



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 5 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MURIITHI NTHIGA.....ACCUSED

J U D G M E N T

A. The Charge

1. The accused herein, John Muriithi Nthiga was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on diverse dates between 21st and 27th February 2014, at Rugusa village, Kigaa Sub-location of Embu County murdered Alex Kinyua John. The accused pleaded not-guilty to the charge.

B. Introduction

2. The prosecution called ten (10) witnesses in this case. The brief facts are that on 21/02/2014, around 3.30 pm the deceased who lived with his parents at Rugusa village in Kigaa Location was sent by his mother to the shops at Runyenjes to buy some food supplies. He did not return home that evening as expected. On the 27/02/2014, the body of the deceased was found in a coffee plantation with severe injuries on the neck and legs.

3. The home of the PW4 the employer of the accused was searched using some leads from witnesses. Some exhibits were recovered from the compound and a bloodstained somali sword believed to be the murder weapon was found under the bed in the workers' quarters' where the accused was housed by his employer. The accused fled the area on the same day the body of the deceased was found but was arrested later and charged with the offence.

C. The Evidence

4. PW3 the mother of the deceased testified that on 21/02/2014 at around 3.30 pm she sent the deceased to Runyenjes town to buy some food supplies. The deceased used a bicycle that he had borrowed from one Muthemba, a neighbor. PW3 also gave the deceased her phone to go with it so that it could be charged.

5. At around 5.00 pm the accused went to the home of PW3 and told her that he "had finished with Alex". PW3 said she did not understand the implication of the message. She was aware that the deceased used to visit the accused before the incident who was an employee of their neighbor of PW4.

6. PW3 further testified that there was a dispute over a phone handset between the accused and the deceased that had already been reported at Kigaa Administration Police Camp. The deceased never returned home from the shops on 21/02/2014. The parents PW1 and PW3 reported the matter to the police.

7. PW4 confirmed that PW3 told him sometime in January 2014 that she had sent the deceased with her phone to PW4's house to be charged and that it had been destroyed in the hands of the accused. PW4 arbitrated on the dispute between the deceased and the accused and found that the accused was on the wrong. He then directed the accused to compensate the deceased for the phone.

8. The evidence of PW8 an administration police officer at Kigaa AP post, was that the deceased and PW3 had reported to him about the damaged phone. PW8 said he was yet to resolve the dispute when the deceased was killed and body subsequently discovered in a coffee plantation.

9. PW7 the investigation officer testified on how the bloodstained somali sword was recovered from the house of the accused. He said that the bicycle the deceased was using on the material day was found in the home compound of PW4 the employer of the accused. This was the

place of residence of the accused as he worked for PW4.

10. PW9 was one of the police officers at the scene of recovery of the exhibits. He testified that the bicycle was recovered and identified by one Muthemba as his property and that he said that he had given it to the deceased to use on the fateful day. PW9 said the accused fled from his employer's home but he arrested him at the same home several days later with the help of PW4. The somali sword believed to be the murder weapon was recovered in the workers' quarters used by the accused according to the witness.

D. The Defence

11. In his sworn defence, the accused denied that he was at Rugusa village on the material day. He said he had gone to his home on 20/02/2014 after being sacked by his employer for not refunding his Kshs. 2,000/= that he was given to buy a phone.

12. The accused further stated that there was a dispute between him and the deceased over a phone that he (deceased) had sold to him but the deceased's parents were unhappy about the sale. The accused said he gave the deceased Kshs. 2,000/= to buy a battery for the said phone. He denied committing the offence.

E. Prosecution Submissions

13. The prosecution submitted that the accused failed to challenge testimony to the effect that the deceased and the accused had a tussle over a mobile phone and further that the bicycle that the deceased was riding was found in the homestead of the accused's boss which was the worker's quarters of the accused.

14. It was further submitted that the defence never brought up any questions during the course of cross examination and thus from the circumstantial evidence adduced, it was clear that the accused was involved in the murder of the deceased.

15. The prosecution proceeded to submit that the government pathologist's expert opinion was consistent with the testimony of several witnesses including PW1, PW2, PW7 and PW8 on the death of the deceased. Further it was the prosecution's case that the accused had the *mens rea* to kill the deceased as he used a somali sword to occasion grievous harm to the deceased and that the assumption of innocence had been taken away by the recovery of a sword that was stained with blood.

16. Regarding the defence of alibi raised by the accused the prosecution submitted that since it was not raised at the earliest opportunity during trial it was an afterthought. They relied on the case of **Criminal Appeal No. 50 of 2007 Ali Mkaro Mwero v Republic** where it was held that an alibi must contain specific details of the whereabouts of the accused at the material time but not a destination at large. The accused in that case had failed to specify the lodging in which he alleged he spent the night in Maua which town has many lodgings.

F. Defence Submission

17. The accused through his advocate Ms. Muthoni Ndeke submitted that the prosecution had not proved the charges of murder against him and further that there was no proof that it was the accused person who killed the deceased with malice aforethought and that none of the ten (10) prosecution witnesses testified that the accused had any intention of murdering the deceased.

18. The defence argued that the circumstantial evidence on record was not watertight to enable the court to draw the inference of the accused's person guilt. He relied on the cases of **Republic v Jacob Limah AGA as well as that of Solomon Kirim M'rukaria v Republic [2014] eKLR** where it was held that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reason or hypothesis than that of guilt.

19. The accused further submitted that the prosecution case was based on suspicion which could not form a basis of conviction. He relied on the case of **Republic v Daniel Musyoka Muasya & 2 Others Mombasa Criminal Case No. 42 of 2009** where the burden of proof in criminal cases was emphasized.

G. The Law

20. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

- a) ***That the death of the deceased occurred;***
- b) ***that the accused committed the unlawful act which caused the death of the deceased; and***
- c) ***that the accused had malice aforethought.***

21. The accused alleges that he was sacked on the 20/2/2014 for his employer PW4 told him to go on leave for 5 days. This is inconsistent with the testimony of PW4 whose testimony places the accused within the larger area where the deceased was prior to his death and where his body was later recovered. It is incredible that PW would be worried about Kshs. 2,000/= he had lent to the accused since he was still under PW4's employment, the amount would have been deducted from his salary.

22. The circumstances that the prosecution relied on revolve around the testimonies of PW1, PW3, PW4, PW7, PW8, and PW9 where the following inculpatory facts can be deduced: -

- a) *That the body of the deceased was recovered from a coffee plantation near the home of PW2 who was a neighbor of the deceased's parents and the accused's employer PW4.*
- b) *That on the day the decomposing body was discovered the accused fled from his employer's home.*
- c) *That it has been established from the evidence of PW2, PW3, PW4 and PW8 that there was a dispute between the deceased and the accused over the phone of PW3 that had been damaged by the accused.*
- d) *That the deceased is the one who had taken the said phone to the house of the accused for charging and found it damaged on collection.*
- e) *That PW4 had tried to arbitrate on the dispute between the accused his employee and the deceased and had found that the accused was on the wrong and advised him to compensate the deceased for the phone.*
- f) *That the accused never paid the compensation and instead lied to his employer PW4 that he had done it and also to the deceased's mother PW3 that he had given the deceased Kshs. 2,000/= on the date he died which turned out to be untrue.*
- g) *That the accused lied to his employer that he had borrowed money to pay the deceased the phone from one Fridah a shopkeeper in the neighbourhood who on inquiry denied lending the accused any money.*
- h) *That false messages were sent to the parents of deceased after his death that he had gone away from home to seek employment whose sole purpose was to cover up the death and to calm down the said parents who had a lot of anxiety over their son who had gone missing.*
- i) *That the borrowed bicycle the deceased was using on the material day was found at the home where the accused stayed and worked with PW9 confirming that the owner one Muthemba identified it on recovery as his own property.*

23. In **R. v. Sukha Singh s/o Wazir Singh & Others** (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

24. PW4 testified that the accused worked for him on 21/02/2014 up to 27/02/2017 when the body of the deceased was discovered. It is on that day that he fled from the area. PW4 said that he called the accused on phone on 27/02/2014 and found that he could not be reached. It was established by the prosecution that the accused was not sacked on 20/02/2014 as he alleged but left the area to escape arrest.

25. I find the alibi defence of the accused incredible and an afterthought designed to exonerate himself in this case.

26. From the evidence adduced, I find that it has been established that the accused and the deceased had a dispute on a damaged phone that the accused was supposed to pay for a new phone for several weeks since January 2014. This dispute was never resolved because the accused never paid the deceased for his phone.

27. There is high probability that on the material day the deceased may have insisted on being given the money by the accused who had already shown reluctance to make good the loss. This may have led the two young men disagreeing and the accused resulting in killing the deceased.

28. Although proof of motive for the offence of murder is not an ingredient, I am convinced that the prosecution have established the motive of the killing in this case.

29. According to PW10 Dr. Maingi who conducted the postmortem the probable type of a weapon used to inflict the injuries was a sharp object. PW7, the investigating officer in this matter testified that he found a Somali sword stained with blood at the worker's residence where the accused resided.

30. I have set out the facts that arise from the evidence of the prosecution. As was held in the case of **Ndurya vs Republic (supra)** case, "*circumstantial evidence is very often the best evidence.*" It is my considered view that the facts point the guilt in this case to the accused to the exclusion of any other person.

31. I find that the prosecution have proved that the accused person is the one who caused the unlawful act that resulted in the death of the deceased. The *actus reus* has therefore been proved to the standards required in criminal cases.

H. Analysis of the Evidence

32. It is imperative to note that the prosecution did not adduce any direct evidence in that no one saw the accused inflict the injuries that caused the death of the deceased. This case is therefore based on circumstantial evidence.

33. Circumstantial evidence, in the case of **Wambua & 3 Others Vs Republic [2008] eKLR 142** was described as follows: -

a) "In order to justify an inference of guilt from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.

b) It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

34. In the case of **Nduruya Vs Republic [2008] eKLR 123**, it was also held: -

Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstance which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would waken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.

I. Malice Afterthought

35. The offence of murder is committed when a person causes the death of another by some unlawful act or omission and was motivated by malice aforethought. Malice aforethought is defined under section 206 of the Penal Code and as what constitutes the element. The code provides as follows: -

"Malice aforethought shall be deemed to be established by evidence providing 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(c) An intention 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. From these provisions the prosecution must prove that the accused had the necessary intention to cause death or grievous harm to the deceased and that it was the injury which led to the death of the deceased. In **Bonaya Tutui & Another v Republic [2015] eKLR** the court observed that, malice aforethought is *mens rea* for the offence of murder and it is the presence or absence of malice aforethought which is the decisive factor in determining whether the unlawful act amounts to murder or manslaughter. Whether or not malice aforethought is proved in any trial for the offence of murder, depends on the peculiar facts of each case.

37. The Court of Appeal in **James Masomo Vs Republic [2015]** observed that the nature of injuries can be manifestation of malice aforethought. The court held: -

"In the present case the slier force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region which extended to the skull bones, and exposed the brain. In addition, she suffered a deep cut on her right hand with a fracture of the right hand. She also had cuts on her legs and suffered burns. Everyne Nditi Nyamai had deep cuts on the right elbow and several cuts on the skull. Susan Mbithie also had two deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain. Surely in inflicting these wounds on the deceased the appellant intended to cause them fatal harm."

38. The post mortem report showed that the deceased had a deep cut wound on the nape of the neck extending to the left lateral part of the neck which had completely severed the carotid arteries and jugular veins and muscles of the neck. The cut extended all the way to the spine.

39. It is not in doubt that the injury on the neck was so severe that the accused must have intended to bring the life of the deceased to an abrupt end. The force used to severe the deceased on the neck was so deep and for the cut to extend "all the way to the spine" is evidence of malice aforethought.

40. As it was held in the **James Masomo case (supra)**, I find that the nature and severity of the injury inflicted fits the description under Section 206(a) of the Penal Code.

41. I find that malice aforethought has been proved as required.

42. I proceed to find that the prosecution have proved the offence of murder against the accused beyond any reasonable doubt.

43. I hereby convict the accused of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**

44. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 9TH DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. Muriuki for Muthoni

Accused present