strangulation mark.

ü Lack of oxygen in the lungs, cause of death was asphyxia secondary to strangulation.

27. Upon cross examination, he agreed that such injuries can be visible even during suicide.

28. **PW8 P.C Alex Kitur** from Sultan Hamud station testified that on 09/08/2018, they received a report of a young man who had been killed while herding. He went to the scene with C.I. Oyugi Martha, I.P Mathenge and Cpl Langat. They found the body in a bush and there was a rope there. He took the body to the mortuary and then returned to the station where he found the accused arrested by members of the public while driving away the six cows. The cattle were photographed at the scene.

29. In cross examination, he said they took the rope but it was misplaced at the mortuary. There were thorny shrubs at the scene and he did not witness any photos being taken.

30. **PW9 Cpl. Evans Sabisa** of DCI Mukaa testified that on 09/08/2018, he was informed of a murder at Sultan Hamud. The following day he went to Sultan Hamud police station and found the matter investigated and a charge of robbery with violence preferred. The suspect was taken to Kilungu Court but the Court declined to hear it since a murder had been committed.

31. He started his investigations and after reading the statement of one of the witnesses, he confirmed that the accused was the person he was talking about. He had a checked shirt and a white vest which he produced as **EXB 1** and **2**. He took the accused for mental assessment and thereafter attended the postmortem. The doctor found the cause of death to be strangulation from the back. The cows were photographed at Sultan Hamud police station.

32. Upon cross-examination, he said that he had been an officer for 32 years. There was no eye witness and he never learnt that the deceased's siblings had died in mysterious circumstances. The accused refused to tell him where his aunt lives but said that the cows had strayed. He visited the scene and there were other people grazing their cows there. The cattle are rarely tied with ropes in ukambani. The recovered rope was misplaced and it was his further evidence that the accused has a history of stealing stock. From Sultan Hamud to where the accused was found is a distance. He was taking the cows to the market.

33. **PW10 Sergeant Paul Kiilu** of DCI Makueni, testified that on 09/08/2018 he photographed the six cows at Emali police station on the request of the investigating officer. He then printed the photos after preparing the certificate. He produced the photos as **EXB 3a-c**.

34. When placed on his defence the accused elected to give a sworn statement and called two (2) witnesses.

35. The accused denied the charge and testified that on 09/08/2018, he was at his aunt's place in Makindu and was travelling home to Nunguni on the same day. He walked from Kambo and arrived in Makindu at 9.30am. He boarded a lorry upto Sultan Hamud and waited for a motor vehicle to Salama besides the road (*Molala junction*). A woman arrived on a motor bike and started screaming while saying that he was the thief of her cows. People came and started to beat him asking for the cows. The woman asked for his phone and identity card which he gave to her. He was taken to Sultan police station at around 11.00am.

36. While at the station, the woman received a call and was informed that her son had been killed. He was interrogated further. His phone was taken and he gave them his parents' telephone numbers. He was transferred to Salama police station and then to Kilungu Court. He was charged with robbery with violence on Friday and later charged with murder on Monday. The Kilungu one did not proceed. He was never taken to the scene but was shown the photos of the six cows. He denied having been involved in the investigations nor killing the deceased.

37. Upon cross examination by learned counsel Mr. Kihara for the prosecution he said that he was not at the scene and was arrested on the road. That there were no cows near his place of arrest and he was not aware as to why they picked on him. He denied being found with any cows. He denied knowing the location of Maasai market in Sultan Hamud. In re-examination, he said that he was given the checked shirt by the Kilungu Court when he appeared without a shirt.

38. **DW1 Dorcas Wausi**, the accused's mother, testified that on 09/08/2018 at around 9.30am, she was in the neighborhood of her home when the accused called to say that he would be going home. He had gone to visit his aunt, Patricia David, in Makindu on 06/08/2018. He was on the way but had run short of fare. She sent him kshs 300/00 through Mpesa. She gave her number as xxxx and that of the accused as xxxx. She produced an Mpesa statement as **DEXB 1**.

39. The accused did not arrive and she later got information that he had been seen by his grandmother, Lucy Muneo Mua, in a police vehicle. The accused's father went to Kilome police station to inquire about him.

