



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 54 OF 2017

REPUBLIC PROSECUTION

-VERSUS-

HENRY KASYOKI NDUNDA ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused, Henry Kasyoki Ndunda, is 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 diverse dates between 16/09/2008 and 10/10/2008 at Kithangaini village, Ikalyoni sub-location, Kee Location in Makueni District of the Eastern Province, the accused murdered Sammy Maithya Ndunda.
3. The accused pleaded not guilty and the matter went into full trial. The prosecution called eight (8) witnesses in support of its case.

PROSECUTION'S CASE

4. PW1 was Stephen Mwanzia Nzewa, he testified that on 11/08/2008, he was told by one Muema Kioko Kaliso that the accused had told his mother that he had killed the deceased.
5. The accused is his nephew as he is the son of his elder brother who is deceased. He proceeded to his brother's house to establish the truth of the allegation. After about 2 hours, there was a foul smell emanating from a place next to the toilet.
6. He went there and noticed fresh soil covering something. He was persuaded that the information was true and went ahead to inform his younger brother, George Makau. They went back to the scene and agreed that the smell was of a dead human being.
7. They decided to look for the accused who had been behaving rather strangely since the death of the deceased. He was behaving as if he was mad.
8. They arrested the accused on 12/10/2008 and tied him with a rope. He pleaded to be taken to his grandmother. The accused was given tea and insisted to be untied which they did but he attempted to run away.
9. They managed to subdue him. They reported the incident to the chief who then interrogated him and he owned up to killing the deceased. He even showed them where he had buried him. The chief summoned the police who arrested the accused.
10. PW2 was Lawrence Mwali Mwau, the assistant chief. He testified that on 12/10/2008, he was at home when PW1 reported that they had arrested a suspect by the name Henry Kasyoki Ndunda who was suspected of having Killed his brother, Sammy Ndunda.
11. He accompanied him to the accused's grandmother and found that the accused had been tied with a rope. After interrogation, the accused led them to his home where he showed them a collapsed pit latrine. There was a nasty smell emanating from there.
12. He contacted Kilome police station and the officers arrived at around 4.00 p.m. They were unable to remove the body and the mission was postponed to the next day. The body was exhumed and photographs taken. The body was decomposed, wrapped in a blanket and tied with ropes.
13. He knows the accused and deceased as they are from his area. He had not seen the deceased for three weeks prior to his body being

retrieved. In the compound of the grandmother, they found, PW1, George Makau Ngewa, Rebecca Ngewa and Muema Kioko.

14. That apart from the accused, the other people who entered his compound were the deceased, their mother and uncle George Makau. The accused and deceased stayed in one house which was partitioned. The accused was unmarried.

15. Further, he testified that their relationship was not good because earlier that year, the accused was blaming the deceased for not assisting to work in the farm.

16. He also burnt the deceased's school certificates, his clothes and beddings. They intervened and the accused was arrested and taken to Court where he was charged, convicted and sentenced to 6 months imprisonment. He was released the same year he killed his brother.

17. That after his release, there were constant fights with the deceased when he was drunk and he threatened to revenge against the deceased for causing him to be jailed. The threats were reported severally to his office and as they tried to resolve the problem, the deceased suddenly disappeared.

18. On cross examination, he said that in the family of accused and deceased, there were other siblings (2 sisters) and their parents were deceased. He reiterated that the relationship between the accused and deceased was not cordial.

19. That occasionally, the accused would chase the deceased from home and the deceased would complain to him (PW2) whereupon he convened several meetings in his office and involved other family members. He was convinced that the deceased was lazy. They then shook hands and promised to live in peace.

20. PW3 was Eunice Wandia Ngonzi, a neighbor of the accused and deceased. She testified that on 16/09/2008, she was preparing to visit her husband in Naivasha when the deceased went and asked her brother in law (employer) for the balance of his salary. The employer told him that he would channel the money through PW3.

21. PW3 returned on 20/09/2008 and stayed for four days without seeing the deceased yet she had his money from the employer. On 10/10/2008, the accused went to her house and demanded the deceased's money. Out of fear, she undertook to give him the next day and actually gave the money to her mother in law for transmission to the accused.

22. She said that there were constant quarrels between the accused and deceased and they were not living peacefully. Later on, she learnt that the deceased body had been retrieved from a pit latrine.

23. PW4 was George Makau Njewa, an uncle of the accused and deceased. He testified that on 11/10/2008, he received information from his brother PW1 that the accused had killed the deceased.

24. They proceeded to the deceased's home but did not find anyone. As they were heading out, a strong stench hit them from the pit latrine and they agreed to arrest the accused.

25. On 12/10/2008, they arrested the accused from the home of Geoffrey Kilome Ngewa, tied him with ropes and took him to the home of PW4's mother. They called the assistant chief and after interrogation, the accused took them to the pit latrine where he had dumped the deceased's body.

26. The assistant chief called the police. The inspector of police ordered the accused to retrieve the body. The body was wrapped in a blanket and tied with ropes.

27. Photographs were taken and the body was taken away. Prior to his arrest, the accused stayed with the deceased in the same house. PW4 went on to say that the last time to see the deceased was two weeks prior to retrieval of the body. That he was a laborer and would go home daily.

28. That the relationship between the two was not cordial and at one point, the accused burnt the deceased's certificates but he was arrested, charged, convicted and imprisoned. He suspected that the accused killed the deceased in vengeance.

29. That the deceased used to complaint to the assistant chief who intervened but the accused did not comply.

30. On cross-examination, he said that he was aware of the post mortem but did not identify the body of the deceased.

PW1 RECALLED

31. At that juncture, PW1 was recalled for further examination in chief and cross examination and he proceeded to testify that the body of the deceased was taken to Machakos District Hospital mortuary and the post mortem was conducted in his presence at Kenyatta National Hospital.

32. He identified the body to the Doctor using a mark on his face and his clothes. He had brown jeans and a green sweater. The body was decomposed beyond recognition. They buried the deceased at Lang'ata as they did not have the money to transport the body home.

33. On further cross examination, he said that prior to his demise, the deceased was not married and had no children. He denied that the deceased was deserted by his wife because cruelty.

34. He reiterated that the relationship between the two was not good and the disagreement was such that each of them used to cook their own food and sleep in separate rooms. That the accused even burnt the clothes and certificates of the deceased.
35. PW5 was Dr. Njeru, a forensic pathologist attached to city mortuary from the ministry of medical service, department of magnostic forensic and blood transfusion service. He said he was a medical doctor and holder of MB CHB, pathologist and with masters in medicine in pathology.
36. He testified that on 29/10/2008 while on duty, he was requested by Kilome police station to ascertain the cause of death on one Sammy Maithya Ndunda. The body was escorted by Cpl. Peter Musyoki and identified by Stephen Mwanzia Ngewa, an uncle and David Kinyua, a brother in law.
37. They could not establish the nutritional status or physique as the body was badly decomposed. Eventually, he found a patch on the skull on the left side of the head but the cause of death was unascertained due to decomposition. He produced the report as exhibit 1.
38. PW6 was Muema Kioko. He said that he was a farmer from Makueni. He testified that on 10/10/2008 at about 4.00 p.m., he was in his grandmother's (*Lembi Ndunda*) house when he heard Kasyoki Ndunda telling his mother, Lembi Ndunda, that he had killed the deceased.
39. At that juncture, the accused's Counsel objected to that line of evidence on the ground that it amounted to a confession and it was not in line with their evidence. The Court sustained the objection.
40. PW7 was Sergeant Peter Musyoki James formerly of Kilome police station. He testified that on 12/10/2008, he received a call from PW2 who informed him that he (PW2) was holding a suspect on allegations of having killed his brother.
41. He booked the report in the OB and informed the OCS. He then accompanied the deputy OCS, Boniface Wakhanu, to the scene where they found the suspect as well as family members and villagers. He interviewed the suspect who offered to lead him to where he had secretly buried the victim. He escorted the suspect to Kilome police station.
42. On 13/10/2008, he returned to the scene with the suspect and OCS and was led by the suspect to where the deceased was buried. He drew a sketch plan and then mobilized people to search and retrieve the body.
43. The body was found in a shallow grave in a pink shirt and green sweater. It was wrapped in a yellowish blanket and tied with a sisal rope. The remains were taken to Machakos General District Mortuary to await post-mortem.
44. The doctors were unable to perform the post mortem and they referred him to City mortuary where the remains were attended to by Government pathologist, Dr. Njeru. he produced the sketch plan [exhibit 2(a)], measurement [exhibit 2(b)], photographs MFI 3(a)-(f) and report MFI 4.
45. On cross examination, he maintained that he was led by the accused to where the body was retrieved. That he stated as much in his statement but did not caution the accused about the danger of recording such a statement.
46. That he was a corporal and it was Chief Inspector Mulandi who took the charge and cautionary statement. He agreed that he retrieved the body without an order but denied that there was any fault in what he did.
47. That in the course of investigations, it had come to his knowledge that more than one person killed the deceased and that other than the admission of the accused, no one else saw the accused killing the deceased.
48. PW8 was Herman Jefwa, formerly the OCS Kilome police station. He testified that on 24/10/2008 at 5.00 p.m., he cautioned the accused that he was to be charged with murder and was not obliged to say anything but whatever he would say would be taken down and could be used in evidence.
49. The accused said that he understood English and was asked whether he could avail his relative or Advocate. He said that he did not have an Advocate and his relatives would not come as he was accused of killing his brother.
50. PW8 recorded a statement from him and he admitted having killed his brother. He also volunteered to show them where he had buried the body. The accused signed his statement and PW8 countersigned. He sought to produce the statement but the accused's Counsel objected. The Court ordered that a trial within a trial be conducted prior to admitting the statement in evidence.
51. On 28/10/2014, when the matter was scheduled for the trial within a trial, the prosecution Counsel sought to strike out the evidence of PW8 on the grounds that he was not the one who recorded the confession. On 20/05/2015, the application by the state to have the proceedings of PW8 expunged from the record was allowed.
52. PW8 was P.C Joseph Mutie. He testified that on 28/12/2008 he received 7 colored negatives from Cpl. Musyoki which he duly processed and printed photographs. He proceeded to explain what each one of them meant as per the accompanying report. He then produced the photographs as exhibits 3(a)-(f) and the report as exhibit 4.
53. On cross-examination, he said he was given the negatives and was not aware as to when they were taken. He did not know how they were kept or how they were stored before being handed over to him. He said he never visited the scene. He confirmed that they were not interfered with during the 2 days they were in his custody.

54. The prosecution case was closed at that juncture and the accused was placed on his defence. Upon being asked to elect the mode of defence, he opted to remain silent.

ANALYSIS AND DETERMINATION

55. 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

56. After the deceased was reported missing for some time, a body was eventually exhumed in the homestead where he used to live with the accused. PW1, PW2, PW4 and PW7 were present when the body was exhumed. PW1 was the one who identified the body to the pathologist. He said he was able to identify it using a mark on the face and the clothes i.e. brown jeans and green sweater.

57. PW7 confirmed that the body had a green sweater but added that it also had a pink shirt. PW5 was the Government pathologist who unsuccessfully tried to perform a post mortem due to decomposition. Photographs showing the body were also produced in evidence. I am therefore satisfied that indeed the death of Sammy Maithya Ndunda occurred.

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

58. There was no eye witness in this matter. It was purely based on circumstantial evidence.

59. 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.”

60. The evidence of the prosecution witnesses was corroborative and they were able to establish that the accused and deceased were brothers who lived in the same house and that there existed bad blood between them.

61. Further, it was clear from the evidence that the deceased had been missing for some time and it was only after the arrest of the accused that his body was found. The prosecution’s case was that it was the accused who showed them where the body had been buried and from the evidence, I am satisfied that indeed it was the accused who directed them to the burial spot.

62. The fact that he knew where the deceased was buried is in my view a strong indication that the death of the deceased is attributable to an unlawful act committed by the accused. The circumstances of this case are such that the only inference to be drawn is that the accused caused the death of the deceased.

THAT THE ACCUSED HAD MALICE AFORETHOUGHT (MENS REA).

63. The prosecution led evidence to show that the relationship between the accused and deceased was soiled. At some point, the accused served a jail term for destroying the deceased’s certificates and burning his clothes.

64. PW2, the assistant chief testified that he had arbitrated over disputes between the two and it was also his evidence that the accused had threatened to revenge against the deceased for causing him to be jailed.

65. It is well within the rights of an accused person to remain silent however, the circumstances of this case are such that it would be reasonable for the Court to expect that the accused would be able and interested to offer an explanation.

66. In **Rafaeri Munya alias Rafaeri Kibuka –Vs- Reginam (1953) 20 EACA 226**, it was held that;

“The force of suspicious circumstances is augmented where the person accused 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 inculpatory effect.”

67. My deduction from the evidence is that the accused was a bitter man owing to the constant wrangles between him and the deceased. Burying his brother in a shallow grave is in my view an indication that his actions were well calculated and that he even had a plan of how he would conceal them. Accordingly, the ingredients of murder were established and the case was proved to the required standard.

CONCLUSION

68. In sum the court finds that, the, accused is guilty of murder and thus the court proceeds to convict him accordingly.

SIGNED, DATED AND DELIVERED THIS 12TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE