



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MULYUNGI KITUI.....1ST ACCUSED

BENSON MUSYOKA MUTISYA.....2ND ACCUSED

J U D G M E N T

1. **Mulyungi Kitui** (1st Accused) and **Benson Musyoka Mutisya** (2nd Accused) are jointly 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 on the **7th day of April, 2007** at about **9.00 p.m.** near **Kitui Municipal Stadium** in **Kitui District** of the **Eastern Province** jointly with others not before Court murdered **Joyfred Mwithi Kiminza** (Deceased).

2. The Prosecution's case was that on the **6th day of April, 2007**, the Deceased, his wife PW1, **Judith Muthini Mwithi** and their friends, PW2 **Jeddy Mwendu Musee** and PW3 **Jacob Nsimula Kawentu** were attacked by persons they did not identify. In the course of the incident the attackers took away cellphones from the victims. Following the attack, the Deceased succumbed to injuries sustained. Investigations carried out culminated into the arrest of individuals who were using cellphones believed to belong to the victims. The stated persons identified the Accused herein as the ones who sold the cellphones to them. They were arrested and charged.

3. To prove the case, the Prosecution called sixteen (16) witnesses.

4. PW1 **Judith Muthina Mwithi** the wife of the Deceased narrated how they returned from a pre-wedding and arrived home at about **10.00 p.m.** only to be attacked. The assailants were armed with dangerous weapons. She did not recognize the individuals but her cellphone and that of her husband were taken from them.

5. PW2 **Jeddy Mwendu Musee** with her husband, PW3 **Jacob Nzumula Kawentu** accompanied the Deceased, his brother and PW2 to the pre-wedding. They were together at the point of being attacked. PW2 witnessed as one of the attackers smashed the driver's window and dragged the Deceased to the bush. They took from her cash **Kshs. 3,000/=** and a cellphone. The attackers took from PW4 **Kshs. 450/=** and a watch, make **Seiko 5**.

6. PW4 **Alex Muthangya Kivuvi** the nephew of the Deceased who was in their company did not recognize any of the attackers.

7. PW5 **Davis Mulambaya Amunza** met the Deceased prior to going to the pre-wedding. On their way to the pre-wedding a motor-vehicle that had carried **Hon. Francis Nyenze's** Personal Assistant, **Meshack Maluki Musyoki** stopped and they talked about a contentious land issue between the Deceased and **Hon. Nyenze**.

8. PW6 **Benick Kiema Kilungi** testified that **Hon. Nyenze** went to **AIC Church Utoo**, that he (PW6) had attended on **6th April, 2007** where he addressed people and related how the Deceased had offended him by buying land that he (**Hon. Nyenze**) intended to buy.

9. PW7 **No. 71489 Corporal Simon Chege** visited the scene of the incident and investigated the case.

10. PW8 **Nicholas Kasumo Maluki** identified the 1st Accused as a person who sold to him a Nokia Phone, Series Number 2600. On cross-examination he stated that he was also arrested but later treated as a witness.

11. PW9 **Stallon Mailu Kasee** stated that in **September, 2007** he exchanged his Nokia 670, a cellphone, with **Mwanzi** who gave him a

Nokia 620. A month later he led the police to his kiosk who took the cellphone and arrested him. The allegation was that the owner of the cellphone was murdered.

12. PW10 **Musembi Mukiti** testified that **Kasomo** failed to raise rent therefore paid him in kind with a cellphone – Nokia 1118. Subsequently, he offered to sell it to **Bahati Mbula** at Kshs. 2,300/=. In the meantime, he had also given it to **Mumo Mungiti** to use. On **15th December, 2007** his brother **Mumo Mukiti** was arrested for possessing the cellphone. He led the police to him (witness) who in turn led them to **Kasomo** who was arrested.

13. PW11 **Mumo Mukiti** testified that he was arrested for using a cellphone that he had been given by PW10.

14. PW12 **Bahati Mbula** bought a cellphone from **Musembi**. Subsequently, he was arrested and the cellphone taken by the police.

15. PW13 **No. 52149 P C Japheth Mulumo** witnessed the post-mortem that was performed on the body of the Deceased.

16. PW14 **William Kilonzi**, a Pastor at African Inland Church (AIC) Kitamwiki testified that **Francis Nyenze** went to church on **6th April, 2007** and when given an opportunity to address faithfuls he told them that he intended to vie for a Parliamentary seat and that he had communicated to the Deceased about not wanting to have a disagreement with him. However, the witness turned out to be hostile. On being cross examined it was established he was not happy with the Deceased for paying more money for a parcel of land he was interested in therefore asked any person who wished to deliver his message of discontent to him to do so.

17. PW15 **Geoffrey Kinyala Kiminza**, a younger brother of the Deceased recounted how he encountered **Francis Nyenze** who sent him to tell the Deceased to desist from undermining him, following an incident where he offered to purchase land but the Deceased offered double the amount hence taking the parcel.

18. PW16 **Dr. Mureithi Miano** adduced in evidence a Post-mortem Report that was prepared by **Dr. Nyagah** who performed the autopsy on the body of the Deceased.

19. At the close of the Prosecution's case the Accused persons were called upon to defend themselves.

20. DW1 **Dickson Mulyungi Kitui**, stated that during the month of **April, 2007** he was on the farm planting vegetables. On the **15th August, 2007** while at **Parkside Villa** to get orders for his vegetables he had an altercation with an individual who turned out to be a police officer. He left, returned ten (10) minutes later with four other people. He was arrested and taken to the police station. Subsequently, he was produced in Court and charged with the offence of Robbery with Violence. As the case was ongoing, he was removed from prison and taken to Kitui Police Station where he was identified by a certain individual. Consequently, he was charged jointly with his Co-Accused. He denied having committed the offence and stated that he saw PW8 for the first time in Court. He accused him of giving false testimony. He also denied having sold to him the cellphone. He argued that there was nothing in writing to suggest that he sold the cellphone and that had **Maluki** (PW8) bought the cellphone from him, he (PW8) should have been arrested before him.

21. DW2 **Benson Musyoka Mutisya** stated that he was at home on the **8th September, 2007** when police officers in civvies went and searched his house but failed to recover anything. However, they arrested him following allegations that he was selling cannabis to pupils. Subsequently, he was charged with the offence of Robbery with Violence in two (2) separate cases in Kitui Court. In **February, 2008** he was escorted to Machakos High Court where he met his Co-Accused a person he used to see in prison. Both Accused persons stated that they were acquitted of the case of Robbery with Violence, but for the 2nd Accused, it was his testimony that one of the cases is ongoing.

22. At the close of the defence case it was submitted for the Accused that the only evidence against them was that they allegedly sold stolen phones to the Prosecution witnesses but the Prosecution failed to prove the basis of circumstantial evidence as captured in the case of **Abanga alias Onyango vs. Republic, Criminal Appeal Number 32 of 1990** where the Court expressed itself 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. (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- iii. (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.”**

23. They called upon this Court to be persuaded by the case of **Sawe vs. Republic (2003) KLR 364** where the Court held that:

“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.”

And faulted the Investigation Officer for not conducting proper investigations in his endeavour to fix the 2nd Accused person.

24. The State on its part summed up evidence adduced and called upon the Court to reach a finding that the case was proved to the required standard.

25. I have duly considered rival submissions by both parties.

26. Being a case of murder, issues to be determined are:

- i. Whether death occurred;
- ii. The cause of death;
- iii. That the unlawful act/omission was caused by the Accused persons; and
- iv. It was with malice aforethought.

27. The mortal remains of the Deceased were identified to the Doctor who performed the post-mortem by his relatives **Judith Muthina Mwithi** (PW1) and **Meshack Vundi Kamina**. The death that occurred was confirmed by **Dr. Nyagah** who issued a Certificate Number **436505**.

28. Per the investigations carried out during the autopsy the cause of death of the deceased was confirmed to be cardiopulmonary arrest secondary to severe head injury. Eye witnesses alluded to the Deceased having been attacked by thugs who took him away. Ultimately his body was found with injuries including a deep cut on the right ulna and the posterior scalp that had two cut wounds. On the head parietal bones had exposed brain tissue. The brain was severed. There was proof beyond reasonable doubt that the individuals who attacked the Deceased and others are the ones who caused his death.

29. None of the witnesses who were at the scene of the incident identified/recognized their attackers. Therefore, evidence adduced against the Accused persons herein was circumstantial in nature. The Prosecution had a duty of proving that evidence presented following investigations carried out unerringly pointed to an inference that would make this Court conclude that the Accused persons committed the unlawful act that caused the death of the Deceased.

30. Principles to be applied in reaching a determination that circumstantial evidence is adequate to sustain a conviction were enunciated in the case of **Abanga alias Onyanto (Supra)** and also **Sawe vs. Republic (Supra)**.

31. In the case of **Omar Mzungu Chimera vs. Republic Criminal Appeal No. 56 of 1998** the Court stated that:

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilty is 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.”

32. PW7, the Investigation Officer relied on evidence alleged to have been obtained from Safaricom and Celtel Communication Companies. He recovered mobile phones identified and stated to have been owned by the Deceased, PW1 and PW2 and having been stolen from them on the fateful night. Cellphone Nokia 6030 that had a sim card for line number **0726 159 457** which was stated to have belonged to the Deceased. A handset Serial Number **E58808004847860** that had line number **0710 100 978** belonged to PW2 but at the time of being recovered it had a line number **0724 177 409**. This particular phone was traced to **Mumo Mukiti** (PW11) who identified his brother **Kasomo Muluki** (PW8) as the person who had given him the cellphone, make Nokia 2600, IMEI Number **3583351009698230**. PW8 alleged that he bought the cellphone from the 1st Accused. PW7 (Investigation Officer) stated that following his investigations he established that one **Joseph** alleged that he purchased a cellphone identified as the Deceased's from **Simon Nguli**, a conductor who was in company of one **Mailu**. The stated **Simon** claimed he bought it from the 2nd Accused.

33. PW9 **Mailu** gave a testimony of having exchanged a cellphone with **Mwanzia** who later led the police to recover it.

34. It is important to note that though the Prosecution purported to rely on data alleged to have been obtained from Safaricom and Celtel Communication Companies that had not been certified to establish the chronological account of how the cellphones were recovered, the documents were not produced in evidence hence did not form part of the record.

35. The allegations that the 2nd Accused was mentioned by **Simon Nguli** as the one who had sold to him the cellphone was not supported as the alleged individual was not called to testify. The statement made by the Investigation Officer purportedly to prove the case against the 2nd Accused was hearsay hence inadmissible.

36. With regard to the 1st Accused, PW8 alleged that **Mulyungi** (Accused) went to his shop on a date he could not remember but in the month of **April, 2007** and offered to sell to him a cellphone as he was in need of money. That he paid him **Kshs. 2,500/=** for the Nokia 2600. Thereafter, two – three months later he sold it to his landlord, PW10. Subsequently, he sold the cellphone to his brother, PW11 who was arrested in the course of investigations.

37. The 1st Accused denied vehemently having sold the cellphone to PW8.

38. The Prosecution had the duty of legally proving the case against the Accused. It was required to prove beyond reasonable doubt the guilt of the Accused as the persons who committed the offence based on the circumstantial evidence. Evidence on record that the 1st Accused sold the cellphone to PW8 is his word against that of the 1st Accused. On cross examination, it was established that the witness (PW8) was arrested following the allegations and held in custody for a period of ten (10) days. He stated that the 1st Accused was arrested prior to him. The fact of being held in custody for ten (10) days would suggest it was necessary for him to answer some questions during interrogation. Circumstances that made the police believe him as opposed to the 1st Accused were not divulged.

39. Looking at the circumstances that prevailed, the witnesses having not recognized the attackers and the evidence of PW8 hanging on a balance of preponderance, circumstances that the inference of guilt could be drawn were not established. Evidence on record does not unerringly point at the 1st and 2nd Accused as one of the persons who committed the act that resulted into the death of the Deceased.

40. Therefore, I find and hold that the Prosecution have failed to prove the case against the Accused persons beyond reasonable doubt. In the result, they are acquitted of the charge of murder.

41. It is so ordered.

Dated, Signed and Delivered electronically through **Skype** this **14th** day of **May, 2020**.

L. N. MUTENDE

JUDGE