



KTL.NO.667/2020

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 46 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MWANIKI MWANGANGI.....ACCUSED

J U D G M E N T

1. **Mwaniki Mwangangi**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that between **23rd and 25th June, 2014** at **Mathunzu Village, Kalive Sub-Location, Nzeluni Division, Migwani District** within **Kitui County** murdered **Gideon Wambua Sammy** (Deceased).

2. Facts of the case are that on the **26th day of June, 2014**, the decomposing body of the Deceased was found in the bush at **Muthunzu**. A postmortem carried out established that he died of haemorrhagic shock, cut right and left carotid arteries and empty cardiac chamber caused by an assault. Investigations conducted revealed that the Accused was one of the individuals who were last seen with the Deceased prior to him going missing. As a result, he was arrested and charged.

3. To prove the case, the Prosecution called ten (10) witnesses. PW1 **Josephine Syomunyu Samuel** testified that she was at her shop on the **23rd June, 2014** when **Mohamed Simon** went looking for the Deceased, her son, and when she went home in the evening she did not find him. After the Deceased disappeared she went in search of him at the home of the Accused but he declined to open for her and others the door and after she reported to the police the Accused was amongst the people who were looking for the Deceased. On cross examination she stated that the Accused, **Mohamed** and the Deceased were friends who associated closely.

4. PW2 **Sammy Makindia Muthama** was led to the thicket where the body of the Deceased was found by his children who had gone to fetch firewood.

5. PW3 **Samuel Marusi** identified the body of his son (Deceased) to the doctor who performed the postmortem.

6. PW4 **Dr. Christopher Wahinya** performed the postmortem on the body of the Deceased.

7. PW5, a minor aged 13 years, **JS** was with his brother, the Deceased when they encountered **Muteti** who had a memory card that belonged to the Deceased. The Deceased went away with **Muteti** and returned home at **7.30 p.m.** Thereafter the Accused went to their home and left with the Deceased soon thereafter and that was the last time that she saw him.

8. PW6 **JMM** a minor aged 16 years had been sent to fetch water when he encountered the Deceased and his siblings. He requested him to wait for him as he needed to collect his memory card from his brother **Muteti**. They went together but when they encountered his brother **Muteti Mutinda**, the two (2) left together and he continued with his journey.

9. PW7 **JMM** a minor aged 17½ years had been sent to the river to follow his brother **JM** (PW6) when he encountered the Deceased his friend. He wanted his memory card that he had. The Deceased requested him to escort him to see a friend. He gave him the memory card but since he did not have a cellphone he requested if they could insert it in his (Deceased's) sister's phone but the Deceased said that he was not going home. They parted after reaching the path leading to **Mohamed's** home. That was the last time that he saw him.

10. PW8 **Sarah Simeon Makau** testified that the Accused went home and requested to be allowed to go and drive animals with his son **Mohamed**. She gave them permission. She took medicine and slept early therefore saw **Mohamed** the following day in the morning. On cross examination she stated that her son **Mohamed** was arrested and released following the incident but she failed to understand why the police made her testify instead of her son.

11. PW9 No. 79107 Corporal Jackson Karumba visited the scene where the body of the Deceased was found and caused it to be removed to the mortuary.
12. PW10 No. 233425 Chief Inspector James Kariuki visited the scene, investigated the case and found that the Deceased was last seen in company of the Accused person therefore caused him to be charged. On cross examination he stated that the scene where the body was found was disturbed; that two (2) suspects had been arrested, **Mohamed** and the Accused but **Mohamed** was released following directions from the **Director of Public Prosecutions(D.P.P.)** as there was no sufficient evidence to have him charged although per the opinion he formed both of them should have been charged.
13. Upon being put on his defence the Accused stated that the Deceased was his closest friend. He testified under oath that on the **23rd June, 2014** he passed by the hotel of **Gedion's** mother where he had tea per his regular custom, then left for the farm where he stayed until evening when he returned home and slept. On the **24th June, 2014** he went to **Nthuku Sammy's** hotel to have tea. She enquired from him if **Gedion** had slept at their home as he had left going to collect a memory card from **Muteti** the previous evening, then sent him to go and find out if **Gedion** slept at **Makau's** place. He went and asked **Munanie Mutinda** if **Gedion** had been seen and learnt that he had been seen with **Muteti Mutinda**, information that was conveyed to **Mutinda**.
14. On **25th June, 2014** he went to the farm and upon returning joined people who were searching for the Deceased. On the **26th June, 2014** he went to **Nthuku Sammy's** hotel. She gave him tea but was evidently not happy with him. He went to the farm and returned at **4.00 p.m.** At about **6.00 p.m.** he heard screams. He went to check only to find that the Deceased's body had been found in the bush. He was present when the police arrived. He was one of the persons who carried the body to the roadside. **Nthuku** told the police that **Mohamed** had said that he knew where **Gedion** was. The police instructed **Muteti Mutinda, Makau Mutinda** and **Mohamed Simon** to go to the police station on the **27th June, 2014** and they complied.
15. In the evening he got information that he was required at the police station. He went on the **28th June, 2018** only to be placed in the cells. **Makau** and **Mutinda** were released leaving him with **Mohamed**, but, subsequently **Mohamed** was released.
16. Issues to be determined are whether:
- (i) Death occurred.
 - (ii) The unlawful act that caused the death was perpetrated by the accused.and,
 - (iii) It was with malice aforethought.
17. The mortal remains of the Deceased were examined by **Dr. Waihenya**. Following the autopsy, he formed the opinion that the cause of death was haemorrhagic shock, cut right and left cardiac arteries due to an assault. A certificate of death was issued which confirmed the fact of death.
18. The Deceased sustained grievous injuries. The left forearm was chopped off, there was laceration of the skin to the shoulder joint. The margins of the cuff were rough. There was a cut on the neck. The scalp was absent on the head. The spinal column had a cut. There was a sharp cut between the vertebrae and the ligament was cut. Severing a body of an individual leading to death is an act that is done unlawfully.
19. The body was found decomposing in the thicket. Nobody saw the individual(s) who did the heinous act. Evidence against the perpetrator of the act was therefore circumstantial in nature.
20. Principles of relying on circumstantial evidence were enunciated in the case of **Sawe vs. Republic (2003) KLR 364** where the Court of Appeal stated thus:
- “In order to justify, on circumstantial evidence, the inference of guilty, 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.”*
21. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** thus:
- “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.”*
22. Following the incident, various suspects were arrested. PW3 and PW6 last saw the Deceased going off with **Muteti** (PW7). Per the evidence of PW7, he parted with the Deceased at a path that led to the home of **Mohamed** who was arrested but released following

instructions by the **D.P.P.** Mohamed was not treated as a witness. His mother PW8 failed to understand why the Prosecution made her to testify instead of her son. She however testified that **Mohamed** and the Accused left going to drive animals. She could not tell where they were at night for she saw her son in the morning.

23. In the case of **David Ruo Nyambura & 4 Others vs. Republic (2001) eKLR** it was stated that:

“The cardinal principle of law is that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused.”

24. The Prosecution had the duty of proving beyond any reasonable doubt the case against the Accused.

25. From evidence adduced, it was not sufficiently explained why the Accused was the one answerable for the death of the Deceased. The last person seen with the deceased was Mohamed. Having not testified, there was no evidence as to when the Accused met the deceased and possibly acted by injuring him. Therefore, evidence on record failed to connect the Accused to the unlawful act that caused the death of the Deceased. Without evidence of **Mohamed** it cannot be authoritatively stated that the Accused was the last person to be seen with the Deceased.

26. Therefore, the Prosecution has failed to prove the case against the Accused beyond reasonable doubt.

27. He is not guilty and is hereby acquitted of the offence of murder.

28. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE