



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE NO. 42 OF 2017**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**SAMUEL NABEA.....ACCUSED**

**JUDGMENT**

1. **SAMUEL NABEA (Accused)** was jointly charged with another who has already been convicted 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 27.05.2017 at Miuine village, Antuambui location in Igembe North Sub-County within Meru County murdered ELIJAH MICHUBU**

**PROSECUTION CASE**

2. PW1 Esther Kanana and PW3 Susan Kirina were at home on 27.05.2017 at about 09.00 am when Accused who was armed with a metal bar and Timothy who was armed with a rungu went to the home of Elijah and pulled him out and went away with him accusing him of stealing Accused's miraa. That they reported the matter to PW2 Ayub Gitonga. Ayub stated that wife Grace, daughter Esther Kananu and Mother Susan that his brother Elijah had been left outside Accused's canteen. That he went to the scene and found Elijah whose hands were tied at the back being beaten with a rungu by Timothy for allegedly stealing miraa. He called one Alex and together they escorted Elijah to hospital where he died while undergoing treatment. In cross-examination, he told court that Elijah was assaulted outside Accused's canteen and because Accused declined to be a state witness against Timothy, he was arrested and charged. PW4 Ibrahim Mithiali stated he found Accused and Timothy assaulting Elijah and he reported the matter to Elijah's brother Ibrahim Gitonga.

3. On 05.07.2017, a postmortem was conducted on deceased's body. The report PEXH. 1 reveals that Elijah suffered 3x2 cm bruise on right side of head, bruise on left side of head, 3x2 cm bruise right leg, 2x1 cm bruise on right shin, bruise on back, 5x4 cm bruise on right scapula, 4x4 cm bruise on frontal chest, sub scalp hematoma on right and left parietal areas, scalp fracture on left and sphenoid bones and massive subdural and epidural hematoma on left brain. The doctor firming an opinion that deceased died of cardiopulmonary arrest due to severe heavy blunt head injury with massive subdural and epidural hematoma. This case was investigated by CPL Onesmus Ngatho and Accused was subsequently arrested and charged.

**DEFENCE CASE**

4. The accused gave a sworn statement in which he stated that Timothy and Elijah took alcohol at his canteen and after they got drunk started quarrelling as a result of which Timothy hit Elijah on the head with a stick felling him. He later received information that Elijah had died and when he declined to record a statement, he was arrested three months after the incident and charged. Accused's witness Juius Michubu who was at Accused's canteen on the material date stated that Elijah and Timothy who were drunk quarreled and Timothy hit Elijah on the head with a stick felling him to the ground. His other witness Japhet Kainga who was one of the persons that escorted Elijah to hospital on 27.05.2017 stated that Elijah said he was assaulted by Timothy.

**ANALYSIS AND FINDINGS**

5. I have considered the evidence on record and submissions and authorities filed on behalf of the Accused.

6. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that Accused persons

committed the murder and that they were actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

**(a) The death of the deceased**

7. The death of the deceased has been confirmed by all the prosecution witnesses and by a postmortem form produced as **PEXH. 1** dated 05.07.2017 which reveals that Elijah suffered 3x2 cm bruise on right side of head, bruise on left side of head, 3x2 cm bruise right leg, 2x1 cm bruise on right shin, bruise on back, 5x4 cm bruise on right scapula, 4x4 cm bruise on frontal chest, sub scalp hematoma on right and left parietal areas, scalp fracture on left and sphenoid bones and massive subdural and epidural hematoma on left brain. The doctor formed an opinion that deceased died of cardiopulmonary arrest due to severe heavy blunt head injury with massive subdural and epidural hematoma.

**(b) Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased**

8. In this case, the first report as reported to police by PW2 vide OB 28 of 27.05.2017 by PW2 was Elijah was assaulted by Timothy. The importance of the first report was appreciated in **Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259** where it was held that:

**“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

9. If truly the PW1, PW3 and PW4 had informed PW2 that Accused had also assaulted Elijah, that information would have been given to the police, and the arrest of the Accused would not have depended on the random arrest three months after the alleged incident.

10. The truthfulness of PW2’s evidence becomes more doubtful for the reason that he admitted in his testimony that the only reason that Accused was arrested and charged was because he had declined to record a statement and be a state witness against Timothy.

11. The evidence by PW1, PW2, PW3 and PW4 properly evaluated falls in the category of what the Court of Appeal described in **Ndungu Kimanyi vs. Republic [1979] KLR 282** as follows;

**“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

12. The variance between the first report and the evidence by PW1, PW2, PW3 and PW4 creates an impression in the mind of the court that the witnesses are either being economical with the truth or untruthful and the evidence ought to be treated with a lot of caution.

13. From the foregoing, I do not consider the burden of proof as having been discharged beyond reasonable doubt as postulated in **Miller v Minister of Pensions [1947] ALL ER 373**, “That degree is well settled. It needs not to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave the only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.” to secure a verdict of guilty and a conviction against the Accused.

14. Consequently, I have come to the conclusion that the state has not proven its case beyond reasonable doubt. Accused is found **NOT GUILTY** of the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code and he is accordingly acquitted.

**DELIVERED AT MERU THIS 09<sup>TH</sup> DAY OF DECEMBER, 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Kinoti**

**Accused - Present**

**For the Accused - Mrs. Ntarangwi Advocate**

**For the State - Ms. Mwaniki**