



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 56 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOYCE KABURO MUTHURI.....1ST ACCUSED

SALESIO GICHUNUKU MUTHURI.....2ND ACCUSED

JUDGMENT

1. On 13/09/2016, **Joyce Kaburo Muthuri and Selasio Gichunuku Muthuri (“the accused persons,”)** were arraigned before this court and charged with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code**. The information against them alleged that on 21/08/2016 at Muiganda Village Ajuki Location in Tigania East District within Meru County, the two accused persons jointly murdered **Patricio M’Etharamburi Muthuri**.

2. The accused persons denied the charge and the trial proceeded in which prosecution paraded 6 witnesses in an endeavour to prove its case. The first witness, **PW1, Jacob Mutiga**, the area chief, gave evidence to the effect that he was at home on 22/8/2016 at about 7.00 am, when he received a phone from one Peter Nkurubu, informing him that, the body of Patricio Muthuri had been found on the ditch along Mikinduri-Meru Road. He immediately rushed to the scene aboard a motor cycle and found the body had an injury on the head being penetrating wound on the top of the skull and there was blood. He then followed the blood trail which led him to the deceased home, about 50 meters away from the scene. He found the 1st accused there and on entering the house, he saw blood spots in the house. He locked the house to secure it from any interference and asked the 1st accused not to leave until the police arrive. He proceeded to open the house belonging to the 2nd accused and saw an axe with blood stains on the handle. He likewise locked it up to secure the scene and its contents till the police arrived. When the police arrived, he showed them the two houses and when they entered the house of the deceased, they found a blanket soaked in blood on the bed. On entering the house of the 2nd accused, the witness showed to the police the axe and they took it. The 1st accused and the wife to the 2nd accused were then arrested. The 2nd accused, who had some injuries on the head, was arrested after being brought to the police station by a crowd of people said to be members of the public.

3. The witness testified that he knew the deceased and his family well. He identified photographs taken at both the scene and the home of the deceased. He also identified the blanket and the axe recovered from the deceased and the 2nd accused’s house.

4. During cross examination, he stated that the deceased family was living harmoniously and that he did not know who had killed the deceased.

5. **PW2, David Ntongai**, the deceased brother, recalled that he was in his shamba on the material day, 20.7.2016, cutting napier grass when he heard screams s from the home of the deceased to the effect that if the deceased did not sell the land and share with the accused the proceeds, they would kill him. It was the wife of the deceased, accused 1, who said they would kill or poison the deceased. He proceeded there and successfully managed to calm them down and advised the deceased to deal with the matter threatening his life. On 22.7.2016, 2nd accused went to his home to inform him that the deceased had been killed. Shocked, he went to the scene and confirmed that indeed the body was that of his brother. He did not find the 1st accused, the 2nd accused and the 2nd accused’s wife at the scene. The body had a deep cut on the left side of the head and the brain matter was out. When the chief came, they followed the blood trail which led them to deceased house, about 50 meters from where the body was. The 2nd accused was later arrested by public and beaten up, but he was saved by the police.

6. During cross examination, he stated that the deceased and his wife had lived together for over 40 years, did not have any quarrels before, save for the incident he had narrated.

7. **PW3, Dr. Timothy Riungu**, stationed at Meru referral hospital gave evidence and produced the postmortem report on behalf of his colleague Dr. Munyoki Simon. According to the P3 form, the deceased had a cut in the parietal head to the frontal head, and the brain tissue could be visualized through the said cut. The cause of death was found to be penetrating head injury with intra-cerebral bleeding. During cross examination, he stated that no terminal illness was detected from the examination.

8. **PW4, Lawrence Kinyua Muthuri**, the government analyst, examined an axe with wooden handle and a purple, black and brown blanket and found the blood therein to be of human origin. Upon DNA profiling of the blood stains on those items, the same matched with the DNA profile from the black hair sample and a piece of heart tissue of the deceased, Patrick Muthuri. During cross examination, he stated that he did not dust the axe for finger prints, as that was not within his mandate.

