



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 2 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

MARTIN MUTETHIA.....ACCUSED

JUDGMENT

1. **MARTIN MUTETHIA (Accused)** is 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 23rd December, 2017 at Kairanya village, Akirangondu Location, Igembe South Sub-County within Meru County, murdered LAWI KABAYA

PROSECUTION CASE

2. The prosecution called five (5) witnesses in support of its case. **Lawi Kabaya (Lawi)** died on 24th December, 2017 from injuries sustained on 23rd December, 2017.

3. According to **PW3 Glory Kagendo**, her husband **Lawi** left home on 22.12.2017 with Accused and Mutembei and did not return until the morning of 23.12.2017 when he was arrived home with injuries on the head and chest. It was her evidence that her husband later the same day died in hospital.

4. Following **Lawi's** death, Accused who was suspected to have murdered him and who also had an injury on the head was arrested and handed over to **PW5 CPL Wilson Kimondo** who upon investigating the matter gathered from Accused that they had been involved in a traffic road accident while riding on a motor cycle. That there being no evidence of foul play, he recommended an inquest but the office of DPP recommended that Accused be charged with murder.

DEFENCE CASE

5. In his sworn defence, Accused denied the offence and maintained that him and **Lawi** were involved in a traffic road accident while riding on a motor cycle from Maua at about 11.00 pm on 22.12.2017 and was injured on the head and face (scars visible). He stated that police did not ask him to identify the scene of the accident.

6. Thuranira Reuben, a clinical officer who treated Accused at K.K.Etama Hospital on 23.12.2017 as confirmed that he had injuries to the head and hand as shown on the treatment card DEXH.I. Accused's 2nd witness Jadiel Mungania who is cousin to **Lawi** stated that he met both Accused and **Lawi** at **Lawi's** home on 23.12.2017. He stated that both had injuries which they said were sustained in a road accident the previous night and that was the last time he saw **Lawi** alive having succumbed to the injuries.

ANALYSIS AND FINDINGS

7. I have considered the evidence on record. **Section 203** and **204** of the **Penal Code** under which the Accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the Accused by an

unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

(a) The death of the deceased

8. That **LAWI KABAYA** died was confirmed by his wife PW3 and by PW1 Julius Theuri and PW4 Joel Mwenda who identified his body to the doctor that conducted a postmortem on 08.01.2019 as corroborated by the postmortem form **PEXH. 3**. The postmortem reveals that **Lawi** suffered bleeding in both chest cavities and had collection of blood on the right side of head and died of traumatic brain injury following a blunt trauma to the head.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

9. In order to establish the accused's culpability, the prosecution wholly placed reliance on circumstantial evidence that there having been no corroboration that Accused and **Lawi** were involved in an accident, Accused must have murdered **Lawi**.

10. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

11. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused 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.

12. A more recent decision in this area is the oft-cited **Joan Chebichii Sawe v Republic [2003] eKLR**, the Court of Appeal stated;

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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

13. I have evaluated the evidence at great length and there is really nothing to connect the Accused with the death of the **Lawi** except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.

14. The summing up of the defence by the Accused gave a reasonable explanation as to what happened to **Lawi** and as to how him and **Lawi** were injured.

15. Accordingly, and for the reasons set out hereinabove, I have come to the conclusion that the prosecution case is not so strong against the Accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence that it is possible that he indeed murdered the deceased.

(c) Malice aforethought

16. Since the prosecution has failed to prove *actus reus*, it would be futile for this court to delve into the issue of malice aforethought.

17. Consequently, I find Accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AT MERU THIS 15TH DAY OF JULY 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For the Accused - Mr. Wamache hb for Mutuma Advocate

For the State - Ms. Mwaniki