



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 75 OF 2017

REPUBLIC.....APPELLANT

-VERSUS-

SAVI MUSANGILA.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The accused, Savi Musangila, 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 16/12/2008 at Kitulu village, Makindu Location, Kibwezi District of Eastern Province, the accused murdered Paul Mbithi.
3. The prosecution called eight (8) witnesses in support of its case.

PROSECUTION'S CASE

4. PW1 was Dr. Aggrey Wafula but he was stood down as he was not familiar with the doctor who conducted the post mortem.
5. PW2 was Fridah Khadija Paul. She testified that on 16/12/2008, at about 10.00 a.m., she was from the farm with her husband, the deceased.
6. She met the accused, her former lover. She said the accused impregnated her and refused to take responsibility. The accused said that he wanted a refund of kshs 400/= which he had spent on milk that he had delivered for the child. The deceased said that he had no money but the accused insisted that he wanted to be paid.
7. That the accused held one of her hands while her husband held the other hand and they started pulling her. That the accused pulled a panga which he had concealed in his trousers and cut the deceased on the right hand side of the head. She identified the panga (MR1 I).
8. The accused turned on her and she ran away screaming. She met his cousin Mutiso along the way and told him what had happened. Mutiso ran towards the scene of the incident. PW2 then stood about two meters away and watched.
9. On seeing Mutiso, the accused dropped the weapon and ran away. She then walked slowly back to the scene and noted that the deceased had a cut on the face and nape of the neck. He had been cut in such a way that only the skin held the head in place.
10. The deceased wore a blue shirt. People gathered and the village elder, Stephen Mutuku, was also there. He called the police who collected the body and took it to Makindu District Mortuary.
11. On cross examination, she said that her friendship with the accused was for one week in August 2006 but he did not take her as his wife. He impregnated her and she gave birth to a baby called James. That she collected milk for two weeks from the accused's place of work and stopped when her breast healed. That the accused was supposed to pay for the milk.
12. That the deceased encountered the accused for the first time on the day that he was cut. She agreed that the accused and deceased were from the same Sub-location but different villages. That she didn't know if the accused and deceased knew each other prior to 16/12/2008.
13. That when the accused was cornered, he was grazing his employer's heads of cattle but she didn't know whether he carried the panga by

virtue of his job as a herdsman. She said that the two did not quarrel over non-payment of milk that was supplied.

14. That the deceased did not react badly when asked for money and did not say the exact date that he would pay. That he did not get annoyed and there was no struggle.
15. They did not fall down but the accused went round him and cut him. That after cutting him, the accused ran to the bush and stayed there for four hours.
16. In re-examination, she said that the accused knew the deceased prior to the date of the incident.
17. PW3 was Stephen Mutuku Mativo. He testified he was a village elder of Kio sub-location and had lived there for eleven years. That on 16/12/2008, he proceeded to the scene after receiving a call from Matota whereupon he found the deceased injured. He had three cut wounds.
18. Matota and Khadija were at the scene. The deceased had a black pair of trousers and a green shirt. He found a panga at the scene which he identified in Court. He called the police.
19. On cross-examination, he said that the accused was not from his village but the deceased was from his area of jurisdiction. That he knew Khadija's parents as well as those of the deceased.
20. He knew that the deceased was employed by Mutinda Kiputo as a herdsman. He agreed that a herdsman can carry a working spade, bows & arrows as well as a panga.
21. He denied knowing that Khadija and accused were lovers but he knew about the marriage of Khadija and deceased. He did not know the biological father of Khadija's child.
22. In re-examination, he said that the area was a game reserve and anyone with weapons could not be allowed in.
23. PW4 was David Mbithi. He testified that on 16/12/2008 at 9.00 a.m., he was at home when he was told that his son had died. He went to the scene and found him lying on the ground.
24. He had been cut on the head and nape of neck. A panga was recovered from the scene and the body was taken to the mortuary. The deceased was married to Khadija but he had no idea whether there was a relationship between Khadija and accused.
25. On cross-examination, he said that he knew the accused on the day his son died but he used to see him grazing animals. That the deceased had four children with the 1st wife and Khadija was the 2nd wife.
26. He wouldn't know whether the accused was the father of Khadija's son. He didn't know whether the accused was supplying milk to the son at the time of his death. He agreed that a Kamba carries a panga, bow & arrows and a walking stick when looking after cattle.
27. PW5 was Grace Kayilu Kaluva. She testified that on 16/12/2008 at 10.30 a.m., she heard her neighbor, PW2 crying and got out of the house.
28. PW2 told her that the accused had cut the deceased. She went to PW2's home and reported whereupon Khadija's parents went to check on the deceased who was in the bush. PW5 also saw the deceased whose head had been cut.
29. On cross examination, she said that would not have known what was happening if she had not seen PW2. She did not see the accused and was not present at the time of his arrest.
30. PW6 was CPL Rodgers Mukeva, he testified that on 16/12/2008 at 11.00 hours, he accompanied the OCS to the scene where they found a body with visible injuries lying in a pool of blood.
31. PW2 told them that the accused had escaped to Kyulu National park. They took the body to Makindu District Hospital. There was a panga beside the body which PW6 identified and produced as Exhibit 1.
32. As they were going on with investigations, some prisoners were brought by KWS officers and after recording their issues in the occurrence book, the accused identified himself as Savi Musingila.
33. PW6 informed the OCS and escorted the accused to Kibwezi station for further interrogation.
34. On 19/12/2008, he accompanied the deceased's father for identification of the deceased to the doctor who conducted the post mortem.
35. On cross examination, he said that the panga was beside the body and they found a crowd at the scene. That an investigating officer who was transferred is the one who removed the panga from the scene.
36. That he saw the panga when it was recovered at the scene and next when he came to Court to testify. He did not escort the panga to the Government analyst. That at the time of his arrest, the accused did not have any physical injuries.

37. In re-examination, he said that he found a panga at the scene and identified it.
38. PW7 was IP Simon Too testified that on 16/12/2008, he was a deputy OCS at Kibwezi Police station when he received a telephone report from CPL Mulene of Makindu that a person had been killed.
39. He proceeded to the scene where there was a crowd and a body lay in a pool of blood. There was also a panga. The body had cuts on the back of the neck. He enquired from the village elder Mutuku who referred him to the deceased's wife.
40. PW2 narrated to him what had transpired i.e. she was headed to the forest with the deceased when they met the accused who was taking cattle to the water point. That the accused tried to beat PW2 and then immediately cut her husband who fell down and died.
41. On cross examination, he said that PC Ngei took the panga to the Government chemist and that both him and CPL Mulenia investigated the case. That it was the deceased who arrived with a panga on the material day.
42. He agreed that the wife had also arrived with a panga going to cut firewood. He established that the quarrel ensued when the accused demanded to be compensated for money he had spent on buying milk for the child. He could not tell whether the two had fought but the issue was over the same woman.
43. PW8 was Dr. Nicholas Mbugua who was also stood down for being unfamiliar with the doctor who performed the post-mortem.
44. The prosecution indicated that it had three remaining witnesses i.e., the Doctor, Investigating Officer and Government analyst and after failing to procure their attendance, the prosecution's case was closed on 10/04/2018.
45. The accused was eventually placed on his defence and he elected to give sworn evidence and not to call any witness.

DEFENCE CASE

46. DW1, Savi Musingila stated that before his arrest, he was a casual worker and that he hailed from Yikisimei village, Muuni sub-location, Makindu in Makueni County. That they border the Tsavo West National Park.
47. That on 16/12/2008, he woke up at 5.00 a.m. and opened for his four cattle and after going for about 300 meters he went to a neighbour, Mutinda Kikuto who gave him 28 animals. He now had 32 heads of cattle.
48. He entered the National park and continued grazing up to 2.30 p.m. He was then accosted by KWS officers who asked for his authority to enter the park.
49. He said he had no authority but there was draught and he had to graze the animals in the park. They arrested him and took him to the station where he was locked up until 7.00 p.m.
50. He was then taken to Makindu police station where the officer at the report office took his name. He said he was arrested for wrongfully entering the park and was locked up until the next day. On 17/12/2008, he was charged with trespassing into the National park.
51. At the report desk, he met a person he didn't know who asked whether he had killed somebody at Kitulu village.
52. He denied but the unknown person told the police officer that he had a murder case.
53. He was locked up until 3.00 p.m. and then ferried via a motor vehicle to Kibwezi Police station where he was charged with the murder of Paul Mbithi. He was locked up until 22/12/2008 when he was taken to various offices and questioned on the alleged murder.
54. He denied and was returned to the cell until 11.00 p.m. when he was called again. His finger prints were taken and then he was returned to the cell.
55. After 25 minutes, he saw the person who was at the report desk. He was then given a paper to put his signature. On 23/12/2008, he was taken to Machakos and locked up at the Machakos police station till 10/02/2009. He was then charged with the murder. He denied being at the scene of murder and said he didn't know the deceased.
56. On cross-examination, he said he had known PW2 since 2005 and they were lovers until 2007. They had a child. He said he didn't know who married her after they separated.
57. That they were not living in the same place. That PW2 lied about seeing him cut the deceased. That on 16/12/2008, he was in the KWS Park grazing his cattle. That he was alone with 32 heads of cattle.
58. That he had no witness to confirm his alibi. That he was arrested between 2.00 p.m. and 3.00 p.m. by KWS officers. He denied killing anybody and said he had no weapon.
59. In re-examination, he reiterated that he was arrested for entering the park and that his relationship with PW2 was not terminated on a sour note. He said they had agreed to part ways. The defence case was closed at that juncture.

ANALYSIS AND DETERMINATION

60. 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

61. PW2, PW3, PW4, PW5 and PW6 testified that they saw the deceased lying on a pool of blood at the scene of the incident.

62. I am therefore satisfied that indeed the death of Paul Mbithi occurred.

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

63. The only eye witness in this matter was PW2, the woman who was said to have been in a romantic relationship with the accused before she eventually got married to the deceased.

64. The accused denied committing the offence and it was therefore incumbent upon the prosecution to prove their case beyond reasonable doubt.

65. In her evidence, PW2 initially painted the picture of a confrontation between the accused and deceased because of some unpaid money which was apparently owing from the deceased but on cross examination, she said they did not quarrel over non-payment of milk and they did not struggle which implies that the alleged attack occurred abruptly and without provocation.

66. She also stated that the deceased encountered the accused for the first time on the fateful day then changed and said she wasn't aware whether the deceased and accused knew each other prior to the date of the incident.

67. In re-examination, she changed yet again and said that the accused knew the deceased prior to that date. In my view, this inconsistency tainted the credibility of PW2 and being the key witness, it was crucial for her not to come across as an untruthful witness.

68. The accused raised an *alibi* in his defence to the effect that he was grazing cattle at the Tsavo West National park at the time the offence was committed.

69. He said he was arrested by KWS officers at about 2.30 p.m. for being in the park without authority. I am aware that when an accused person raises a defence of *alibi*, he assumes no burden of proving it.

70. Further, in as much as the *alibi* was raised during defence, the Court is still duty-bound to weigh it *vis-a-vis* the prosecution's evidence. This is in line with the holding of the Court of Appeal in Criminal Appeal No. 194 of 2003 Gerald Theuri Muchemi -Vs- Republic where it stated that:-

“In the case of Ngeiywa -Vs- Republic 2 KLR 152 in which this Court said at page 157:-

The defence of alibi was first raised in the appellant's defence and not when he was called up to answer the charge. In that case it is sufficient for the trial court to weigh the alibi against the weight of the prosecution case – See Wangombe -Vs- Republic [1980] KLR 149.”

71. The fact that the accused was in the National park was corroborated by PW6 who stated that;

“...as we were going on with investigations, officers from KWS brought in some prisoners who were at the park. Upon recording their issues in the occurrence book, the accused person identified himself as Savi Musingila...”

72. The prosecution's case did not reveal the park from which the prisoners were brought from and the time that they were brought in which leaves me with no other option but to believe the accused's version.

73. On the other hand, PW6 testified that when he went to the murder scene, PW2 informed him that the accused had escaped to Kyulu National park after committing the offence.

74. In my view, if indeed the accused had escaped to Kyulu National Park as per PW2's evidence, it was important for PW6 to state the National park that the prisoners were brought from. It is my considered view that the prosecution did not adequately dislodge the *alibi* defence.

75. It is also a fact that the post mortem report and report from the Government analyst were never produced.

76. In the circumstances of this case, those were fatal omissions. Having opined that the only eye witness in the case did not come across as truthful and in light of the alibi defence, it was crucial for the prosecution to lead evidence on the cause of death and to establish a nexus between the crime scene and the accused.

77. Further, PW2 talked about his cousin Mutiso who she met as she was fleeing from the accused and the impression created is that Mutiso saw the accused at the scene. In my view, failure to call Mutiso as a witness entitles this Court to draw an adverse inference.

78. From the foregoing, there is doubt as to whether the death was caused by an unlawful act committed by the accused and that means that the ingredients of murder have not been proved to the required standard.

CONCLUSION

79. In sum the court finds that the prosecution case has not been proved on the required standards, thus court makes the following orders:-

- The accused is hereby acquitted under Section 215 Penal Code and shall be released forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE