



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR NO. 32 OF 2017

FORMERLY MACHAKOS HCCR NO. 44 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ALEX MWANGNAGI MICHAEL *alias* NGANGI..ACCUSED

JUDGMENT

1. **Alex Mwangangi Michael *Alias* NGANGI** the accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the accused on the 23rd day of May 2013 at about 5.00 p.m. at Kyome village, Mangani sub-location, Kisau location in Mbooni East district within Makueni county murdered **Muli Syuma**.
2. He denied the charge and the matter proceeded to full hearing with the prosecution calling eleven (11) witnesses.
3. **Pw1 Stephen Nduli Kithika** was in his shop preparing chapatis for the hotel on 22nd May 2013 at 6.30 a.m. when the accused came inquiring on whether the chapatis were ready and whether his neighbour mama Faith had come. As soon as mama Faith arrived the accused bought a chapati and went to mama Faith's shop, for a few minutes and left.
4. On 23rd May 2013 at 10.00 a.m., the accused while dressed in a grey t-shirt arrived with his dog and sat under a shade outside their hotel. He also had a panga which he sharpened as he took tea. One Kyalo Mwangangi joined him. As he sharpened the panga Muli Syuma (deceased) who used to sell him firewood came together with his brother Ndunge Syuma, and they took tea. Thereafter, the deceased and his brother left leaving accused and his brother behind. They then followed the deceased and his brother as they argued. This was around 11.00 a.m. – 12.00 noon.
5. Later at around 2.00 p.m. the deceased came by the hotel carrying a panga, axe and a rope. He gave him Kshs.50/= and left. He thought he went to the Kisau hill where he used to get firewood. After sometime the accused also passed by on his way to his home in the direction of the hill and he carried a panga. He later went to his home to shower and got back to work.
6. He returned at 4.00 p.m. only to find people closing their shops and heading to the Kisau hill where he went and found the deceased lying dead. Faith Muli closed the window of her shop and went to her home in the opposite direction from the hills. At the scene he identified the grey trouser and orange cap which the accused had been wearing. They also found firewood, panga, an axe which belonged to the deceased.
7. In cross examination he said the accused followed the deceased 40 minutes after he had left. He did not know how many people passed by after the deceased went to the hills. Further that the recovered sweater had no blood, though the deceased's shirt had blood. The panga the accused is said to have been sharpening was never recovered. He said there was no one quarrelling anyone that day.
8. **PW2 Titus Kiisuma** is a brother to the deceased. He was notified of the deceased's injury by a neighbour. He arrived at the scene at 6.00 p.m. on 23rd May 2013 and found him already dead. He identified his deceased brother's brown sweater and maroon cap. The body had cuts on several parts of the hands and head. It was his evidence that there were two sweaters at the scene. One was black and white in colour belonging to the deceased while the brown one belonged to somebody else.
9. **Pw3 Mutunga Muli** the deceased's son identified the body for post mortem on 30th May 2013. **Pw4 Daniel Mutunga Mutinda** the area chief of Kisau location was in his office at Ngooni sub-location when he received a call on 23rd May 2013 at 4.15 p.m. from the head teacher Kavuvuni primary school. He informed him of a murder at Kisau hill. He went to the scene in the company of the assistant chief Joseph Kabungo.

10. At the scene they found two sweaters and a cap, bundle of firewood fixed with a rope, panga and axe. He identified the panga and axe in court as the ones he had found at the scene. The greenish sweater and cap belonged to the deceased, while the cream sweater and maroon cap belong to the accused. He also testified that while at the scene there was a woman screaming saying the items at the scene belonged to her husband the accused.

11. **Pw5 Dr. Solomon Maundu** conducted the post mortem on the deceased's body on 30th May 2013 at 3.00 p.m. The body had the following injuries;

- *Multiple lacerations on the head and hands.*
- *Deep lacerations in the head, below the mouth and muscles.*
- *Deep cut on the left side of the face, pinner of left ear and upper part of ear.*
- *Loss of tissue behind the ear.*
- *Cut on right back side of head towards the face.*
- *Cut on left arm.*
- *Deep cut on the palm extending to the bones.*
- *Deep cut in between the right fingers.*
- *Deep cut on the right hand extending to the muscles.*

He found the cause of death to be haemorrhage due to the several cuts by a sharp object. He produced the post mortem report as EXB4.

