



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 81 OF 2016

BETWEEN

REPUBLICPROSECUTOR

AND

PHINEAS MURIITHI MUUGA.....ACCUSED

JUDGMENT

1. **PHINEAS MURIITHI MUUGA (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 24th October, 2016 at 07.00 hrs at Athiru Gaiti in Igembe Sub-County within Meru, murdered FELIX GIKUNDI MBOI

PROSECUTION CASE

2. The prosecution called nine (9) witnesses in support of its case. **PW2 Selina Gacheri** recalled that she last saw deceased alive on the night of 24.10.2016 when Accused beat up and chased the deceased and his brother Edaphan Mutwiri out of the homestead for allegedly refusing to go buy potatoes as instructed by **PW8 Winifred Gakii**. **PW7 Edaphan Mutwiri** similarly stated that he last saw deceased alive on the night of 24.10.2016 when Accused beat them and chased them out of the homestead for allegedly refusing to go buy potatoes as instructed. Deceased's body was discovered in a shamba on 25.10.2016 by **PW1 Gerald Mungania Mbatani** and was removed to the mortuary by **PW6 CIP Shadrack Momu**. deceased and his brother Edaphan Mutwiri out of the homestead for allegedly refusing to go buy potatoes as instructed.

3. A postmortem conducted on deceased's body which was identified by his father **PW3 John Mboyi** was conducted by Dr. Kooro on 31st October, 2016 and he formed an opinion that that the deceased died of head injury due to blunt head trauma as evidenced by the postmortem form **PEXH. 3**. Accused was subsequently arrested and charged.

DEFENCE CASE

4. In his sworn defence, Accused conceded that he asked deceased and his brother why they had not gone to buy potatoes as instructed but denied beating them as alleged. His witness Pastor Muriithi stated that he knew Accused as a good man who related well with the deceased who he was taking care of.

ANALYSIS AND FINDINGS

5. 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:

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

204. Any person who is convicted of murder shall be sentenced to death.”

(a) The death of the deceased

6. That **Felix Gikundi Mboi** died was confirmed by all the prosecution witnesses and the Accused and was corroborated by the postmortem form **PEXH. 3** which reveals that deceased died of head injury due to blunt head trauma.

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

7. In order to establish the accused's culpability, the prosecution wholly relied on the evidence by **PW2 Selina** and **Gacheri PW7 Edaphan Mutwiri** who stated they last saw deceased alive on the night of 24.10.2016 when Accused beat him and chased him out of the homestead for allegedly refusing to go buy potatoes as instructed by **PW8 Winifred Gakii**.

8. From the evidence on record, none of the prosecution witnesses saw Accused persons or anyone of them inflict the injuries that resulted in the death of **Felix Gikundi Mboi (deceased)**.

9. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

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. In the case of **Ernest Abanga Alias Onyango vs. R CR. NO. 32 of 1990 (UR)**, the Court of Appeal cited with approval the case of **Rafaeri Munya Alias Rafaeri Kibuka vs. Reginam (1953) 20 EACA 226**, where it was held that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”

13. The summing up of the defence by the Accused failed to give a reasonable explanation as to what happened to the deceased after he chased him out of the homestead on the material night.

14. In the case of **Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782** the Court had to say thus:

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.

15. The logic of this reasoning is inescapable for the accused did not explain anything on the alleged offence as framed and prosecuted against him by the prosecution.

16. In these circumstances of this case, I find that it can safely be inferred that Accused caused the injuries that resulted in deceased's death.

(c) Proof that deceased had malice afterthought

17. The offence of murder is complete when, “*malice aforethought*” is established if there is proof of the following circumstances:

“(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.”

18. In the case of **Republic v Lawrence Mukaria & Another [2014] eKLR**, the Court of Appeal considered what constitutes malice aforethought and observed as follows:

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

19. The fact that deceased was hit on the head leaves no doubt in the mind of the court that Accused must have known that his action would cause deceased grievous harm or death. I am therefore persuaded that malice aforethought on the part of Accused has been established.

20. Consequently, Accused is found **GUILTY** and is convicted accordingly. 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. Ashaba Advocate

For the State - Ms. Mbithe