40. Upon cross examination, she said that the fare was for the accused to go to Ikalioni. That the date of murder was the same day that he called her. She agreed that the Mpesa statement can't show what the money was for. The scene is between Makindu and Ikalioni. That the accused was arrested along the Mombasa-Nairobi road. In re-examination, she said that the statement shows kshs 270/= and not 300/= because of transaction costs.

41. **DW2 Patricia Kamende Kimuia**, the accused's aunt, testified that on 09/08/2018, the accused who had been visiting since 06/08/2018 said that he was leaving for their home in Nunguni. She gave him kshs 300/= as motorbike fare to Makindu. She was then called by her mother in law, Loise, and informed about what had befallen the accused.

42. In cross examination, she said that the accused left her home before 11.00am. She was not sure how long it takes from her home to Nunguni. She didn't know where the scene was.

43. At the close of the defence case both parties filed written submissions.

44. The learned Prosecution Counsel, Mr. James Kihara, submits that the circumstantial evidence adduced by the prosecution established all the elements of the offence of murder. That it was the accused who killed the deceased in order to take the heads of cattle. He argues that three witnesses confirmed seeing the accused driving the cattle towards Sultan Hamud. He submits that the accused committed an unlawful act by simply removing the cattle from the grazing field and taking them towards the market. It is his contention that the evidence of the witnesses points to the accused as the person who caused the death of the minor.

45. The accused, through learned Counsel Mr. Muli, submits that the evidence of all the prosecution witnesses is purely circumstantial and the element of motive was not established. He relies *inter alia* on the case of **Omar Chimera –vs- Republic-Cr.A. No. 56 of 1998** where the Court held that;

“In a case dependent on circumstantial evidence in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”

46. He submits that PW3 was the only person who allegedly saw him leaving the homestead of PW1 yet he did not participate in the arrest and an identification parade was not carried out. Counsel submits that in light of the accused's evidence that he was given the checked shirt in Court, the question which begs is whether PW3 would be able to identify him if he is placed amidst other people wearing checked shirts. He contends that there is no distinct feature on the checked shirt which the accused wore.

47. He submits further that the evidence of PW1 and PW5 is contradictory with regard to whether or not PW1 screamed after seeing the accused with the cows. It is also his submission that there were contradictions with regard to the number of cows owned by PW1.

48. He contends that the prosecution failed to avail a crucial witness *to wit* the 16 year old boy who was grazing near the farm of PW1.

49. Relying on statistics of Google maps, he submits that the distance from Makindu to Sultan Hamud is about 60.7 kilometers hence it was impossible for the accused to leave Makindu at 9.30am, arrive at Sultan Hamud, proceed to PW1's homestead, kill the deceased and still be found at Sultan Hamud with the cows at around 11.50am.

50. He submits that from the evidence on record, PW8 and PW9 neglected, refused and/or failed to conduct prompt, effective, proper and professional investigations. That the investigating officers could have at least tracked the accused person to confirm whether he actually left Makindu or if at all he was at the scene where the deceased was found. He contends that the investigations were conducted on suspicion and that alone can never be basis for a conviction.

Analysis and determination

51. The charge of murder is defined under section 203 of the penal code as:

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

52. Malice aforethought is defined under section 206 of the penal code as:

“(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 of 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;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

53. I have keenly considered the evidence on record and the submissions. The main issue for determination is whether the prosecution has proved the charge of murder against the accused. To secure a conviction for the charge of murder, the prosecution has to prove three ingredients to with:

(i) The fact and cause of death of the deceased.

(ii) That the death was accused by an unlawful act of commission or omission by the accused (actus rea).

(iii) The said unlawful act was accompanied by malice aforethought/intention (mens rea).

The fact and cause of death

54. PW2 saw the deceased at the scene and the post mortem report (EXB4) confirms the death. The report also indicates that the deceased was identified by PW4 and PW6 at the mortuary. Accordingly, the deceased's death was sufficiently proved.

Proof that the death was caused by an unlawful act of commission or omission by the accused

55. This case is purely based on circumstantial evidence as there was no eye witness. The Court of Appeal, in **Abanga alias Onyango –vs- Rep Cr. A No.32 of 1990(UR)**, set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, 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 unerringly pointing towards guilt of the accused; (iii) the circumstances taken 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.

56. In **Sawe V Republic [2003] KLR 364** the Court of Appeal stated thus on circumstantial evidence:

1. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

57. On the material day (09/08/2018), the accused was seen with the stolen cows by PW1, PW3 and PW5 and it was broad daylight. PW3 was the first one to see him driving the cows away and he took the initiative of contacting the deceased's family to find out what was happening. Shortly thereafter, the accused was arrested with the cows by PW1 and PW5. All the three witnesses testified that he was wearing a checked shirt and they identified it in Court.

58. The accused acknowledged the checked shirt but explained that it was given to him by the Kilungu Court when he appeared before it without a shirt. This explanation does not add up because he was arrested on the material day and taken to the cells. On the same day, PW3 drove the stolen cows to the police station and was shown the accused who was still wearing the checked shirt.

59. According to PW9, the charge in the Kilungu Court was robbery with violence and the certificate accompanying the photographs of the stolen cows indicates that they were photographed at around 4.00pm on the material day. It is therefore quite obvious that he was not taken to Kilungu Court on the material day hence could not have acquired the shirt from the Court. He was taken to court while wearing the shirt (EXB1).

60. Having established that he was found with the cows that the deceased was herding then two facts are clear. He was either the thief or the recipient of the cows. He did not give any explanation. PW3 saw him driving away the cows from the scene and he became suspicious.

61. He frantically tried to get in touch with the owners of the cows. Within a short time PW1, PW5 found the cows being driven away by the accused. On receipt of the information of the recovery of the cows PW1 and PW6 who were the deceased's adoptive parents wanted to know the whereabouts of the deceased as he was the one with the cows.

62. PW6 sent PW2 to go and check where the cows were being herded. It's there that she found the boy's body lying on the shamba. She screamed and people came.

63. This narration clearly leads to the conclusion that the deceased was killed to enable the thief take away the cows.

This incident occurred in broad daylight. Counsel for the defence has raised an issue about identification of the shirt and even the accused.

64. It is clear that the recovery was at a public place – near the standard gauge railway. PW3 went to the police station and was later shown the accused, after he got the cows from the scene. There was no way he could have been taken to a parade to identify a person he had already seen! PW1 and PW5 who first saw the accused with the cows had not known him before. PW1 was the first to identify her cows. They arrested him on the spot. PW9 Cpl Evans Sabisa informed the court that the accused had a history of stealing stock. This he said during cross examination. This has not been rebutted.

65. The accused in his defence does not deny being around the area where the offence was committed. DW1 and DW2 were nowhere near the scene and they did not know what the accused was doing when he was out of their sphere of influence. He may have asked for money from his mother (DW1 but that in itself cannot exonerate him from guilt. By the time this incident took place the accused had already left DW2's home according to her evidence. The accused did not give any explanation for possession of the cows which were not his.

66. Finally on this issue, the accused was the person found with the cows which were being herded by the minor before he was found dead.

This circumstance has been firmly established and it infers guilt on the part of the accused. Further, the fact that only a short time had lapsed between the murder and the accused's arrest buttresses the finding that indeed the deceased's death is attributable to an unlawful act committed by the accused. I am satisfied that the circumstantial evidence points to none other than the accused as the person who killed the deceased in order to take away the cows.

Whether the accused had malice aforethought (mens rea).

67. The accused must have conceived the idea of taking away the minor's life in order to take possession of the cows and the evidence of PW7 was that the strangulation was from behind. This indicates that the minor was ambushed and in my view, an ambush is certainly a pre-meditated event. Further, the accused must have known that the act of strangling the minor would cause him grievous harm or even death. See **Daniel Muthee –vs- Republic [2007] eKLR**, where the Court of Appeal stated as follows with regard to the issue of malice aforethought:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”

68. I am satisfied that the killing was well meditated in order to open a way for the accused to disappear with the cows without a hitch. I therefore find the ingredients of murder to have been established.

69. For my part I find the accused guilty of the offence of murder contrary to section 203 of the penal code and he is convicted accordingly.

SIGNED AND DATED THIS 19TH DAY OF MAY, 2021 IN OPEN COURT AT MILIMANI NAIROBI BY:

H. I. ONG'UDI

JUDGE

DELIVERED THIS 15TH DAY OF JUNE, 2021 IN OPEN COURT AT MAKUENI BY:

GEORGE DULU

JUDGE