



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR NO. 79 OF 2017

FORMERLY MACHAKOS HCCRC 79 OF 2015

REPUBLIC.....PROSECUTION

-VERSUS-

JACKLINE NTHENYA UHURU.....1ST ACCUSED

JOHN WAMBUA MUNAYO.....2ND ACCUSED

JUDGMENT

1. **Jackline Nthenya Uhuru** and **John Wambua Munyao** referred to as 1st and 2nd accused are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that 1st and 2nd accused on the night of 15th and 16th September, 2015 at Ndumbu village, Kisau location in Mbooni East district within Makueni count jointly murdered **Michael Makeni Nduva**.
2. They both denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. Each accused gave a sworn statement of defence without calling any witness.
3. The prosecution case is that on the night of 15th September 2015 at 9:30 pm **Pw2 Fredrick Mwanzia Muli** was asleep in his house in Kyome village of Kisau location where he was with his family. He was woken up by the 1st accused who told him she had been attacked in her home by the 2nd accused and Makeni the deceased who were fighting. He said his home to the 1st accused's was 3-5 kilometers. He advised her to go back to her home. On second thoughts he followed her. He had not gone far when he saw someone coming from the direction of the 1st accused's house. The person was walking slowly with difficulty.
4. He stood by a house under construction and watched. He saw the 2nd accused dragging the deceased whose leg was broken. There was moonlight. He did not talk to them and they did not see him. He knew it was the deceased because the 1st accused had told him she had been attacked by the deceased and the accused. The deceased was his neighbor while the 2nd accused hailed from the neighbouring village.
5. After seeing them he went back to his house and slept. The next morning, he learnt that the 2nd accused had killed the deceased. There were many people near their fence. He went to the scene with his wife and they found the deceased's body. He added that the 1st accused was in a love relationship with both the accused and deceased.
6. In cross examination by counsel for the 1st accused he said he never saw the 1st accused hit or injure the deceased. He did not know to where the body had been dragged that night. He had not heard of any bad blood between the 1st accused and the deceased. He said when he saw the deceased he was already dead.
7. On further cross examination by counsel for the 2nd accused he said there was moonlight on the material night. He identified the 2nd accused by what he was wearing and as he passed near the house where he stood. He did not see the accused and deceased fighting. He concluded it was the 2nd accused who killed the deceased from what the 1st accused had told him.
8. In re-examination he said he identified the thing being dragged as the deceased's body.
9. **Pw1 Francis Maingi Michael** is the deceased's son. He was away in Nairobi when this happened. He was with his uncle **Pw6 Benedict**

Makeni when they identified the deceased's body for post mortem on 21st September 2015. He had no idea as to who killed the father.

10. **Pw3 Bernice Ndumi Nduva** went to the farm on 16th September 2015 morning together with her children. She went to the shops thereafter to buy sugar for making tea. After doing ten (10) meters she saw a person lying on the ground. She moved closer and identified him as the deceased. There was blood around his legs. There was a trail of blood from the kiosk to where the body lay. They went with police to the 1st accused's home where they found blood.

11. The blood was on the door of the 1st accused's house. It was her evidence that the 1st accused was her close neighbour. She could hear when she talked from her home. She did not know who was responsible for the deceased's death.

12. In cross examination by counsel for the 1st accused she said there was blood on the deceased's trouser. She only saw the broken leg after removal of the trouser. On further cross examination by counsel for the 2nd accused she said she knew the deceased was injured before he died.

13. **Pw4 Jacinta Musenye** heard screams on 16th August (*sic*) 2015 at 7:00 am, while in her homestead. She ran in the direction of the screams at the home of Pw3. She found the deceased's body on the ground, and he had blood on his legs. She screamed and people came. They followed the blood stains which showed he had been dragged to the scene. They followed the blood from the road near Pw3's home to the fence of the 1st accused. They were accompanied by police and people from the homestead. The blood was up to the 1st accused's house which was locked.

14. She found the deceased's phone in the 1st accused's house near the kitchen. It was a Techno phone which she knew as the deceased was her father-in-law. The phone was given to the police. She also saw a blood stained sheet at the 1st accused's home.

15. Upon cross examination by counsel for the 1st accused she said the phone in court belonged to the deceased though she did not know the serial number nor deceased's phone number. The 1st accused was not found at her home when the police went there. She saw police take blood from 1st accused's door.

16. **Pw5 Dr. Maundu Solomon** from Makueni hospital did the postmortem of the deceased on 21st September 2015. He said the body had multiple bruises, and fractures. Cause of death was severe head injuries secondary to blunt trauma. In cross examination he stressed that the force in this case was severe, on both sides of the head. Further that the injuries on the arms show there was a possible fight and he was hit severally.

17. **Pw7 No. 86390 P.C Elphas Magut** took over the investigations from Cpl. Sululu (*who retired*) and I.P Oscar Mbugus. He produced a piece of wood with blood stains (EXB2) blood stained soil (EXB3) recovered from the entrance of 1st accused's house, samples of soil from 1st accused's house (EXB4), sample of soil recovered outside the gate of 1st accused's house (EXB5), 2nd accused's greenish trouser (EXB6) with blood marks.

18. He said the 1st accused was moving with the 2nd accused and the deceased. The two men met at 1st accused's house. Both accused beat up the deceased and his body was found 200 metres from 1st accused's house. This witness never visited the scene. He produced the sketch maps of the scene (EXB7a and b).

19. Upon cross examination he admitted that no inventory of the recovered items was produced. He did not know how the exhibits were collected. There is a home between the deceased's home and 1st accused's home. He did not know where EXB2 was recovered from. That two phones were recovered from the 1st accused's house. He could not confirm if the marks on EXB2 and 6 are blood stains. He however confirmed that the two phones are not exhibits.

20. In her sworn statement of defence the 1st accused denied the charge. She stated that she used to live in Mbumbuni. She however left for her maiden home in Kakiyani Machakos on 15th September 2015 after receiving a report of her mother's illness from her brother. She was arrested from Kakiyani on 16th October 2015. She had known the deceased as a neighbor in Mbumbuni (home). She said the witnesses lied against her. Pw2 was a distant neighbor in Mbumbuni where they had a quarrel over a parcel of land.

21. In cross examination she said she lived alone in Mbumbuni and she is a salonist. She knew the 2nd accused and deceased as neighbours and nothing more. She denied the deceased having been injured by someone from her house. She also denied the deceased having found the 2nd accused in her house. She denied having been taken to her house after arrest nor being shown any blood from her house. She said her husband Uhuru works in Athi river. Her house to the nearest neighbor is 50-70 meters away. From Pw2's house to her house are trees, fences and home and he is no. 3 from her house. She denied disappearing after the incident.

22. The 2nd accused also sworn stated that he was a farmer. On the night of 14th/15th September 2015 he was at his home (*Miumbu village*). He was arrested about a month after the deceased's death. He was released and re-arrested later. He stated that Pw2 lied to having seen him from far that night. He wondered how he would see him killing and he goes to sleep without reporting anywhere. He blames Pw2 for fabricating all this on him while they don't live in the same village.

23. Upon cross examination he said he was arrested twice for this offence. He said he used to meet with Pw2 in drinking places and he lied against him. He denied being accused1's lover and fighting with the deceased. He said accused1, the deceased and him had never met together anywhere.

24. In re-examination he reiterated that he was at his home on the day of this incident.

25. Counsel for both parties filed submissions. Learned counsel for the prosecution Mr. James Kihara in his analysis submits that indeed the 1st accused sought assistance from Pw2 but it's not clear if she had participated in the attack on the deceased. That the *alibi* she raised in her defence came as an afterthought. He further submits that the 2nd accused's *alibi* was also an afterthought. His defence was full of contradictions he says.

26. He further submits that no one witnessed the killing and so the evidence adduced was purely circumstantial. He cited the case of **Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990 UR** in setting 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:

- a) The circumstances from which an inference of guilt is sought to be drawn must cogently and firmly established;
- b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- c) The circumstances taken cumulatively should form a chain so complete that there is no escape from conclusion that within human probability the crime was committed by the accused and none else

27. Mr. Kihara submits that both accused were at the scene of crime as per Pw2's evidence. That they did not adduce any evidence to show otherwise. Secondly that there were blood stains as corroborated by three witnesses. The 1st accused was unable to explain the presence of blood stains at her house and 200 metres from there. The recovery of a blood stained blunt object near accused1's premises confirms it further. Further that there is strong evidence linking the 2nd accused to the killing for unknown reasons. The disappearance of the 1st accused was not a coincidence and she never called her mother to support her disappearance.

28. Counsel further submits that according to Pw2 the deceased and accused2 were not in good terms and he had heard accused2 verbally threaten the deceased with death. That his dragging the deceased's body further confirms his responsibility for the murder. He submits this cannot be imputed on accused1 but her participation cannot be ruled out.

29. He also submits that in this case exculpatory evidence is in play and cited the case of **Rafaeri Munya alias Rafaeri Kibuka –vs- Republic (1953) EACA 226** where it was held that:

“The force of suspicious circumstances is augmented when the person attempts no explanation of facts, which he may reasonably be expected to be able and interested to explain false incredible or contradictory statements given by way of explanation; if disapproved or disbelieved become of substantive exculpatory effect.

He therefore urges the court to find that the two accused persons used excessive force in beating the deceased to his death.

30. Mr. Hassan for both accused in his submissions contends that the evidence of Pw2 was full of inconsistencies especially on how he identified the person being dragged as the deceased. He has cited what he finds as the inconsistencies. He wonders why Pw2 took no step after allegedly seeing all this. He reported nowhere. His wife was not called to corroborate this story.

31. Mr. Hassan while comparing the evidence of Pw2 and Pw3 on the broken leg of the deceased, submits that Pw2 could not have known that the leg was broken from where he was. That Pw3 whose home is near the 1st accused's home never heard any commotion from her house. About blood she said there was no blood where the deceased was lying. The trail of blood was from the kiosk to where the body was found.

32. On Pw4's evidence he wonders how she was able to retrieve a phone from the 1st accused's kitchen which was never produced as an exhibit. Counsel submits that no exhibits were taken to the government chemist and so it could not be ascertained that EXB2 contained any blood or was used to injure the deceased. This further submits that the prosecution evidence is purely circumstantial with the prosecution witnesses giving conflicting and contradicting evidence on circumstantial evidence. He cited the case of **Mohammed & 3 Others –vs- Republic (2005) I KLR 722** where the court stated as follows as to what constitutes circumstantial evidence;

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a 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 by the one proposed to be proved.”

33. Counsel in further citing **Republic –vs- Nicholas Onyango Nyolo (2014) eKLR** submits that the prosecution has failed to prove the critical ingredients of the offence of murder. He blames the failure of the case on poor investigations. He thus urges the court to acquit the accused person.

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

35. Section 203 of the Penal Code under which the accused have been charged defines murder as:

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

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

(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.

37. From the definitions above and case law (see **Abanga alias Onyango –vs- Republic (supra) AND Republic –vs- Nicholas Onyango Nyoro (supra)**) the following are the critical ingredients in proving a charge of murder:

- i. The fact and cause of death.
- ii. The unlawful act of commission or omission causing the deceased's death (*actus reus*) having been caused by the accused.
- iii. That the unlawful act was accompanied by malice aforethought (*mens rea/intention*).

(i) The fact and cause of death.

38. The fact of death has been proved by Pw1 – Pw6 who saw the deceased's body. Pw1 and Pw6 identified the body for postmortem. **Pw5 Dr. Maundu Solomon** did the post mortem and found the cause of death to have been "severe head injury secondary to blunt trauma". Besides the head injury the deceased had several other injuries.

(ii) The unlawful act of commission or omission causing the deceased's death (*actus reus*) having been caused by the accused.

39. There is no witness who testified to having seen the person who killed the deceased. What is before this court is therefore circumstantial evidence which is one of the best pieces of evidence if properly coordinated. How should circumstantial evidence be handled?

40. The Court of Appeal in the case of **Nzivo –vs- Republic (2005) I KLR 699** held thus:

(5) In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt 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.

41. The most critical evidence in this case is that of **Pw2 Fredrick Mwanzia Muli**. He states that he was in his house asleep with his wife and children when the 1st accused woke him up to inform him of what was happening at her house. The time was 9:30 pm. She also told him that the deceased and 2nd accused were fighting at her house. All he told her was for her to go back to her home. She must have gone back since he never said anything more about that.

42. According to his evidence his home and that of the 1st accused were 3-5 kilometres apart. He adds that it was just like beyond the gate of Machakos law courts to the court room where he was. Obviously that could not even be 300m. He changed his mind and decided to go and see what was happening at 1st accused's home as she was alone. He did not go far when he saw somebody coming from the direction of the 1st accused's house walking slowly with difficulty.

43. It was at night. All that Pw2 said was this:

"It was at night. There was light from moonlight."

There was no further evidence given as to the brightness or so of the moonlight. In the case of **Simiyu and Another –vs- Republic (2005) I KLR 192**, this is what the Court of Appeal said of such condition:

(4) In the present case, neither of the two courts below demonstrated any causation. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

44. If indeed he was able to clearly see that night, how come he never told the court who the person walking slowly and with difficulty was? Where did this person go to? He says nothing about him or her. He also does not say where the 1st accused went to since he followed her soon after she left his house.

45. On identification of the 2nd accused and deceased this is what he says:

“I stood by a house that was being built and watched. I saw the 2nd accused dragging the deceased. It was at night. There was light from moonlight. The deceased’s leg was broken. I did not talk to them. I knew it was the deceased because Jackline had told me he had been attacked by Wambua and Makeni. They did not see me”.

46. The question is whether he saw the 2nd accused and deceased or he assumed it was them because of what the 1st accused had allegedly told him? In cross examination on identification he states this:

“I was able to identify him as he passed near the house I was standing. I saw he was dragging something which I later saw a body (sic)”

47. What is it that the 2nd accused was wearing which made Pw2 identify him? He never stated. What is it that made Pw2 identify 2nd accused and the deceased? Was it the moonlight, or was it because of what 1st accused allegedly told him, or was it because of what he was wearing or was it because of all the above conditions? It is not clear from the evidence.

48. The 1st accused has denied ever going to Pw2’s house. It is therefore his word against that of the 1st accused. Pw2 said the visit was in his house where he was with his wife and children. Didn’t any of them hear the alleged conversation between the two of them? Neither Pw2’s wife or child was called to corroborate this story by Pw2.

49. Pw2 wants this court to believe that after witnessing what he says he did he just went back to his house and slept soundly until morning. He never even told his family members, nyumba kumi chair or village elder. He did not report the matter anywhere. He never even explained to his wife in the morning upon seeing people near their fence. At one point he says he was present when the 2nd accused threatened to kill the deceased. Under the same breath he says he only heard it from others so which is which?

50. **Pw3 Bernice Nduvi Nduva** and **Pw4 Jacinta Musenye** told the court that police found blood at 1st accused’s home/house and scooped it. It was Pw3’s evidence that the police did not allow anyone into the house of 1st accused. Pw4 also confirmed that the 1st accused’s house was locked with a padlock. She however says the deceased’s phone was found in 1st accused house near the kitchen.

51. There were phones in court one of which Pw4 had identified as belonging to the deceased. The prosecution however indicated that the phones were not exhibits and should be returned to the police station for release to a relative of the accused. It means the phone as claimed by Pw4 did not belong to the deceased.

52. Several exhibits were produced here EXB2 (piece of wood with blood stains); EXB3 (blood stained soil); EXB4 and 5 (samples of soil) EXB6 (2nd accused trouser with blood marks). There is no inventory of recovered items produced by the prosecution. There is also no evidence that the several items produced herein were ever taken to the government chemist to confirm if indeed they were blood stained and whose blood it was. If ever they were taken, then they ought to have been returned with an analyst’s report. The prosecution had no evidence of receipt of such a report and neither was the defence ever served with any such report.

53. It is only the experts who could have confirmed to the court the presence and origin of any blood stains on the piece of wood, soil and accused 2’s trousers. Without such evidence EXB 2 -6 are of no assistance in this case.

54. Pw2 and Pw3 who were close neighbours to 1st accused’s home did not hear any noises or shouts from 1st accused’s home that night. Infact Pw3 said her and 1st accused could hear each other as they talked from their respective homes. She never heard anything from 1st accused’s home. Pw2’s evidence if believed by his court would be the only evidence that points at the accused as the persons who committed this offence. However, with the many contradictions and inconsistencies already pointed out I do not find his evidence to be dependable without corroboration.

55. First of all, the conditions for a favourable identification were wanting. Secondly he made very serious assumptions and in the process contradicted himself. I can only describe him as per what the court of Appeal stated in **Kiilu & Another –vs- Republic (2005) I KLR 174**

(4) The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

56. Pw2 and Pw7 testified that 1st accused had an intimate relationship with the deceased and the 2nd accused at the same time. This was suspected to be the cause of the killing. Besides stating this there is no evidence to show that indeed 2nd accused killed the deceased because of 1st accused. Their evidence is based on suspicion. Pw2’s evidence would only have been of assistance if it had been consistent and/or corroborated. Had he seen what he alleges there is really nothing that stopped him from reporting the matter or informing others who would have corroborated his evidence. Suspicion alone cannot be the basis of a conviction. In the case of **Sawe –vs- Republic (2003) KLR 364** the Court of Appeal said,

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

57. Both accused persons have denied the charge against them. The prosecution has failed to connect them with the killing. They have failed

to prove that indeed the police trailed blood from where the deceased's body was found to accused1's home/house. EXB2 – EXB6 have not been proved to have any connection with the deceased's death.

58. All in all, I find that the prosecution has failed to prove that the accused persons unlawfully killed the deceased. For my part I find them not guilty and acquit both of them of the charge of murder contrary to section 203 of the Penal Code. They shall be released forthwith unless otherwise lawfully held under separate warrant.

Orders accordingly.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge