



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 2 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KARUNGARU NDEREBA.....ACCUSED

JUDGEMENT

1. The accused David Karungaru Ndereba is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. Particulars are that the accused David Karungaru Ndereba on the night of 17th and 18th January 2014 at Mbeti Village, Kaurone sub location in Imenti South District within Meru County murdered Robert Mugambi Karungaru.
3. The prosecution presented 7 witnesses in support of its case that the deceased was murdered by the accused person.
4. PW7 Dr Nicholas Koome Guantai conducted autopsy examination on the body of the deceased and has conclusion as to the cause of death as multiple injuries secondary to assault with sharp object.
5. He said there were stab wounds between the abdominal cavity and thorax on the right upper abdomen. There was another stab wound at the back of thoracic region. There was a 3rd stab wound on left shoulder and on left Achilles tendon. He also found multiple gut lacerations.
6. PW1 uncle to the deceased got report that his nephew had been killed by the father and he proceeded to the Mitunguu police station where he accompanied police to the village where accused persons home was. Accused person was found drinking in company of other people. By then the police had already removed the body of the deceased to the hospital. Accused was arrested and taken to police station. PW1 said that the Assistant Chief had severally called them to mediate between accused and the deceased and that deceased used to confess he would kill his son.
7. He said the dispute between the accused and the deceased was over land and that PW1's elder brother had severally intervened. PW1 in cross examination said they found accused person about 1 KM away from his home drinking in company of 5 to 6 people. He said police called the accused and he cooperated and accompanied them. He said Assistant chief presided over the meeting they had with accused and the deceased but he could not remember if minutes were taken. He said the meeting resolved that the land be subdivided. He said the foul smell from deceased person's house made people realise that he had died.
8. He said he could not tell when deceased was murdered but it was not on the day he got the information. PW1 said the deceased was raised by the grandfather but after circumcision his brother took the deceased to stay with the accused.
9. He said his sister differed with the accused and got married elsewhere. He said he had no grudge with the accused and he didn't talk to him to establish what had happened.
10. PW2 Jamleck Mutunga Ndereba said he was brother to the accused PW2 said that on 17th January 2014 the deceased informed him that the accused had warned him of dire consequences if he found him at home. He said that he had agreed with the deceased to use his bicycle to carry for him sand on Saturday but he didn't turn up.
11. That when he went to his house which was hereby to check, he found the door locked from inside but there was foul smell coming from inside the house.
12. That he called Assistant Chief through phone and when Assistant chief came he tried to open the door but it could not open.

13. That accused was called and he was able to open the door and they found the body of Mugambi with an open abdomen.

14. PW2 said there was a lot of blood at the scene. The body had stab wounds on right shoulder blade and left ankle joint. They went and made report at Mitunguu police station and waited until the next day at 6.00 am. When police vehicle went to collect the body the accused accompanied the body to the mortuary. PW2 said he had no grudge with the accused but that accused and the deceased had a lot of problems-dispute over land and he was always present whenever the dispute was being resolved. He said he tried Mugambi's door but it was hard. He said the window to Mugambi's house was open. He said the deceased had only a trouser and with no shirt. He said David Mbaabu was the closest neighbour to accused at a distance of 50 metres.

15. He said his home was also 50 m from accused persons home. He said he was taking care of a boy who had been circumcised and he was not at home and when he returned home and asked for Mugambi the deceased he was told no one had seen him. He said the deceased reported to him about the quarrels between him and the accused and he promised to go and sit them down but the accused was not at home. He said when the deceased went to report about the quarrel on 17th in the morning; PW2 said he could see the accused was at home with his wife Karangu. He said the accused person's wife Karangu was alive but the accused chased his 2 sons Isaka Kyambi and Erick Munene. He said we went to have succession forms to their late father's estate signed and it was not true he wanted to grab accused persons portion of land. He said he had no intention of disinheriting the accused. He said accused persons son was using the land. He said accused and the deceased frequently quarrelled and there were severally sittings with the chief to resolve their disputes over land including in August 2008. He said it was resolved that the accused gives one acre to the deceased.

16. He said when Assistant chief called the accused to go and open the son's door he looped his hand above the door and opened and the door was not broken. He said it was after entering the house that they saw the window to deceased person's house was open. He said the window was in the bedroom. He said the body of the deceased lay next to the bed on its back.

17. PW3 the deceased person's mother said that while on her way to church on 19th she learnt her son had been killed. She said it was the Assistant chief who informed her, her son had been killed in Mbeti Sub location. She said she send her brother to Mbeti sub location where offence was committed as she was in shock. She only viewed the body at the mortuary when collecting for burial. She said in her statement she recorded that Mugambi was murdered because of land. She said that she cohabited with the accused but they never got married. She said Assistant chief of Kauro known as Khaji informed the assistant chief of her sub location about the murder of her son. She said PW2 was in company of the accused when the deceased was given a portion of land on which his body was buried. PW3 said that the deceased differed with the accused because the accused wanted to sell land.

18. PW4 said that the deceased was accused person son and he is the one who took him to accused persons home and they helped him to construct his house on a portion of land given to him by the accused. He said that the accused threatened to kill the deceased over the land and the deceased reported to assistant chief and accused was warned. He said he was present when the Assistant chief warned the accused against issuing threats to the deceased. He said he was with Mutunga and Elijah when they saw the body of the deceased in the house and it had cut on the neck, back and abdomen.

19. PW5, Assistant chief of Kaurone sub location send the deceased and the accused resided within his sub location. He said that in August 2012 the accused and the deceased had a complaint before him. That the accused said the deceased was not his son. That he counselled them and advised the deceased to give his father a he-goat and he accepted.

20. Then in the 2nd instance, the deceased reported the accused had threatened to kill him and he referred them to the police station. That on 10th September 2013, the deceased reported the accused wanted to sell land without giving him his portion. PW5 said the purchasers went with the deceased to his office and that the accused said it was the purchasers who would hive off some portion for the deceased. That the purchasers accepted that proposal and the matter ended.

21. That on 18.1.2014 at around 6.30 pm he got phone call from Jamleck Mutunga requiring him to go to their house urgently. That Jamleck Kirimi and Alex Chabari- 2 elders accompanied him to Jamlecks home. On arrival he was told that Robert had not been seen. Jamleck reported that on 17th January 2014 there was a scuffle between accused and the deceased and that PW2 said they found Robert house was locked. That they proceeded to accused persons home and found his wife. The wife called him and PW5 told him he should lead them to his sons house and open the door as his son was reported missing. That accused refused to go open claiming he had quarrelled with the son and the son would be annoyed if found accused had opened his house.

22. PW5 said there was foul smell coming from deceased person's house. That he ordered accused to open the door and he opened from inside from the top. That the house had a partition with a curtain door to the bedroom. When he removed the curtain he found Roberts body lying on the floor and he was dead. He said he had a stab wound on left side of chest and the abdomen was cut and his intestines were outside. That there was also a cut on the leg. That PW5 made a phone call to OCS Mitunguu and he was instructed that the owner of home should go and report. The Assistant Chief wrote a letter for accused to take to police station. That police came next day and collected the body. PW5 said he recorded a statement at Mitunguu police station. PW5 said the window in the bedroom to deceased house was open and the one in the sitting room was closed. He said the deceased body was dressed only in a trouser without a shirt. He said the trouser was dark with blood stains. PW5 said that Silas Kinyua was the one currently using accused persons land as well as Erick both being accused persons sons. PW5 said he was not aware of land dispute between PW2 and the accused. PW5 said he saw accused loop his hand above the door to accused persons house and opened it from inside. He said accused appeared to have know how to open the door.

23. PW6 Inspector Kashindi Mwalungu investigated the murder. He said that the OCS CIP Peter Okello instructed him to investigate the murder case. That he met the accused herein and Jamleck Mutunga at Mitunguu police stations and booked the report of murder. In company of PC Mwaniki and the 2 Reporters they proceeded to the scene in Mbeti village where they met PW5 the Assistant Chief and other Members of the public. That in company of Assistant Chief they proceeded to deceased person's house and found there was foul smell with flies.

24. He said when they pushed the door and entered the house they found deceased body had multiple cuts and there was blood all over the

floor. That the intestines had come out of the abdomen. That there was a small window with wooden shutter that was open. That there was recent shoe marks on the window to show someone had entered through the window. PW6 drew a sketch map of the scene showing accused persons house was 30 metres away from the deceased person's house and from deceased person's house to PW2 house was 20 metres.

25. Scenes of crime officers also took photographs at scene before the body was taken to the mortuary for post-mortem on 14th February 2014 – EXP2. PW5 said he established the accused had threatened to kill the deceased if continued demanding to be given land. He said the dispute over land between the accused and the deceased had been handled by Assistant chief but was not resolved. PW6 said his investigations established the accused was connected to the murder of his son. That he traced accused at a local brew place and he was arrested and a jacket was recovered in his house covered with soil under the bed. That a knife was also recovered in the pockets of the jacket. The 2 exhibits were kept – EXP 3 & 4. He said in cross examination there was minimal brownish substance on the jacket they recovered under accused persons bed. He said he was with accused and PC Mwaniki when the jacket was recovered in accused persons house buried under the bed. He said he was not aware that accused, his brother Jamleck had a grudge. He also said he was not aware that Jamleck - PW2 was using accused persons land. PW6 said he found people at scene including PW2's 3 sons who left the scene on their arrival.

26. PW6 said when they pushed door to the deceased house and entered. He said said flies were all over due to foul smell. He said the house was divided with a curtain and the deceased persons body was lying near the bed. PW6 said he saw sign of struggle in the house as some clothes were hanging on the bed almost falling. He said he saw the deceased persons house, accused persons house and Jamleck PW2's house in the vicinity.

27. He said he didn't establish where Jamleck spend the night prior to making report to police. PW6 said he arrived at the scene in the morning. He said he was not aware if a threat to kill report had been made to police station but PW2 told him the accused had threatened to kill the deceased. He said the threat to kill report was made to Assistant chief. He said he arrested accused from a beer den 2 Km away from his home. PW6 said he saw the letter written by Assistant chief concerning land dispute.

28. When accused was place on defence he gave sworn statement, he said on the night of 17th and 18th January 2014 he was in Nkondi 80 Km away from Mbeti village and didn't commit offence. He said he had been hired to graft mangoes and oranges by 3 people among them was the Sub Area Manager. He said he went back to Mbeti village on 2.2.2014 and found Assistant chief at home and the body of Robert was in the house. He said his house is 100 m from the deceased person's house. He said he found Assistant chief in company of 5 people seated under a tree at his home. That before he could enter his house Assistant chief called him and when he approached he was told that there was a dead body in the house. He said the door was open and the Assistant chief led them into the deceased persons house and they found the deceased fallen on the ground/floor and was bleeding from the abdomen. He said the body had not decomposed and there were no flies.

29. That he used his motorbike to go to police station in company of his brother while Assistant chief remained at home. That they waited for police vehicle until the next day in the morning at 6.00 am when they proceeded to scene and the body was collected and taken to the mortuary. That when body was taken to the mortuary the Assistant chief and his brother remained at home. That on 4.2.2014 he was arrested from his neighbour Munya's home where he was relaxing at 10.00 am. That they claimed he is the one who killed his son and he was taken to court on 5.2.2014. he told police he was not home when Robert died. He said that Jamleck who claimed that he killed his son had not been in good terms with him. That he and Jamleck had dispute over land and that Jamleck used Roberts's death to fix him. He said his brother Jamleck and his family stay with him on the same land and that the land belonged to their father. He said the dispute over land was never taken to elders or chief. He said that Jamleck had many children and waned to grab his portion of land. He said he had cordial relationship with the deceased who was his son and he used to give him food.

30. He said he had not differed with the deceased. That it is Jamleck and his children who differed with the deceased over land. He said that when found his son had died he was shocked and dumbfounded. He said he reported to police who collected the body. That he was arrested 2 days later after the body had been collected. He said police didn't call him to record a statement. He said he was fabricated so that his land can be grabbed. He said the Assistant chief and Jamleck are working together to grab his land. Accused said he had no reason to kill I son and that he could not have gone back home if committed the offence.

31. In cross examination accused said the deceased was brought home in 1993 when he was already an adult and was married. He said he returned from Nkondi on 31.1.2014. He said that succession cause to his father's estate was determined and each of the 3 sons got 4 acres but he had not collected his title deed. He said distribution was done in September 2013. He said there is no time the deceased took him to Assistant chief over land dispute and there is not time the deceased demanded for land from him. He said he gave the deceased a bigger portion of land than himself. He said Ann Mwari – deceased person mother evidence was false and was meant to grab his land. He said Assistant chief evidence is also false. He said he was arrested on 2.2.2014 and the deceased body was taken to mortuary on 31.1.2014.

32. The accused person asked for an adjournment to call a witness and was given a date for further defence hearing but on 15.1.2019 he failed to avail the witness and closed his case.

33. In defence submission the court was urged to acquit the accused for the reasons that prosecution's case raised several doubts as to whether the accused committed the offence. It was argued that non of the prosecution witnesses saw the offence being committed and there was no direct link between accused and the offence. It was also argued that evidence of PW1, PW2, PW3 and PW4 was hearsay. It was also submitted that prosecution withheld crucial evidence from possible witnesses and as such it should be inferred that such evidence if produced would have been unfavourable to the prosecution and the authority of said **Awadhi Mubarak vs Republic [2014]eKLR** was relied upon.

34. It was defence submission that PW1, PW2, PW3 and PW4 demonstrated lack of knowledge of the grudge between the accused and the deceased over a land dispute and the break in chain of evidence and missing link in causation creates sufficient doubt in the mind of court and it will be unsafe to convict on such evidence.

35. The defence argues that claims by PW6 that PW2 told him deceased and accused had a commotion on the night of 17.1.2014 were false

as PW2 didn't spend the night of 17.1.2014 at home and in any case if there was such commotion the other neighbours could have responded and rescued the deceased and reported to the police.

36. It was argued that there was no proof PW5 presided over a land dispute between the deceased and the accused and that PW1 gave a different date – August 2008. PW2 and PW4 who claimed to have attended the meeting could not remember the date and PW5 the Assistant chief said that it was August 2012. It was also submitted that PW6 didn't forward jacket and knife allegedly recovered from accused persons house buried under the bed for analysis to establish if there were any blood stains and if so whether the blood came from the body of the deceased.

37. The court was urged to be guided by the Authority of **Joseph Ateka Kinanga vs Republic [2016]eKLR** and find that there is doubt in the prosecutions case and acquit the accused as per the holding in **Samuel Mwangi Kamau vs Republic [2005]eKLR**.

38. It was submitted that the accused person accepted the deceased when he was escorted home by PW4 and he was given land upon which he put up his house and he co-existed with the accused peacefully and harmoniously and that it is not true that accused harboured any malice towards the deceased. It was argued that prosecution failed to adduce any evidence to the effect there existed animosity and/or bad blood between the deceased and the accused person.

39. It was submitted that the alleged incident was framed and tailor made to fix the accused person who is innocent because of previous grudges between PW1, PW2, PW3 and PW4 and accused.

40. It was also submitted that the accused person conduct of casually drinking beer at a nearby market 1km from his home and who cooperated when called by PW5 without a fuss is not consistent with conduct of a guilty person. That it is accused who made a report of death of his son and didn't hide or escape as would be expected of a person who has killed another. The court was urged to acquit the accused.