12. **Pw6 Benson Mutinda Munguti** and **Pw7 Francis Isika** were working at the latter's home on 23rd May 2013 at 3.00 p.m. when they heard screams uphill. Going there they saw a person running away screaming. On reaching the scene, they found a person lying down having fallen.

13. The fallen person had several injuries and was bleeding heavily. They reported to the chief. The two witnesses did not identify the people running from the scene or even the deceased person. Pw6 could not identify the clothes he had seen at the scene. The two witnesses gave similar evidence.

14. **Pw8 Evelyn Mutindi** wife of the accused testified following a Ruling by Justice Kariuki after the defence had objected to her testifying under section 127 Evidence Act. The ruling was delivered on 24th September 2018. Her evidence is that on 23rd May 2013 the accused left her home and returned at 12 noon and went back. He returned at 1.00 p.m. and was not happy when he found food not ready. He however waited, ate and left. At 4.00 p.m. she heard screams saying somebody had been killed on the hills.

15. She left her two children and went to the scene and found the deceased having been killed. She found a striped sweater (EXB1) and cap (MFI 2) of the accused at the scene. On seeing them she kept silent and ran home, and took her children. She saw the accused from far (20 meters away) wearing a different shirt. He told her not to go away. She took a different route and ran to her parents' home.

16. On 24th May 2013 Pw4 and the police came to her home and took her and her mother to record statements. She went to accused's home later in the company of the police and she took her clothes. They found a sack of maize there. She identified a panga (EXB5) and axe (EXB6) as belonging to the accused. These exhibits were not at their home when they went there.

17. In cross examination she said she and the accused had been married for eight (8) years but she had remarried in 2013. She admitted quarrelling with the accused when he returned home on the material day at 1.00 p.m. He left for Kyome market after lunch. She never told anyone that the clothes she had seen belonged to the accused but she ran and informed her parents the same day.

18. **Pw9 Muumbua Wa Mule** is the widow to the deceased Muli Syuma. She testified that on 23rd May 2013 at 3.00 p.m., she was at her kiosk in Kisau when she learnt the deceased had been killed at the Kisau hill. She left with others to the hill and found the deceased's body lying there with an injury on the head and hand. She said the deceased has passed at the kiosk on his way to the hill. She explained that the deceased wore a sweater and creamish trouser that day, and she never saw those items at the scene. She however identified the sweater (EXB1) as belonging to the deceased. She said she had seen the accused that morning at a neighboring kiosk taking tea.

19. **Pw10 Henry Kiptoo Sang** the government analyst said they received exhibits and blood samples. After analysis he found the blood stains on the pullover to match those of the deceased. He produced the report and exhibit memo as EXB 5a & b. In cross examination he said there was no blood of the accused on the items provided. He identified the pullover with blood stains as EXB 2.

20. **Pw11 P.C. Dennis Simiyu** the investigating officer testified that on 23rd May 2013 the Mbooni East DC1 received a report of a death within Kisau area. The OCPD, DCIO, and Pw11 proceeded to the scene and confirmed the report. They found the deceased's body which had deep cuts on the head, back and both arms. They also found an axe tied with firewood. They learnt that the deceased used to get firewood from that forest. They took the panga and axe as exhibits (EXB5 & 6), a Motorola phone (EXB7) of the deceased which was identified by his brother (Pw2), and grey pullover with blood stains (EXB2) identified by Pw8.

21. A post mortem was later conducted by Dr. Maundu and a post mortem report (EXB4) prepared. The grey sweater was sent to the government chemist for analysis and a report was filed (EXB5a & b). He added that Pw1 had seen the accused sharpening a panga and going to the hills with it and his dog. The accused was later arrested in Ongata Rongai and arraigned in court.

22. In cross examination he said the panga and axe recovered belonged to the deceased. The pullover was identified by accused's wife as

belonging to the accused. He said he was not aware that the deceased's wife said the pullover belonged to the deceased. He did not recover the panga the accused was said to have been sharpening. He denied that the deceased's wife planned for the murder.

23. He admitted that two mobile phones were recovered from the deceased's wife. When taken to safaricom it was confirmed that there was communication between the accused and the deceased's wife. There was suspicion of a love affair between the accused and the deceased's wife. He however decided to use the deceased's wife as a witness.

24. He explained that it was not possible to tell the exact time of the murder. The scene was at a forest and there were several ways leading there. The accused's wife (Pw8) had informed them that the accused had not been seen home since the deceased's death. She told them the recovered sweater belonged to the deceased.

25. In his sworn defence the accused denied committing the offence. He stated that on 23rd May 2013 he left home at 9.00 a.m. after being served with tea by his wife (Pw8). He went to Kisau hill (2 kms) away to gather firewood, using a panga and he finished this at 11.00 a.m. – 11.10 a.m. and carried the wood, panga and his clothes home.

26. He denied ever meeting the deceased that day. Reaching home, he found lunch not ready, and he disagreed with Pw8 when he asked her to hurry. He left for Nairobi from where he was later arrested because of a person who had died at home. He denied ownership of the sweater (EXB2). He said his greyish sweater had a zip (DEXB1) unlike EXB2.

27. In cross examination he said he collided with his wife on 23rd May 2013 and was arrested on 10th September 2013 while in Nairobi where he had been throughout. He denied knowing where the body had been found. That there was no evidence showing that the body was found where he had been cutting firewood. He denied knowledge of any of the items produced in court.

28. Counsel for both parties filed written submissions. Mrs. Owenga for the prosecution gave an analysis of the evidence adduced and made the following observations.

i. That both the accused and the deceased were at the scene which was at the bushy Kisau hills as their clothes were recovered from there after being identified by both family members of the two as well as members of the community.

ii. It is also apparent that the deceased had gone to the hill to fetch firewood as a stack of firewood was recovered tied together with his axe and panga.

iii. It is also apparent that the accused had been seen earlier in the day while sharpening a panga at the nearby center.

iv. It is also apparent that the two had bad blood between them.

v. It is also apparent that no other person was seen around the forest moments before the deceased was found dead.

vi. It is also apparent that the accused was arrested ten days after the incident in Ongata Rongai in Nairobi.

vii. It is also in evidence that he had gone missing from the date of the incident as confirmed by his wife's evidence, and that of the investigating officer among others.

29. She submits that the above observations plus the evidence of the accused's wife (Pw8) show how the accused locked her in the house, wore clothes unknown to her. That identification of his clothes at the scene led to an inference of guilt of the accused. All these circumstances she says lead to none other than the accused as the person who committed this offence.

30. She crowns it all by submitting that the accused underwent a fair trial having been provided with legal representation by the State. According to her Article 50(2) of the Constitution was fully complied with. She called for the accused's conviction.

31. Mr. S. M. Makau for the accused submits that the investigating officer Pw11 testified that the only connection between the accused and the scene of murder was a pullover that was recovered and which was identified by Pw8 as belonging to the accused. This evidence he contends was contrary to Pw9's evidence that the pullover belonged to the deceased and not accused.

32. Counsel submits that Pw8 was not a credible witness. The reason being that she was the accused's wife and they were not in good terms. She also got married soon after the accused's arrest. He also cited the contradiction in the ownership of the pullover (EXB1) between Pw8 and Pw9. He submits that though Pw8 claimed to have identified the accused's clothes at the scene she never mentioned it to anyone until the police came for her.

33. Further that she claimed that the panga and axe (EXB5 & 6) belonged to the accused. On the other hand, Pw11 the investigating officer stated that they belonged to the deceased who used them to harvest firewood further highlighting the contradiction in the prosecution case.

234. Citing the case of **Miller –Vs- Ministry of Pension (1947) ALL ER 372; May –Vs- O'Sullivan (1955) 92 CLR 654; and Republic – Vs- Prazad (1979) 2A CRIM R 45**, counsel submits that the burden of proof had not been discharged by the prosecution in this case. That the prosecution case was full of contradictions.

35. He finally submits that the accused in his defence testified that on the material day he went to fetch firewood from the hill and when he came back at lunch time he got into a quarrel with his wife (Pw8) and after the quarrel he went to Nairobi from where he was arrested for

allegedly committing the murder herein.

36. This is now the case before the court for determination.

37. The charge facing the accused is one of murder which is defined under **Section 203** of the Penal Code as follows;

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

38. Malice aforethought which is one of the ingredients to be proved is defined in **Section 206** of the Penal Code as;

“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.”

39. In this case the following have to be proved to sustain a conviction;

(i) The fact and cause of death.

(ii) Whether the accused’s actions by commission or omission caused the death i.e. actus reus.

(iii) The presence of malice aforethought/intention to kill/Mens rea.

Issue (i) – The fact and cause of death.