9. **PW5, Corporal Gabriel Kosgei**, the scenes of crime officer, attached to directorate of criminal investigations Meru, received exhibit memo and a film from PW6. He processed the film and prepared 8 photographic prints, relating to the exhibits, scene of crime and the deceased. He produced the photographs, certificate and the exhibit memo as exhibits in court. During cross examination, he stated that he was not at the scene of crime.

10. **PW6 P.C Stanley Kipchumba**, the investigating officer, gave evidence that he received the report of the death of the deceased on 22/8/2016 at around 7.00 am. He rushed to the scene in the company of the OCS and one CIP Nicholas Murgor and found PW1 and a large crowd at the scene. They also found the body of a male adult in a white vest and a trouser, lying on the belly by the road side. The body had severe deep cut and the brain had been shattered. He observed that a heavy object had been used to cut the deceased on the head. They proceeded to the home of the deceased, where they found the 1st accused. When they entered the house, they found dry blood on the floor. Upon searching the room, they found a folded blood stained blanket hidden in a mat and immediately arrested the 1st accused. They followed the blood trail from inside the deceased house to a footpath, which led them to the ditch where the body was dumped. They then went to the house of the 2nd accused, 5 meters from the house of the deceased, and recovered an axe with a wooden handle, which was blood stained. They suspected it to have been the murder weapon and arrested the wife to the 2nd accused. The witness formed the opinion that the deceased was murdered inside his house and his body dumped in the ditch to conceal the crime. He took photographs of the scene and drew a rough sketch map of the scene. They later rescued the 2nd accused from an irate mob that had thoroughly beaten him.

11. The witness then adverted to having interrogated the 1st accused and the wife to the 2nd accused, and obtained the information to the effect that; the deceased had arrived home on the 21.07.2016 at 11.00 pm, him and 1st accused quarreled over a piece of land he wanted to sell. The deceased retired to bed after which the 1st accused went to call the 2nd accused from his house. They then picked the axe and cut the head of the deceased.

12. As part of his investigations, the witness prepared the exhibit memos for the axe, blanket and portion of deceased heart for analysis by the government chemist. After conclusion of the investigations, he charged the accused persons but discharged the wife to the 2nd accused. He produced the sketch plan, the blanket, the axe and the exhibit memo as exhibits.

13. During cross examination, he maintained that the accused persons had informed him that the quarrel was over land. He stated that the deceased and the 2nd accused were known to him prior to the incident, because they had a case at Tigania Law Courts. During re-examination, he stated that he was able to establish that it was the 2nd accused who had used the axe, as it was found in his house.

14. After the prosecution closed its case and the accused adjudged to have a case to answer, the defense counsel announced that his clients would give unsworn testimony and call no witnesses.

15. In her unsworn statement, **DW1, Joyce Kaburu Muthuri**, the 1st accused and the deceased wife, stated that on 21.07.2016, being a Sunday, she woke up and attended church till 1 pm, came back home and busied herself with usual duties till 9 pm when she went to bed only to wake up later at about 3.00 am due to a tooth ache. In the morning of 22.07.2016, as she was looking for dry grass to light a fire, she heard noise from the road. When she went there and found her husband, Patricio Muthuri, lying there, she fell down. After the police came, they proceeded to the station but she could not remember anything else as well as what she recorded in her statement.

16. **DW2, Selasio Gichunuku Muthuri**, said that on the 21.07.2016 at about 7 am he was asleep in his house when he heard people making noise at the road and decided to go and see. He however met his mother, the 1st accused, wailing that his father had been killed. After reaching the place and finding his father dead, he went to the home of his uncle Ntongai (PW2), to inform him. The police came and took the body after which he was arrested and beaten up by the police. He denied either having killed the deceased or having any disagreement with him.

Analysis and Determination

17. This being a murder case, the prosecution retained the burden and duty prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused persons and lastly that unlawful acts were accentuated by malice aforethought. The courts duty is therefore to review the evidence led and be satisfied that, the deceased's death was indeed caused by the unlawful acts of the both or either of the accused which was propelled by malice aforethought.

18. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. It was established by PW3 that the cause of the death of the deceased was a penetrating head injury with intra-cerebral hematoma. All witnesses, including the accused persons, agree that the body found in a ditch by the roadside on the 22.07.2016 was indeed that of the deceased agreed to have been the husband of the 1st accused and father to the 2nd accused. What is in dispute is who inflicted the injury identified as a deep penetrating wound to the head that the doctor attributes as the cause of death.

19. The issue for determination is thus whether the said injury and consequent death was the result of an unlawful act of omission or commission on the part of the accused persons. I have carefully analyzed the testimony of the investigating officer in conjunction with the exhibits adduced herein, and I am satisfied beyond any shred of doubt that, there was enough evidence linking the accused persons to the death of the deceased. PW1 was the first person to arrive at the scene. He followed the blood trail which led him to the home of the deceased. Upon entering the said house, he found blood stains inside. His testimony was corroborated by that of pw3 and PW6. PW6 recovered the

blood stained blanket from the deceased house and the blood stained axe from the house of 2nd accused. That evidence remained the truth as it was not subjected to cross examination. PW4, the government analyst, matched the blood found on the exhibits with that of the deceased. PW2 confirmed that prior to the incident, he had witnessed the accused persons pick a quarrel with the deceased due to an alleged sale of land. When the 1st accused and the wife to the 2nd accused were interrogated by PW6, they indeed admitted that the 1st accused had quarreled with the deceased over land, shortly before the accused persons pounced on him with an axe. That evidence even if not a confession strictly, was never controverted by the defence even by way of cross examination.

20. More critical is the fact that the accused persons having been placed at the scene of the crime by own evidence and the blood stains found on items found in their houses where both admitted to having spent the night, and linked to the deceased, chose to offer no exculpating explanation at all.

21. I find the aggregate of the evidence to establish irrefutable circumstantial evidence that the two were full aware how the deceased died. It is for example difficult to comprehend that the 1st accused opted to give no account of the whereabouts of the deceased for the whole of 21st July 2016, day and night, till the body was discovered in the morning of 22nd July 2016. Having been implicated by PW6 as the perpetrators of the offence, both should have sought to remove themselves from blame but strangely chose not to rebut the evidence. Since *R v Kipkering arap Koske* (1949) EACA 135 at 136, the law on circumstantial evidence has remained settled that for the evidence to justify a conviction, it must point to nothing, but guilt of the accused. The duty remains that of the prosecution to prove that it was the accused and not another who committed the offence. The court set the law in the following words: -

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

22. The accused persons' unsworn defenses were sheer denials. DW1 having been implicated by the investigating office, instead of confronting such inculpatory evidence, gave it a wide berth and denied being able to remember what statement she had recorded with the police when such statement was easily obtainable by her counsel. I get the impression that the evidence by the defence was at best evasive and not credible at all.

23. From my analysis of the prosecution and defence evidence tendered, I find that the prosecution proved beyond reasonable doubt that the accused persons herein are the persons who in fact caused the death of the deceased.

24. The next issue is whether there was malice afterthought, which is defined under **Section 206 of the Penal Code** as follows;

“Malice aforethought shall be deemed to be established by evidence proving any one or more 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.”

25. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 is that malice aforethought can be either direct or indirect, depending on the facts of each case. That position has been clearly elucidated in the case of *R v Tubere S/O Ochen [1945] 12 EACA 63* where the court held that: -

“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”

26. Evidence was led by the prosecution witnesses on how the accused persons orchestrated their plot to kill the deceased in his bed while he was asleep, and then thereafter dumped his body in a ditch by the road side, 50 meters away from his house, to conceal the crime. The manner in which the injuries were severely inflicted and particularly on the head, demonstrate that the accused persons had the sole intention to inflict an injury that was aimed to be fatal. I have looked at the photographs of the deceased's body and I see no other intention but to kill and kill heartlessly and in a beastly manner.

27. In conclusion, therefore, I find that the prosecution has proved malice aforethought on the part of the accused persons. Being satisfied that the accused persons were the cause of the deceased death and were propelled by malice aforethought, I find the two guilty of the offence of murder and then convict them accordingly.

DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 17TH DAY OF SEPTEMBER, 2021

Patrick J O Otieno

Judge