



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC. NO. 139 OF 2017

FORMERLY MACHAKOS HCCR NO. 62 OF 2014

REPUBLIC..... PROSECUTOR

-VERSUS-

NDOLO MATUNDUACCUSED

JUDGMENT

1. **Ndolo Matundu** the accused herein stands 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 1st day of October, 2014 at Kalamba sub-location, Nzau district within Makueni county jointly with others not before court murdered **Nzomo Muthoka**.

2. The accused denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. The accused gave a sworn statement and called one witness for his defence.

3. Pw1 **Nichodemus Nzioki Matundu** who is an elder brother to the accused testified that on the night of 1st October, 2014 at midnight he was asleep at his home which is near the road in Kalamba. He heard the accused's voice from the road saying:

"Nzomo stop there." He went to the window and he heard a sound ***"kuu!"*** somebody fall. Accused then said: ***"I told you I will kill you and I don't fear being jailed."*** He added ***"hata ule akija hapa nitamumaliza"***

4. He said there was moonlight and he could clearly see the accused stepping and kicking the person screaming. His wife advised him not to go out. The distance from his house to the scene is ten (10) meters. Their mother (Pw2) came out to intervene but he chased her away, telling her ***"nikimalizana na huyu, I will turn to you."*** Pw2 ran into her house.

5. The accused went back to the deceased, laid heaps of dry leaves and dry sticks on top of the deceased's body and lit a fire, using a match box. Accused stood by the bush. Thereafter, he left the scene and entered his house. Pw1 went to view the scene and returned to his house to sleep, as he feared for his life.

6. The next morning, he went and reported to the village elder as people gathered at the scene. He went to the scene after the arrival of the police and viewed the body which was burnt. A phone cover for accused's phone was found there. Upon his arrest, accused was found with his phone which had no cover.

7. In cross examination, he said the deceased lived in Kalamba market. What woke him up was the accused's voice. He denied knowledge of what the deceased used to do at night.

8. Pw2 **Mutindi Kili Nzioki** is the mother to the accused. It was her evidence that on the night of 1st October 2015 at midnight, she was in her house when she heard some noises from the road. She went out to check and found it was the accused. She found him standing and asked him whom he was talking to. He asked her where she was going at that hour of the night. She saw Nzomo (*deceased*) lying down. They talked (accused and Pw2) while three meters apart.

9. The next morning, she went to the scene and saw the deceased's burnt body. She then went to Pw1's house. In cross examination she said they had an open entrance and not a gate to their home. There was no electricity.

10. Pw3 **Philis Mbula Musyimi** a neighbor to Pw1, Pw2 and accused was asleep on 1st October, 2015 midnight when she heard the accused saying loudly ***"Nzomo I told you I will kill you."*** She pointed at the accused as the **Ndolo**. She walked out of her house and went nearer. She again heard the accused repeat the same words. She again moved nearer. It was then that she heard the accused ask the mother why she had

come out of the house at that hour of the night.

11. The mother ran back to the house. She became fearful as the accused told the mother “when I am done with this one I will come to you.” The witness went back and slept. The next morning the village manager John Ngau called and asked her to go to the Matundu’s home as someone had been killed. She went to the scene and found the deceased’s burnt body and clothes. She said she had known the accused since birth while she also knew the deceased.

12. In cross examination, she said she only heard the voice but did not see the accused. That though there was no electricity at the scene, her home has electricity. She confirmed being the village manager and her home to the Matundus is 150 meters. She admitted that the deceased had been arrested by Aps for having sex with a donkey. He paid the owner and was forgiven.

13. Pw4 **Alphonse Mulwa Mutuku** is the deceased’s cousin. He received a report of the incident on 1st October 2015 at 7:00 am. He was accompanied to the scene by a fellow teacher, and they found the deceased’s burnt body. Members of the public with him went for the accused from the valley where he had called from. He was chased until he was caught and taken to the scene where he conceded having killed the deceased. A phone cover was recovered at the scene.

14. The mob present wanted to lynch the accused. He was searched by a police officer who recovered a phone without a cover. The recovered cover fitted the accused’s phone well. The witness said he used to pass the scene but did not know the accused. That among the nearby houses were Matundu’s which was the accused’s family.

15. Pw5 **Paul Kimeu** is the deceased’s cousin. He received a call over the incident and went to the scene. He was present when the suspect was brought by members of the public. He saw a phone cover at the scene. He also saw police retrieve a phone from the accused and the recovered cover fitted the accused’s phone so well. In cross examination he said the deceased used to work at Ikanyavya three kilometres from the scene and stayed at Kieti or Kalamba market.

16. Pw6 **No. 88298 Pc Raphael Kasyoki** investigated this case. He was one of the officers who visited the scene on 1st October, 2014 morning. They found a partly burnt body. Minutes later, a group of young men arrived having arrested the accused. A brother and mother to the accused were among the group members. Accused was re-arrested and placed in the vehicle while interrogations continued. He explained what Pw1 and Pw2 had told him.

17. The accused was searched and a coverless phone recovered. Its cover was found where the deceased’s body was. He produced the cover and the phone as EXB1a and b. Witness statements were recorded and the body taken to the mortuary where a postmortem was later conducted.

18. In cross examination, he denied taking the phone from Pw1 nor being aware of any grudges between the brothers. The scene was cleared of the public up to three meters away.

19. Pw7 **Senior sergeant Reuben Makio** said on 1st October 2014 at 6:00 am he was at Kalamba AP post when he received a call from a member of the public and told of a dead body by the road side near Kalamba secondary school. He gave similar evidence to that of Pw6.

20. In cross examination he said there was an allegation that the deceased had, had sex with a donkey but he was not arrested as he ran away. He also stated that there was no electricity at the scene or surrounding homes. He denied being in possession of an Occurrence book showing accused was arrested over bhang. Accused was arrested by members of the public. By consent of the prosecution and defence the postmortem report by Dr. Loiposha was produced as EXB2.

21. When placed on his defence the accused in his sworn testimony denied the charge. He stated that on 1st October, 2014 at 6:00 am Pw2 came to his room and asked him to check on some people at the road side. He went with Pw2 and other family members and found people standing with one person on the ground – 150 meters from home.

22. Later his brother (Pw1) passed by but never greeted them. He took the direction of the market, and returned with APs from Kalamba post. He pointed at him. He asked what it was and Pw1 told him he would know later. He was thereafter arrested and taken to Kalamba AP post then to Emali police post with Pw1 in the vehicle.

23. It was his evidence that him and Pw1 have never been in good books. That when their dad died, Pw1 wanted them to sell land and do business but he refused hence the hatred. He even wanted to chase away their stepmother (Rebecca), and closed the path to her home. It was him and his mother who reported the matter to the chief. Thereafter Pw1 told him never to call him his brother. This was said in the hearing of both mothers and others, as Pw1 threatened him.

24. It was his testimony that Pw2 planted this on him, divided the land and sold it while the accused was in prison. He denied knowledge of the cover and phone EXB1a and b. His money Kshs.800/= and Nokia phone 1100 were taken at the station.

25. In cross examination he said Pw2, Pw3 and Pw6 had no grudge with him. He added that he had family members who were aware of the grudge between them. He denied ownership of the phone produced as EXB1b.

26. Dw1 **Joyce Muunda Mutisya** testified that she knew the accused as a grandson to her elder brother. She also knows Pw1 who is an elder brother to the accused. She said pw1 and the accused do not relate well as Pw1 hates the accused who is hardworking and a very good person. That Pw1 beats his brothers including his father. She however said she did not witness the incident in issue. It was her evidence that Pw1 closed the path to Rebecca’s and he stops them from going to see the accused’s grandmother.

27. In cross examination she said she did not witness the deceased's death. Further that she has never reported any of the complaints to the police, neither has Pw1 ever been charged.

28. On answering questions from the court, she said the accused's father is deceased, and he only had one wife. The said father is the same as grandfather. She confirmed that she is married elsewhere.

29. In her written submissions, the learned counsel for the prosecution submits that the evidence adduced is sufficient to sustain a conviction. She contends that the direct evidence by Pw2 plus recovery of the phone nailed the accused. Further that his running away from home and going into hiding is a clear sign of guilt. She argues that the accused's motive was to kill the deceased and nothing else.

30. She submits that in his defence the accused elected to only talk about the events of the following morning, leaving out those of the night in question. He never brought up the issue of bad blood during cross examination, of the witnesses.

31. Mr. Hassan for the accused in his written submissions submits that the phone EXB1b had no special mark on it and no analysis was done on the cover (EXB1a) to show that it was for the phone (EXB1a). Secondly, the circumstantial evidence of Pw1 – Pw3 was not sufficient. None of them saw the accused do anything to the deceased. That there was evidence of a strenuous relationship between Pw1 and accused. Further that Pw1's wife should have been called to corroborate Pw1's evidence since she was said to have been present. He cited the case of **Bukenya –vs- Uganda (1972) E.A** to support this argument.

32. He finally submits that the prosecution did not satisfy the ingredients of murder as set out in the case of **R –vs- Nicholas Onyango Nyolo (2014) eKLR**.

33. This is now the case before this court for determination.

Analysis and determination

34. The charge facing the accused is murder which is defined under section 203 of the Penal Code as follows:

Murder

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

35. Section 206 of the Penal Code on malice aforethought states:

Malice aforethought

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.

36. The ingredients of murder were set out in the case of **Roba Galma Wario –Vs- Rep (2015) eKLR** where the Court of Appeal held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the Appellant; and that he had the required malice aforethought. Without malice aforethought the Appellant would be guilty of manslaughter as it would mean the death of the deceased during the brawl was not intentional.”

37. It follows that what has to be proved for a charge of murder to stand is as follows:

i. The fact and cause of death.

ii. The act of omission or commission (*actus reus*) having been caused by the accused.

iii. In the omission or commission, the accused acted with malice aforethought/acted intentionally (*Mens rea*).

i. The fact and cause of death

38. There is no dispute about the fact of death of the deceased person. All the witnesses (Pw1 – Pw7) herein have attested to that fact. The postmortem report (EXB2) revealed the cause of death as:

“Severe chest injury secondary to blunt injury causing haematoma in the respiratory and cardio vascular system.”

Those who saw the deceased’s body said he had burns on the lower part of the body. This finding confirms that the deceased’s death was not natural.

ii. Whether it is the accused who caused the deceased’s death

39. This incident took place in the night not far from the homes of Pw1 – Pw3. Pw1 and Pw2 are an elder brother and mother respectively to the accused. Pw1 – Pw3 explained to the court what they heard the accused uttering that night of incident. Pw1 testified saying his home is near the road which was the scene of murder. Further that the scene was outside his fence. He witnessed through his window what was going on.

40. It is the accused’s defence that him and Pw1 are in very bad books because of their late father’s property. I have gone through the defence’s cross examination of Pw1. At no one single point did the defence counsel question the witness over the many allegations of impropriety as have been raised by the accused and his witness (Dw1). That was his opportunity to bring that up so that Pw1 explains himself on the same. It means he never gave his counsel any instruction to that effect as it was not there.

41. Pw2 is the accused’s own mother. She told the court what she heard and saw that night. She even spoke to her son to stop doing what he was doing but he instead chased her away and even threatened her. At least this one, (Pw2) had no grudge against him and so could not lie. Pw3 is a neighbor who said she heard the accused’s utterances which were similar to what Pw1 heard. The accused confirmed that Pw3 had no grudge against him. So she could not lie against him.

42. In as much as there was no light at the scene Pw3 said there was electricity in her compound. The electricity is not just confined to a small place. Pw1 – Pw3 identified the accused by voice. Pw1 was able to see the accused and what he was doing as he checked through the window. Pw2 (his mother) went upto the scene before she was chased away by the accused.

43. The accused besides pleading fabrication as a result of a grudge which has been dismissed, only talks about how he was arrested. He never told the court where he was on the night he is alleged to have been with the deceased on the road. Further he says he was arrested when he had gone to the scene with his family members. The clear evidence on record is that he was sought for, from his hiding in the valley by a mob of youths who brought him to the scene. This is the evidence by Pw1, Pw4 – Pw7, which was not challenged.

44. A phone cover (EXB1a) was found at the scene where the deceased’s body was lying. It had mud on it. After his arrest the accused’s pockets were emptied and a phone (EXB1b) found on him. The phone was found without the back cover. The recovered back phone cover fitted EXB1b so well. What a coincidence? It went further to confirm the accused’s presence at the scene of murder.

45. My finding is that all the evidence points at none other than the accused as the person who caused the injuries to the deceased. He thereafter burnt the body by piling dry leaves and dry sticks on it and setting it on fire. He was found dead in the morning.

iii. Whether the killing was premeditated/intentional

Malice aforethought is defined under section 206 of the Penal Code.

46. This is an incident that occurred when the accused and the deceased were by themselves on the road. The utterances by the accused which were heard by Pw1 and Pw3 were threats and reminders that the deceased would be killed. This is a clear indication that the accused was set to kill the deceased. Even when his own mother (Pw2) approached him and asked him to stop he would have none of it.

47. He continued stepping on the deceased and kicking him. He thereafter set him ablaze. The deceased thereafter slept never to wake up again. This is sufficient proof of malice aforethought as defined under section 206 of the Penal Code.

48. I am satisfied from the evidence before the court that the prosecution has proved its case beyond reasonable doubt and I make a finding that the accused is guilty of murder and I convict him accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

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H. I. Ong’udi

Judge