40. All the prosecution witnesses save for Pw10 the government analyst have testified to the physical death of the deceased. Most of them saw the body at the Kisau hill forest and they identified it.

41. **Pw5 Dr. Solomon Maundu** who conducted the post mortem has outlined all the injuries found on the deceased’s body. He found the cause of death to be severe haemorrhage as a result of multiple injuries from a sharp object. The fact and cause of death were therefore established and the death was not a natural one.

Issue (ii) – Whether the accused’s actions by commission or omission caused the death i.e. actus reus.

42. There was no witness who testified of having witnessed the killing. What has been presented to this court is pure circumstantial evidence which if properly coordinated is one of the best pieces of evidence. What then is circumstantial evidence?

43. It is evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one to be proved.

44. The court of appeal has given some guidelines on what to look out for when dealing with such evidence. In the case of **Sawe –Vs- Republic (2003) KLR 364** the Court of Appeal held thus;

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and ever shifts to the accused.

44. The same was followed in the case of **Nzivo –Vs- Republic (2005) I KLR 699** where the Court of Appeal held as follows;

5. In a case dependent on circumstantial evidence in order to justify the inference of guilty the incriminating facts must be

incompatible with the innocence of the accused or the guilty of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.

45. I would first of all wish to deal with the issue of **Pw8 Everlyn Mutindi** whom the defence says was an incredible witness. The issue had been raised by the defence way back on 31st July 2018 under Section 127 of the Evidence Act, which provides;

(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that: -

(i) The person charged shall not be called as a witness except upon his own application;

(ii) Save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;

(iii) The failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

(3).....

(4) In this section 'husband' and 'wife' mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom."

46. The defence had claimed that Pw8 was the accused's wife. The prosecution responded that Pw8 wanted to testify and so Section 127 of the Evidence Act was not applicable to her. In its ruling dated 24th September 2018 the court found Pw8 to be a competent witness as the information before the court on their relationship was too scanty.

47. This court took the evidence of Pw8 upon the transfer of Kariuki J. This is what Pw8 stated in her evidence in chief;

"On 23rd May 2013, I had been married by Alex Mwangangi Michael alias Ngangi."

In cross examination she said;

"We had been married for 8 years. I am now married elsewhere. I remarried in 2013."

48. The investigating officer (Pw11) clearly identified Pw8 as the accused's wife in both his evidence in chief and cross examination. These are witnesses who testified after the ruling by Justice Kariuki. Their evidence is clear that accused and Pw8 lived as husband and wife. They even had two children together. Both Pw1 and Pw8 confirmed that accused and Pw8 had differed on the date of incident.

50. The proviso to section 127(2) (ii) Evidence Act only allows for a spouse of an accused person to be called as a witness on the application of the accused person, and not vice versa as submitted by the learned prosecuting counsel Mr. Gitau on 31st July 2018. Had Justice Kariuki heard the evidence of Pw8 and Pw11 he would not have found her to be a competent witness against the accused who was her husband then.

50. I am fortified in this by the holding of the court of appeal in the case of **Simon Nchore Onyiego –Vs- Republic 2020 eKLR** where the court held that;

Only if called by the accused person himself is a spouse competent to testify in a criminal trial unless the charge be one of bigamy or an offence under the Sexual Offences Act or in respect of an act or omission affecting the person or property of the spouse or the children of either of them, is the spouse both competent and compellable, and not otherwise. That is the thrust and meaning of Section 127(3) of the Evidence Act and the same did not apply to the case before us.

This special evidential rule is meant to protect the sanctity of marital communication and confidences between spouses in recognition of the unique bond that exists between spouses where there is total vulnerability and an opening of hearts one to the other. To breach that immunity would be to unleash an improper collateral attack on the right to accused persons to remain silent. It would be a dangerous assault on that notion were the matters heard and observed in the marital space to be used against spouses in criminal trials. The protection initially applied to monogamous marriages only but in Kenya the Evidence Act expands it to cover polygamous marriages such as that of the appellant and PW1. We note herein only that the language employed in sub Section (4) referring to such marriages as marriages under "native or tribal custom" is plainly incongruous in a free, proud, independent and democratic nation.

Be that as it may, the prosecution should not have called and the learned Judge should not have allowed PW1 to testify. In Julius Mwita Range -Vs- Republic [2003] eKLR, this Court approved of the action of the High Court Judge who did exactly that in a

similar case;

“Elizabeth Nyaitoto was in a marriage covered under section 127(4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.

The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect.

I therefore find Pw8 to have been an incompetent witness to testify against the accused. I will therefore not regard her evidence in determining this case.

51. The evidence of Pw1 was that the accused had been sharpening a panga but it was not found at the scene. He however found a grey trouser and orange cap both worn by the accused and he even identified them in court. For unknown reasons the grey trouser was never marked for identification nor produced as an exhibit by the prosecution. The orange cap though marked as MFI -1 was also never produced as an exhibit.

52. From the evidence of Pw2 (brother to deceased) a cap, and two sweaters were recovered from the scene. The maroon cap with the black/white sweater belonged to his deceased brother. The other sweater which was brown in colour belonged to somebody else. Pw4 (area chief) said the sweater found at the scene was cream with blue stripes (EXB2). He did not talk of a 2nd sweater.

53. It is these items namely: panga, axe, cap, sweater which seemed to connect the accused with the scene. It is true a panga and axe were found tied up in a bundle of firewood at the scene. Pw1 was clear in his evidence that the panga is not what the accused had been sharpening as he took tea outside his shop/hotel. Pw2 (deceased's) brother identified the orange cap as belonging to the deceased while Pw4 (chief) said the cap belonged to the accused. This cap as I said earlier was never produced as an exhibit.

54. Pw11 the investigating officer who was expected to enlighten the court more stated that the panga (EXB5) and axe (EXB6) found at the scene belonged to the deceased who used them to cut firewood at the forest. He also produced a Motorola phone (EXB7) which was identified by the deceased's brother (Pw2) as belonging to the deceased.

55. Pw11 further produced a grey sweater (EXB2) which he said was identified by the accused's wife as belonging to the accused. The sweater he said had blood stains, which the government analyst (Pw10) found to belong to the deceased. Contrary to what Pw11 told the court on the issue of the sweater which is a key exhibit herein, Pw9 (deceased's widow) identified the sweater (EXB 2) as belonging to her late husband the deceased herein.

56. Pw11 also testified that from his investigation there was a suspected love affair between the accused and Pw9. He even talked of telephone conversations between the “two lovers” which communication had been confirmed by safaricom. This witness who was also the investigating officer did not avail any evidence in form of data from the service provider before the court to confirm his allegations.

57. Despite Pw2's allegations that two sweaters were found at the scene i.e. one for the deceased and one for a stranger only one sweater (grey) in colour was brought to court and produced as EXB2. As per his evidence even the sweater shown to him in court (EXB2) was not among the two sweaters he had found at the scene. Pw6 and Pw7 who heard the screams and ran to the scene, at around 3.30 p.m. in broad daylight did not identify the two persons whom they saw running away.

58. Pw6 was clear that he never saw the accused at the scene. Pw7 never even saw the clothes mentioned by witnesses. Pw6 however said he saw the cap (not produced) and the sweater (EXB 2).

59. The accused in his evidence has denied the charge against him. He was arrested in Nairobi/Rongai in September, 2013. He claims to have left his house after quarrelling with his wife. There is no evidence of the movement of the accused after leaving the area around the hotel/shop of Pw1. Pw1 could not confirm that the accused went to the hill following the deceased.

60. Pw1 also told the court that both accused and deceased had passed by his hotel twice that day. He never witnessed them quarrelling at any given moment, and he was not following their movement. It is not even clear when this incident may have occurred, gauging from the evidence of Pw4, Pw6 and Pw7. Some photos identified as MFI 3 and a cap (MFI 1) were not produced as exhibits. No explanation was given for that omission.

61. After analysing all this evidence, I find that the sweater (EXB 2) which may have linked the accused to this offence has not been clearly identified as belonging to him. **(See evidence of Pw2, Pw9 and Pw11)**. Secondly Pw6 and Pw7 who were the first to hear the screams and run to the scene saw two people running away and one even entered the forest. Unfortunately, they were not able to identify any of these two people. In cross examination Pw6 made it clear that he never saw the accused at the scene.

62. The alleged involvement of Pw9 and the accused in a love affair that could have led to this unfortunate incident is unsupported by any evidence before this court. The accused denied the charge against him. It was the duty of the prosecution to place him at the scene. It has failed to discharge that duty.

63. For my part I find the charge not proved to the required standard. **The accused is found not guilty and acquitted under Section 322 (1) Criminal Procedure Code. He shall be released unless lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong'udi

Judge