41. From evidence on record, the issues for determination are whether the prosecution has proved the ingredients of offence of murder beyond all reasonable doubt namely:-

- a. Fact of death
- b. Cause of death
- c. That cause of death resulted from unlawful act and/or omission.
- d. That the unlawful act and/or omission were actuated with malice aforethought.
- e. That the unlawful act and/or omission actuated with malice aforethought was perpetrated by the accused person.
- f. Did the prosecution witnesses fabricate the accused persons?

42. To start with the last issue the accused person said that PW2, his brother claimed he killed his son to fix him because they had a dispute over land and were not in good terms. He said the land which was cause of dispute belonged to his father. In being cross examined by the prosecuting counsel accused said that succession cause to his father's estate had been determined and each of the 3 sons got 4 acres of land and that he had not collected his title deed. The assistant chief confirmed that it is 2 of accused persons sons whom he had earlier chased away who were using his land and not PW2 whom the accused claimed colluded with the chief to grab his land. The evidence of all the 5 witnesses was that accused person had land dispute with his son and that PW1, PW2 and PW4 intervened and referred matter to the Assistant Chief severally even when accused person wanted to sell land without giving a portion to the deceased.

43. The fact that witnesses forgot dates or even didn't take minutes of the meeting held before Assistant chief cannot be taken to mean the meetings didn't take place. PW5 is a representative of the government within the sub location and this court has not found any fault with the manner he handled the dispute between accused and the deceased. PW5 said that when reports of threat to kill were made to him, he referred the deceased to police. It appears no such report was made prior to the murder. The deceased persons mother testified that she had a child with the deceased out of wedlock, but later got married and settled elsewhere. Indeed the deceased was returned to his father the accused person when he was already an adult. It didn't come out that PW1 and his sister and brother held any grudge against the accused for failing to marry the deceased persons mother. The claims of grudge held against accused by his brother PW2 and his in laws as well as deceased persons mother do not hold water and cannot be regarded.

44. In submissions defence counsel claimed that the conduct of the accused was not consistent with that of a person who had killed a person.. with due respect, the conduct of the accused was questionable. The deceased reported to his uncle during the morning of 17th January 2014 that the accused had threatened to kill him if he found him at home and PW2 promised to talk to accused but didn't find him. The following day when PW2 learnt that the deceased had not been seen, he proceeded to his house and found it was locked from inside. When Assistant chief PW5 was called the same evening and informed that the deceased was missing and his house was locked from inside, he went and called the accused who was in his house 30 m away and on going together to the deceased house, he was able to open the deceased persons door by looping his hand above the door. Inside the house the body of the deceased was found lying dead near the bed. PW2, PW5 and PW6 said there were flies all over due to foul smell emanating from the house. The deceased person's abdomen was ripped open and intestines had come out. There was a stab wound on chest, shoulder a cut on the ankle joint.

45. PW6 said there were signs of struggle in the house where deceased body was found and there was a window that was open with sign of someone having climbed out of the house through the window. The accused admitted to Assistant chief he had quarrelled with his son and

that is why he didn't want to open the door but when Assistant chief insisted , he knew where to and how to open his sons house. Having found that his "beloved" son had been brutally murdered on the evening of 18th January 2014, it was sadistic for him to be found relaxing casually 2 days later while drinking a local brew in the market place when he should have been in the forefront seeking from police to establish who had killed the son he had lived with "peacefully" and harmoniously like he would have wanted the court to believe.

46. It is the Assistant chief who made him go to report the murder and PW2 escorted him. This court finds that his conduct was not that of a reasonable man whose son had been brutally murdered. He didn't give a damn to the sad and painful death that his son had gone through.

47. The accused person further in his defence said that he was not at home since 14th January 2014 as he was in Nkondi about 80 Km away from Mbeti village where had been hired to graft oranges and mangoes. In his defence he said he returned home on 2.2.2014 and that is when he learnt that his son Robert had died. He however said that when he arrived and found Assistant chief and 5 people seated under a tree, they told him there was a dead body in the house and the house was open. That when Assistant chief led them into the deceased house he found the deceased had fallen on the ground from the bed and was bleeding from the abdomen. He said the body had not decomposed and there were no flies.

48. This evidence contradicts the evidence of the prosecution witnesses which is to the effect that the deceased was discovered dead in his house on 18.1.2014. In the evening and that the accused was home and that he is the one who opened the door to the deceased house which was locked from inside. Even the investigating officer said that he visited the scene on 19.1.2014 early in the morning to collect the body after accused and PW2 reported on 18.1.2014. The accused confirms that PW2 accompanied him to the police station and confirms they remained at the station at night waiting for the police vehicle until the following morning when the police accompanied them back home to collect the body. The only thing he is changing now is the date. The accused defence of alibi is outright lies and has been raised too late in the day to be of any probative value. The question that lingers in the mind of the court is why the accused would raise an alibi to remove himself from the scene of offence if really he was found at home when the son had not been seen and he opened the door to the sons house and the body was found lying dead. It doesn't make sense why he claimed he was arrested on 2.2.2014 whereas he was arrested 2 days after 19.1.2014 and arraigned in court on an earlier date on 22.1.2014. It is not possible that he could have been arrested on 4.2.2014 but arraigned in court on an earlier date on 22.1.2014. The defence by the accused are like the kicks of a dying horse. I do find that his credibility is questionable.

49. On arrest, the accused persons house was searched and a jacket and knife found to have buried covered with soil in a hole under his bed. The accused didn't make any response towards this recovery in his house save that the Investigation officer was questioned on analysis of the exhibits and he said when forwarded them for analysis. The defence counsel on behalf of accused has submitted that failure to send the exhibits for analysis was fatal to the prosecution case against the accused person.

50. This court agrees with the defence that no one saw the accused commit the offence and therefore even if the entire village was called to testify probably none would given evidence as an eye witness. However the circumstances of this case points to the fact that it is the accused was the perpetrator of this heinous act. The accused had according to the prosecution witness at logger heads with the deceased over land. He didn't want to given him land but PW5 the Assistant chief intervened and it was agreed that the deceased would be given one acre of land. Later the accused wanted to sell the land without giving the accused his portion and according to PW5 the Assistant chief the purchasers whose names he gave accepted to hive out a portion for the deceased. PW5 said that he had at one time referred the deceased to police when the accused threatened to kill him. It appears the deceased didn't make it to the police prior to his death.

51. PW2 also testified that on 17.1.2014 the deceased reported that accused had threatened to kill him and PW2 promised to sit down with the accused to resolve the issue. The following day when he was told that the deceased had not been seen and they found his house locked form inside he called chief and found the deceased had been killed inside.

52. The accused was at home but from his conduct it appeared that he was not concerned about his son. It took his brother PW2 to come and discover the deceased was dead. This court finds that all circumstances point to the inference of guilt of the accused person. There is no other conclusion that can be made other than the accused committed the offence. This court finds that the authorities relied upon by the defence don't support facts in this case and can't be used to find that accused is innocent. The evidence adduced by prosecution proves beyond reasonable doubt that the deceased herein died as a result of unlawful acts actuated by the malicious actions of the accused.

53. This court finds accused person guilty and he is convicted under section 215 CPC.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 14TH DAY OF MAY 2019.

In the presence of:

C/A: Kinoti

State:-Ms Mbithe

A:-Present in person

Ms Gitonga holding brief for Carl Peters.

Mbaabu for accused

HON A. ONG'INJO

JUDGE

Ms Mbithe

I apply for copy of Judgment. I pray for mention date to confirm records.

Order

Mention 17.6.2019 for Records, mitigation, victim impact statement and sentencing.

HON A. ONG'INJO

JUDGE