



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 17 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

DAVID MWENDWA MULWA.....ACCUSED

JUDGEMENT

1. The accused is charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap. 63 Laws of Kenya.
2. Particulars being that on 19/1/2014 at Mbubu Sub-Location, Mbuvu Location, Mwingi East District, Kitui County murdered John Mwilu Mutua in Count 1 and Count 2 murdered Kavata Mwilu.
3. He pleaded not guilty and matter went into full trial.
4. After close of prosecution case, the accused was put on his defence whereof he tendered unsworn defence and called no witness.
5. The prosecution's case is that PW1 testified that on 20/1/2014 at 7am while taking children to school his neighbour Musya came to his house and told him the accused David Mulwa aka Mbisi had taken goats to market.
6. These were goats belonging to the Mwilu 1st deceased herein. And that the said Mwilu wife, Kavata had broken her leg. This he was told on night of 19/1/2014. That when accused sold the goats Mwilu was to come and take money and that Kavata had been taken to hospital with help of police. Mwilu was young brother of witness's father. Accused lived with the deceased persons herein. When he got the aforesaid information he thought accused was sent by the deceased Mwilu to sell goats.
7. After taking children to school he was called by one Kasyoka Musya who told him to go to home of Mwilu as he had seen things he could not understand. While at the scene home of Mwilu he saw blood stains in the kitchen, blood outside kitchen, the poles of the house had blood stains.
8. There was also spade with blood stains. There was also a chair with blood stains. Also a blood stained stick. The Assistant Chief was informed via telephone. He came to the scene and called police who came to the scene and took photographs. They mobilized people to excavate a toilet – the 2 bodies of deceased were retrieved from the pit latrine. They were collected by the police after photographing. Also exhibits were carried. The witness witnessed the postmortem of the 2 dead people. Accused was brought up and educated by the deceased. Accused was arrested in Garissa and witness saw him at Ukasi Police Station.
9. PW2 John Kamau Assistant Chief stated that on 20/1/2014 at Midday he received call from Kasyoka Musya neighbour of Mwilu deceased asking him to go to home of Mwilu as there was an incident.
10. On arrival he found huge crowd. He called Kasyoka Musya a lady and asked her the details and she said she had not seen deceased persons and also their goats since morning. She took witness to the kitchen.
11. There was a blood stained chair near the door, there was at the fence a blood stained stick. The pit latrine was covered with soil. One side appeared broken soil removed and returned again.
12. One old man Muthyoto told him that the previous night Mbisi (accused) told him that Kavata broke legs and Mwilu told him to go sell goats and bring him money. The witness called OCS Ukasi. The police came to the scene and the latrine was opened and the bodies were retrieved. The same were identified as Kavata and Mwilu and were taken by police to the mortuary.

13. PW3 Dorcas Munyoki Mwilu deceaseds' neighbour and related to him stated that accused lived with the deceased couple as Kavata lost her only child and she asked her sister to allow her (Kavata) to live with accused.

14. On 20/1/2014 while in Garissa, the witness received report of death of the couple herein. She saw accused David in Garissa. When she called him by common name Mbisi he ran away.

15. On 10/9/2014 at Mororo, Garissa she saw him at a restaurant and she called police who arrested him. At police station accused kneeled down before her and started narrating what he had done. He said he committed the offence because his aunt (Kavata) prevented him from selling his own goats. He said he committed the offence to be able to sell goats.

16. PW4 PC Hillary Yegon testified that on 20/1/2014 he received report at 14.30pm that 2 people had been killed. He got it from the OCS Ukasi police station. He entered same in the OB. He proceeded to the scene with OCS and other police officers during the day.

17. He found members of public. The pit latrine was opened via digging and 2 bodies were retrieved. They collected bodies and other blood stained items as exhibits. Bodies were taken to the mortuary.

18. They got information that the accused left at 4am with goats of the deceased's to sell them. Later accused was arrested in Garissa and charged with offence.

19. PW5 Benard Kimani Police Constable Ukasi Police Station produced the postmortem by consent as Pexh 4.

20. The prosecution closed its case and the accused was put on his defence. He gave unsworn evidence and called no witness. He denied killing the 2 deceased persons. He said on 19/1/2014 when death of the 2 occurred he was in Garissa. He confirmed that PW3 is the one who pointed at him for police to arrest him in Garissa. He was later charged after investigations.

21. The parties agreed to file submissions but none complied with that agreement. The court thus prepared the judgement without benefit of parties' submissions.

22. **Section 203 of the Penal Code** states:-

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

23. **Section 204 of the Penal Code** states:-

“Any person convicted of murder shall be sentenced to death.”

24. **Section 206 of the Penal Code** states:-

“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. In the case of **John Mutuma Gatobu vs Republic [2015] eKLR** the Court of Appeal stated:

“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal.....

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.”

28. In the case of **Joseph Kimani Njau vs Republic [2014] eKLR** the Court of Appeal stated:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both

the actus reus and mens rea have been proved to the required standard”

27. There is no contest that the death of the 2 accused persons died. The PW1, PW2, PW3, PW4 all witnessed the retrieval of the 2 bodies from the pit latrine. Postmortem report confirms deceased persons died due to multiple injuries to the head with sharp objects.

28. As to whether the accused is responsible to the said injuries which caused death, the available evidence is circumstantial. This issue was dealt with by the **Court of Appeal in the case of Republic -V- Michael Muriuki (2014) eKLR** where it was held:-

“In Sawe -V- Rep [2003] KLR 364 the Court of Appeal held:

“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 this 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 never shifts to the accused.

4.

5.

6.

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

29. In **ABANGA alias ONYANGO vs REP CR. A NO. 32 OF 1990 (UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

30. The accused used to live with 2 deceased persons as he was brought up and educated by Kavata one of the deceased. She was his aunt and was given accused while he was a child by her sister as he didn't have any of her own child after she lost the only child she had sired.

31. On 19/1/2014 Muthyoto saw accused with goats of Mwilu the deceased taking them to the market to sell and stated that he was going to sell them under owner's instructions and bring him money as his wife Kavata broke her legs.

32. The PW2 informed PW1 of the same fact. The accused did not challenge that piece of evidence by PW2. The accused disappeared from that date to Garissa until the day he was arrested in Garissa on 10/9/2014.

33. When arrested he told PW3 that he committed crime as his aunt Kavata deceased was preventing him from selling his own goats. The disappearance from 19/1/2014 to 10/9/2014 of about 9 months and the fact that he admitted to PW3 after arrest that he committed crime because deceased Kavata was preventing him from selling goats convinces court beyond reasonable doubt that he inflicted injuries to the deceased persons which caused death.

34. He never rebutted the evidence by PW2 that he was going to sell goats of Mwilu deceased on 19/1/2014. That the second limb of murder ingredients is proved beyond reasonable doubt.

35. On whether there was malice aforethought, the court has noted that the injuries were very serious; grievous harm by any standard. The same were inflicted with aim of either inflicting grievous harm or cause death.

36. The infliction of the noted injuries and subsequent burying deceased persons in the pit latrine was definitely to absolutely cause death of the two deceased persons. Thus malice aforethought is proved beyond reasonable doubt.

37. Thus, the court holds that the murder charges have been proved beyond reasonable doubt.

38. Thus, accused is convicted of murder offence accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE