



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 142 OF 2017

REPUBLIC PROSECUTION

-VERSUS-

MATHEW MULI NUNDU1ST ACCUSED

HENRY MUKOMA NZIOKA 2ND ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused persons have been charged charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya.
2. The particulars are that on 12/09/2008 at Sololo village, Kilili Location, Makueni District of Eastern Province jointly murdered Kamuti Nzioka Lavu.
3. The prosecution called ten (10) witnesses in support of it's case.

PROSECUTION'S CASE

4. PW1 was Faith Mwikali Mwendwa, a cousin to the deceased. She testified that on 12/09/2008 the deceased passed by her home and requested for food. She told him that she had not cooked and he went away.
5. While going to a ladies meeting at 2.00 p.m., she found him lying alongside the road and found him lying at the same place on her way back. On reaching home, he saw the accused persons. They are also her cousins. She told the 2nd accused to go and wake the deceased as he was not wearing any jacket.
6. The 2nd accused told her not to mention the deceased as he was the cause of him (2nd accused) not having chicken. They parted and she went to sleep. The following day, the deceased's daughter, Nthenya, led her and some other people to where the deceased was lying. It was a different place from where she had left him the previous evening.
7. The deceased was given porridge which he did not take and a short while later, he was dead. PW1 further testified that the deceased was bleeding from the anus and that she could see blood stains where he lay. The body was then collected by police officers.
8. On cross-examination, she said that the deceased was a cousin to her husband and she had known him for 3 years. That she saw the deceased three times on 12/09/2008 and he was okay but drunk.
9. The fourth time she saw him was 6.00 a.m. of the following day and he was at a different location and unconscious. Approximately 15 meters from the initial location.
10. It was on a common public foot path and there were bushes nearby. She could not tell what caused his death. She also said that when the deceased went to her home, he was with Somba Nzeki who was asking for money from the deceased. The deceased asked her to pay Somba on his behalf and he would refund later. She did not give him any money.
11. When referred to her statement where it was written that she gave Somba Kshs. 50/= and the deceased kept Kshs. 30/=, she said that she had forgotten and was confused. Further, she said that Somba and the deceased did not leave together. She could not say with certainty that the deceased was removed from the initial spot by people.

12. She also said that there were safari ants on the deceased's body but could not tell whether they had attacked him at night. That when people gathered and the body was taken away by the police, she saw the 2nd accused at the scene. That she had told the 2nd accused to go and help the deceased because it was very cold and he (deceased) had an unbuttoned shirt but when he declined, she did not tell anyone else.
13. PW2 was Miriam Mbithe Kituku. She was an assistant chief of Katatu sub-location. She testified that on 13/19/2008 at 8.00 a.m., Muti Kamuti reported that his father, the deceased, had not returned home and was found dead on the roadside.
14. She went to the scene and found him dead. He had lacerations on the neck, shoulders, hip and leg. She consulted the chief and they sent some relatives to report at Sultan Hamud police station. That a lady called Mwongeli said that she had seen the deceased with Somba the previous day.
15. On cross-examination by Counsel for the 1st accused, she said that she had known the deceased for about 10 years and he was a habitual drunkard. She did not hear anyone implicate the 1st accused. That the injuries on the deceased could not have been the result of falling.
16. That Somba Nzeki was the last man seen with the deceased as per what the lady said. That Somba, who was known to her, was not arrested and was not a witness in the case. She didn't know who killed the deceased. That the 1st accused was not found with anything belonging to the deceased and she was not told whether he was the last man seen with the deceased. She also did not receive any report of existence of bad blood between the 1st accused and deceased.
17. On cross-examination by Counsel for the 2nd accused, she said that the 2nd accused was a younger brother of the deceased and they did not have a good relationship. That her office was aware of the dispute that existed between the brothers. That Nthenya was the one who reported and was the same one who said that she had seen her uncle holding her father.
18. That a drunken person could not necessarily sustain injuries by falling down. That the place was not rocky and there was no shrubs and grass. PW1 then said that it was possible for a person to sustain injuries if he fell at the place.
19. PW3 was Monica Syokau Kamuti. She testified that the deceased was her husband and that she went home upon receiving information that he had died. She was at Kimana when it happened. The body was taken to Makueni District Mortuary. It was her son who identified the body to the Doctor who performed the postmortem. There was no cross examination.
20. PW4 was Prisca Ndenya Mulei, a daughter of the deceased. She testified that she used to live with her father. That on the morning of 12/09/2008, the deceased went with his grandson (PW4's son) to the hotel and bought him chapatti. He returned the child and told PW4 that he was going to his usual place to drink alcohol. She did not know the specific place.
21. PW4's sister, Damaris Ndula had visited. The deceased did not return and they slept at 10.00 p.m. At 11.00 p.m., their uncle Mukoma Nzioka passed by and was asked by Ndula whether he had seen their father. He said he had left him lying down but did not say exactly where. They slept. The 1st accused entered their father's house and upon being asked by PW4 why he was entering, he said he would rape her.
22. She heard his voice but did not see him physically. In the morning, she accompanied her sister to fetch water and look for their father. There were two people ahead and one looked like her uncle Mukoma. She could tell from the way he was dressed. They were holding another but she was not able to identify the persons. On reaching them, they released the one they were holding and ran off.
23. The person who was dropped turned out to be her father and he was bleeding from the left leg and left hand. He also had scratches on the neck. She proceeded to PW1's place and told her that the persons who had passed by had killed her father. PW1 said that the persons who had passed by were PW4's uncles. She left her father sleeping and went home to notify the people. She then went to the chief and reported the incident.
24. On cross-examination by Counsel for the 1st accused, she said that she said that she had known the 1st accused for one year and there were no differences between him and the deceased. She agreed that her father was a habitual drunkard who would sometimes drink and not eat food.
25. That when she found him lying on the ground, he was not talking and therefore did not tell her exactly what happened to him. She did not see the accused persons assaulting her father. She did not see 1st accused that night but recognized his voice.
26. On cross-examination by Counsel for the 2nd accused, she said that the 2nd accused was her uncle. She agreed that she used to stay with his wife called Veronica and that at some point she had quarreled with Veronica and even fought with her.
27. That when she saw the two people in the morning, they were approximately 150 meters away and she was not able to identify them. That initially, the two people were walking and not carrying his father. That it was after reaching where the deceased lay that they carried him up. She saw them supporting him but on getting closer to them, the released him and ran off.
28. She didn't know for how long the deceased lay at that particular point. She did not see the 2nd accused hitting the deceased. She could tell that the 2nd accused was one of the two persons because of his clothing however she agreed that when the 2nd accused woke up that morning, she did not see him. She said that she knew the coat but agreed that she did not get close enough to scrutinize whether it was indeed the coat she knew.

29. PW5 was Damaris Subula Mulei a daughter of the deceased who had visited her sister PW4 on 12/09/2008. She arrived at 9.00 p.m. and was told by PW4 that their father had gone to their uncle's place (Nundu) to drink alcohol. At 11.00 p.m., their uncle, the 2nd accused called her out but they did not open.
30. They asked him where their father was and he (2nd accused) said that he had left him with a woman. In the morning at 6.30 a.m. on their way to fetch water, they saw two people about 100 meters away. There was moonlight and she could see but could not identify them. She believed it was her father being carried because he was a drunkard.
31. She ran to her uncle's place but did not find him. She found her aunt and returned with her to where her father lay. She found her sister at the scene who said that she had recognized the people. Her father had scratches on the legs and hands.
32. She went with her aunt to the chief and they made a report. The chief returned with them to the scene. She found her uncle Mukoma at the scene. The chief told him to go and report to the police. He returned with the police at 5.00 p.m. and the body was removed from the scene.
33. On cross-examination by Counsel for the 1st accused, she said that her parents were separated and at the time of his father's demise, he had not remarried. That after the separation, her uncle Mutia took the responsibility of raising her younger sister, PW4 while she (PW5) proceeded to her maternal uncle.
34. That she had seen the 1st accused thrice before and could identify his voice. That there was a homestead near where the deceased was found but nobody said they had witnessed something unusual. She did not know who killed the deceased.
35. On cross-examination by Counsel for the 2nd accused, she said that upon her arrival from Nairobi, she did not interact with the two accused persons. That she saw the two accused persons carrying his father but did not see any of them hitting him.
36. That when her uncle said that he had left the deceased with a woman, she did not endeavor to establish where they were and what they were doing. She did not establish the home of the woman and wouldn't know if a fight had ensued between her father and the woman.
37. PW6 was Alfred Nzioka Kamuti, he testified that on 13/09/2008 while in Loitoktok, he received a call from the assistant chief and was informed that his father had been killed. His body was at the Makueni Mortuary. He witnessed the post mortem. The body had injuries on the right hand, leg, abdomen and chest area. This witness was not cross examined.
38. PW7 was Margaret Mukulu. She testified that on 12/09/2008 at around 7.00 a.m., she was woken up by Kamuti's daughter with enquiries as to who had passed by. She then passed and went to Mwenda Makai's place.
39. She then returned to PW7's place and asked her to make porridge for her father. PW7 made the porridge and gave it to her. She later followed and found that the deceased had been given porridge but didn't know who had given him. A crowd gathered and she decided to go back home.
40. On cross-examination by Counsel for the 1st accused, she said that the deceased was her neighbour and he had a family. He was separated with the wife but they had children. One of the children was the lady who had gone to wake her up. The deceased was a habitual drunkard. She did not see the deceased.
41. PW8 was Jemima Kabibili Mutua. She testified that on 13/09/2008 at 11.00 a.m., she received information that her brother had died. She went to confirm and found that he had been covered with a bed sheet. The deceased was near the homestead of Mukulu Musau. On cross examination, she said that she didn't know who had caused her brother's death.
42. PW9 was Francis Mbuvi Makai. He testified that on 13/09/2008, he was asleep when he heard a voice but could not tell where it emanated from. People seemed to be quarelling. He went to his brother's place, Mwenda Makai and found his father, Makai Lavu. PW9 asked him why they were quarelling and was informed that Nthenya Kamuti had been there but had left.
43. Mwikali the wife of Mwenda was also there. His father said that Nthenya Kamuti was damaging the house and knocking on the door. He sought to know why she was doing so and Nthenya said that she had followed people from where her father lay and one of them seemed to have entered the house.
44. They were then informed by Mwongeli Makai that Kamuti had died. He went to where the deceased was, near the home of Musau Muthiani. He saw the body. The deceased was bleeding from the nose and his trousers seemed to have blood. He didn't know what caused the death. The 2nd accused was at the scene.
45. On cross-examination, he said that he met the 2nd accused at about 9.00 a.m. That he was taking tea with Mukoma at his home when his mother broke the news to them. That he was with the 2nd accused from 8.00 a.m.
46. PW10 was CPL Richard Langat of Sultan Hamud Police station. He was the Investigating Officer in the matter. He testified that post mortem was conducted on 13/09/2008 by Dr. Michael at Makueni Hospital. PC Alex Kinyua was present during the post mortem. He produced the report as exhibit 1.
47. On cross-examination by Mr. Kituku for 1st accused, he said that he was not the original I.O. He agreed that the post mortem report was

only signed but the name of the Doctor was not indicated.

48. He agreed that he was not present when the post mortem was conducted and was gathering information from the documents. That it was officer Alex Kinyua who escorted the body for post mortem. That the post mortem reported was dated 13/09/2008 but the stamp date was 22/09/2008. He could not comment on the cause of death.

49. On re-examination, he said that the body was found on 13/09/2008 but the post mortem was done on 22/09/2008 and that the cause of death was shown on page three thereof.

50. After the close of the prosecution's case, the accused persons were placed on their defence. Both of them elected to give sworn statements and had no witnesses to call.

DEFENCE CASE

51. DW1 was the 1st accused, Mathew Muli Nundu. He testified that he was a farmer before his arrest. Further, he testified that he spent the night of 11/09/2008 at his uncle's home. He left at 10.00 a.m. on 12/09/2008 and when he got home, he was informed that Kamuti had died in the morning. He had seen him on 11/09/2008 in the morning. The deceased was his cousin. He didn't know how he died and did not go to see him at the scene.

52. He said that from the scene to his home was a distance of one kilometer. He was arrested at home on 14/09/2008 and was not told the reason for the arrest. He was taken to the police station and did not record a statement. He was never questioned from 12/09/2008 to 14/10/2008.

53. On cross-examination, he said that he went to his uncle's place at 5.00 p.m. on 11/09/2008. He used to live in Kisololo village which was one kilometer from his uncle's place. He would take 30 minutes to go there. His uncle's place to the scene was also one kilo meter. The deceased's place was between his home and his uncle's place. His uncle is deceased but at his home where he spent, his uncle's son and son's wife were there. He had no witness.

54. Further, he said that his uncle had sent for him in order to give him a report on cutting trees. He got the report on the morning of 12/09/2008 and in the evening, he went to cut the trees at Nzauni forest. He used to live at home with his parents and was not married.

55. On the evening of 11/09/2008, he was drunk and went to his uncle's place while drunk. From his uncle's place, he went home direct and arrived at 10.30 a.m. He found people drinking and joined them. went to cut trees in the evening.

56. DW2 was the 2nd accused, Henry Mukoma. He said that he was a timber splitter before his arrest. He testified that on 12/09/2008, he woke up at 7.00 a.m. and proceeded to Kilili town where they were constructing a house.

57. He met his cousin Francis Mbuvi and they took tea at his place. Mbuvi's mother told them that Kamuti was still at the place he was the previous day. He had slept at the same place since 11/09/2008 at 2.00 p.m.

58. That on 11/09/2008, he left work at 5.30 p.m. and went home where he took alcohol and on 12/09/2008, porridge was taken to Kamuti in his presence. He consumed 2 cups and slept at the same spot. Then the assistant chief arrived and said that Kamuti was dead.

59. Then PW4 and PW5 arrived and said that they knew their father's killers. Then the police took the body to the mortuary. Further, it was his evidence that the deceased was his elder brother and he had no grudge with him but he was a serial drunkard.

60. On cross-examination, he said that on 11/09/2008, he went to the drinking den at 1.30 p.m. and left at 2.30 p.m. when the 1st accused arrived. They never drank together. He went to work upto 5.30 p.m. and then went home. He sent his child to buy alcohol which he drank and slept.

ANALYSIS AND DETERMINATION

61. To secure a conviction for the charge of murder, the prosecution has to prove three ingredients *to wit*;

- a. That the death of the deceased occurred.
- b. That the death was caused by an unlawful act committed by the accused (actus reus).
- c. That the accused had malice aforethought (mens rea).

PROOF OF DEATH

62. PW2, PW4, PW5, PW8 and PW9 saw the deceased at the scene. PW6 was the deceased's son who witnessed the post mortem. The post mortem report produced as exhibit 1 indicated that the cause of death was asphyxia. I am therefore satisfied that indeed the death of Kamuti Nzioka Lavu occurred.

PROOF THAT THE DEATH WAS CAUSED BY AN UNLAWFUL ACT COMMITTED BY THE ACCUSED.

63. The evidence adduced by the prosecution was purely circumstantial. No one witnessed the incident that led to the death of the deceased. The question which begs is whether the evidence links the accused persons to the offence.

64. In **Mwangi & Another (2004) 2 KLR 32** the Court of Appeal stated as follows with regard to circumstantial evidence;

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypotheses that the accused is guilty of the charge.”

65. The prosecution’s case is largely hinged on the evidence of PW4 and PW5, the two sisters who claimed to have seen the accused persons carrying their father (deceased) on the morning of 13/09/2008 when he was found dead. However, the same witnesses are on record admitting that they could not identify the two persons who were carrying the deceased.

66. Starting with PW4, her evidence was that when the two persons carrying the deceased dropped him and ran away, she went to PW1’s house to enquire about the people who had passed by and PW1 told her that it was her uncles, the accused persons. On the basis of that, she proceeded to notify other people.

67. In my view, the enquiries of PW4 from PW1 is a clear confirmation that her identification of the two persons was not positive. That notwithstanding, a look at PW1’s evidence reveals that she did not give PW4 such information. PW1 stated as follows;

“They then said Nthenya (PW4) said that she had seen two (2) people holding Kamuti (deceased). One of them was Mukoma. It was being alleged I had locked Mukoma inside the house. We then went. Nthenya led us to where Kamuti was lying. She led many of us from the homestead..”

68. Most importantly, PW4 testified that when she first saw the two people walking ahead of them, they were walking and not carrying the deceased. That it was only after getting to where the deceased was lying that they carried him up, then when PW4 got close to them, they dropped the deceased and ran away.

69. In my mind, this sounded like a case of two people who had stopped to assist another one in distress but changed their minds and aborted their mission. In a nut shell, I do not think the conduct of the two persons at that point is consistent with that of people who had committed a crime.

70. On the other hand, PW5’s evidence was largely based on what her sister PW4 had said. As much as she testified that she saw two people on her way to fetch water, she conceded that she could not identify them. Her evidence about a bad relationship between the 2nd accused and deceased was also based on hearsay.

71. This case was such that there were really no circumstances to form a chain so complete that the only inference was the guilt of the accused persons.

72. It was common ground that the deceased was a habitual drunkard and from the evidence, the deceased had been lying on the same spot for a long time and it is probable that he spent the night there.

73. One of the witnesses said that prior to sleeping on the roadside; he was with one Somba Nzeki who was demanding some money from him. Another one said that there were safari ants on the deceased’s body. The post mortem report indicated the cause of death as asphyxia. The dictionary definition of asphyxia is *“a condition arising when the body is deprived of oxygen causing unconsciousness or death. Suffocation.”*

74. I have already concluded that the accused persons were not positively identified as the ones who were carrying the deceased and even if they were, the fact only of carrying him was not sufficient to prove that they had killed him. The suspicion might have been there but it is now trite that Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

75. Further, from the evidence on record, I have entertained thoughts that the asphyxia could have resulted from a myriad of reasons. Any doubt in the Court’s mind should be exercised in favor of an accused person.

76. The upshot is that there is no evidence upon which the Court can find that the death was caused by an unlawful act committed by the accused persons.

CONCLUSION

77. It is this court’s finding that the offence of murder was not proved beyond reasonable doubt. The court thus makes the orders;

i. The charge is dismissed and accused persons acquitted under section 215 CPC.

ii. The accused persons shall be set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

.....

HON. C. KARIUKI

JUDGE