REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.28 OF 2014

REPUBLIC.......................................PROSECUTOR

VERSUS

MARK MUNGATHIA......................1ST ACCUSED

DAVID MAKENDA MURIIRA.......2ND ACCUSED

JUDGMENT

[1] **MARK MUNGATHIA** and **DAVID MAKENDA MURIIRA** ('the accused') herein has been charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 3rd day of July 2013 at Mbaranga Sub – Location in Tigania East District within Meru County jointly murdered MICHAEL KIRIMUNYA ('the deceased'). The prosecution called three (3) witnesses to establish its case.

[2] **PW1 David Kibore M'Anampiu** chief of Mbaranga location told the court that on 3/7/2013 at noon he was at his office when he met his assistant chief, Kalome K. Mutia. He informed him that he separated the 1st accused and deceased whom were fighting over Kshs. 30/-. He had with him a coffee plant stack which he recovered from the deceased. The following day he was informed that a dead body had been found. When he and the assistant chief got to the scene they identified the body to be that of the deceased. The police came started their investigations and took photographs. They went to the homes of the deceased as well as of the accused. When he and the police went to the 1st accused's home they recovered from the table room an axe which was blood stained.

[3] **PW2 Dr. Wendo Kubai** produced the post-mortem report that was conducted by Dr. Guantai. She stated that post-mortem was conducted on 18/7/2013. That from general observation the body was decomposed. Externally, it had a cut wound on left buttock cheek, stab wound epigastria region and open wound on the head. Internally, the digestive system had hemoperitoneum and lacerations of the gut. The head had an incisional wound on parietal region. The cause of death was concluded as hemoperitoneum secondary to stab wound to the abdomen.

[4] **PW3 No. 90903 CPL Kipkirui Serem**, the investigating officer, testified that when he was instructed to investigate the incident he went to the scene where he was received by **PW1**. He found the body of the deceased which had injuries on the forehead, check, abdomen and legs and the clothes soaked in blood. Upon inquiry he was informed that on 3/7/2013 the 1st accused and the deceased had engaged in a physical fight. They were separated by the assistant chief who advised them to seek other means of resolving their dispute. Despite the advice the accused person kept on threatening to kill the deceased. He went to the deceased's house which was not too far from the scene. He discovered that he lived alone. There were physical attempts of breaking in as a hole had been dug from outside.

[5] He interviewed the neighbor, Anjerica Kinya, whose house was 30 meters away. She told him that she heard the deceased calling for assistance from her husband who was not home. She responded and met the deceased person being chased by the two accused persons who were armed. The 1st accused had an axe with a metal handle and the 2nd accused had a panga. They assaulted the deceased jointly. She tried to tell them to stop but the 2nd accused threatened her and she left. At the time the deceased got space and started running away but the accused persons pursued nad got up to him.

[6] He visited the accused persons' home on the same day in the company of **PW1**. At the 1st accused person's home they found his wife washing clothes his husband had changed; the husband was not there. They searched the home and found an axe which had been hidden on the roof. When they went to the 2nd accused person's home they did not find him. They tried to find the accused but later arrested them on 25/04/2014 and 15/05/2014 respectively.

[7] At the close of the prosecution's case the accused persons gave sworn testimonies. **DW1 Mark Mungathia** testified that on 3/07/2013 he was at Isiolo selling miraa. He went back home at 9.00PM and remained indoors. The following day on 4/07/2013 he went to buy miraa at

Mutwati. When he was arrested that is when he came to learn of the deceased's death. His wife informed him that police had come to his home but she did not tell him the reason for the police visit; he however did not enquire about it or follow up with them. Between 3/7/2013 and his arrest he was doing business as usual. No one told him or summoned him to the police station. It is not true that the authorities were looking for him or that he was involved in the death of the deceased.

[8] **DW2 David Makenda** testified that on 3 - 4/07/2013 he was at Antubetwe for work where he was picking miraa and tilling land. It is not far from his home as they usually pay Kshs. 100/- as bus fare but he had rented a house there. He knew the deceased but did not work with him. He learnt of his death when he was arrested. No police came to his home prior to that.

Submissions

[9] Parties were directed to file written submissions. At the time of writing this judgment, the prosecution had not filed their submissions. The accused submitted that the prosecution has not proved their case beyond reasonable doubt as they have not met the ingredients. The burden of proving their guilt is on the prosecution and not them. They relied on **JMM v Republic [2013] eKLR** and **Joseph Muriuki v Republic Criminal Appeal No. 140 of 2014** to support their case.

Analysis and determination

[10] According to **Section 203 of the Penal Code**: -

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

Thus, the four ingredients that the prosecution must prove beyond reasonable doubt are:

> **1. The fact of the death of the deceased**
>
> **2. The cause of such death**
>
> **3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
>
> **4. Proof that the said unlawful act or omission was committed with malice aforethought**

Fact and cause of death

[11] In proving the fact and cause of death of the deceased, the evidence adduced is that the deceased was attacked as a result of which he sustained fatal injuries. **PW3** stated that body had injuries on the forehead, cheek, abdomen and legs. According to **PW2** no relative who identified the body but no post mortem can be carried out on a body that is not identified. According to **PW3** who was present during post mortem stated that the body was identified at the scene. **PW1** confirmed having identified the body at the scene and it belonged to the deceased; someone he knew well. In addition, the cause of death according to the post mortem was concluded to be hemoperitoneum secondary to stab wound to the abdomen. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved.

Did the unlawful act or omission by accused cause the death?

[12] It must be proved that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; that is *actus reus*. Towards this end, **PW1** stated that he was informed by his assistant chief that he found the deceased and 1st accused fighting over Kshs. 30/- which he stopped. The next day the body of the deceased was found with injuries. **PW3** being the investigating officer told the court that when he began the investigations he was informed of the fight. He went to his home and found that there were physical attempts of a break in. He then interviewed a neighbour of the deceased who saw the incident. She told him that when he heard the deceased call out for her husband for assistance she responded. She met the deceased being chased by the accused persons who were armed. She tried to tell them to stop but the 2nd accused threatened her.

[13] The testimonies by **PW1** and **PW3** is based on matters they heard from other persons who were not called as witnesses. See the Court of Appeal on admissibility of hearsay evidence in the case of **Kinyatti v Republic[1984] eKLR:**

> **"Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. … The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated: Archbold Criminal Pleading Evidence & Practice 40th Edition p 809 para 1282. Mr Onyango Otieno argued that since the maker of the statement was not a competent prosecution witness so the prosecution could not narrate her statement as evidence of its truth because she could not be cross-examined so as to enable the court to consider her demeanour when deciding whether or not to believe what she was alleged to have said. This may be an excellent reason for requiring the maker of the statement to be called when that is reasonably possible but it may be a poor reason for rejecting the statement when it is impossible, impracticable or even highly inconvenient to call the maker. … It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."**

[14] The assistant chief who saw the deceased fighting with the deceased was not called as witness. The neighbor, Anjerica, who saw the

incident occur, could not be called as witness for she passed away. Apart from this evidence, **PW3** stated that they found a blood stained axe at the home of the 1st accused which he produced as an exhibit. This being a criminal case the standard of proof is high, that is beyond reasonable doubt. For circumstantial evidence to form a basis for conviction, it must point to the guilt of the accused and not otherwise. The Court of Appeal in the case of **Abanga Alias Onyango .v. Republic Cr. A No. 32 of 1990 (UR**) held:-

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which the inference of guilt is sought to be drawn, must be cogently 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."***

[15] Hearsay evidence is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The truth of the statement by the assistant chief is not admissible. The truth of statement by Anjerica is also in that genre. Moreover, the circumstantial evidence adduced to link the accused to the offence does not satisfy the test of the law. A major link was overlooked; the blood-stained axe was not analyzed and tested so as to ascertain that the blood was the deceased's.

[16] At this juncture and before I close, I am compelled to state the following. An otherwise good case may be lost because of the manner investigations were carried out. Any bystander can easily discern that a strong case on the basis of circumstantial evidence required the assistant chief who witnessed the fight between the accused and the accused to be called as a crucial witness. Similarly, science and technology are perfect tolls in proving commission of a crime. And so, on a scientific front, a reasonable person shudders to the thought that the blood on the axe- the killer weapon- was not subjected to testing and analysis to establish the link between the said blood and the deceased. No explanation would be plausible enough to justify these omissions especially failure to analyze and test the blood on the axe. I am acutely aware that ours is an adversarial system in which the role of the court is primarily that of an impartial referee between the prosecution and the defense. The system is also emboldened with staple protections based on rights of the accused in the Constitution. Compare this with inquisitorial system of justice where the judge is actively involved in investigating the facts of the case. I say these things with great trepidation when justice to victims is lost in the hands of investigations which do not evince any admiration. I also say these things, for perhaps one will care to take care and avoid such travesty in other cases. I will not forget to state that, in making the decision to charge a person, the prosecution is guided *inter alia* by public interest, interest of justice. See article 157(11) of the Constitution which provides that: -.

> **(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

[17] I have said enough. In the upshot, I find that the prosecution failed to prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; that is *actus reus*.

[18] Accordingly, on the basis of the evidence adduced, I find the accused persons are not guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**. The accused are hereby acquitted. They will be set free unless otherwise lawfully held in custody.

Dated, signed and delivered at Milimani Nairobi this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

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