



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL CASE NO. 19 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NGALA KIVOTO.....ACCUSED**

**RULING**

1. **Ngala Kivoto**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **18<sup>th</sup> day of June, 2015** at **Kavete Village** in **Mutomo Sub-county**, within **Kitui County**, jointly with others not before Court murdered **Gideon Kisomo Ndoyo** (Deceased).

2. Facts of the case are that on the **18<sup>th</sup> day of June, 2015** at about **7.00 p.m.** PW8 **Gedion Mwendwa** was on his way to the shop to purchase kerosene when he encountered the Accused, his uncle who assaulted him. He went back home and reported the incident to PW1 **Josephine Mulewa**, his mother, his father (deceased) and a cousin. The Deceased decided to look for the Accused with a view of getting an explanation regarding his conduct. He left the house carrying his torch at about **8.00 p.m.** In the meantime, at about **10.00 p.m.** the Accused went in search of PW8 for allegedly pushing him an act that made him fall down. In an attempt to calm him down PW1 went outside the house, encountered him and tried to convince him to have the matter resolved the following day. The Accused reminded her of the fact of their animals trespassing onto his land, a matter that had been resolved by the family of the Deceased compensating him for the damage caused.

3. PW2 **Kisomo Gedion**, son of PW1 arrived and on hearing the argument told the Accused to leave and he complied after removing a stick that he had concealed beneath his shirt. The family waited for the Deceased but he was not returning home. His two sons went in search of him only to find his motionless mortal remains alongside a footpath some 200 metres away from their home. Beside the body was a cap they believed belonged to the Accused. The report of murder was made and received by PW7 **No. 37394 Sergeant William Kiprop** who amongst other police officers visited the scene at **2.30 a.m.** They collected exhibits, removed the body from the scene and escorted it to Kitui District Hospital.

4. On the **19<sup>th</sup> June, 2015**, PW3 **Onesmus Mulwa Kyamata** a resident of **Voo Mutomo** returned home at **6.30 p.m.** and found a stranger, the Accused herein. He sought for a job and since he had an identity card which bore the name **Ngala Kivoto**, he gave him some manual work. He worked and received a wage on casual basis. On the **23<sup>rd</sup> June, 2015** PW3 heard news on radio about a person who had murdered his cousin. He notified the police of the Accused person's presence on his farm. The police went, confirmed, and arrested him. Further investigations were carried out that culminated into the Accused being charged.

5. Upon being put on his defence the Accused stated that he was at home on the **18<sup>th</sup> June, 2015** and they were required to leave the forest as a security measure as people were being killed. He travelled to **Mutha** by bicycle which he left at the home of **Katee**. He later used the motorcycle of PW4 **Mutuku Mulwa**, his nephew to go home. Upon arriving they went to the home of **Nzilu** to drink traditional liquor, and when they parted he went home to sleep. He denied having gone to the home of the Deceased, his cousin. He denied having disagreed with **Mwendwa** (PW2) but stated that PW2 was herding animals that trespassed onto his land on **14<sup>th</sup> May, 2015** and the Deceased and his wife agreed to compensate him for the damage done, which was to be done the **28<sup>th</sup> May, 2015**, that on the **19<sup>th</sup> May, 2015** he went in search of work and was engaged by **Onesmus Mulwa Kyamata** where he worked until he was arrested. He denied having known that his cousin was dead or having had an altercation with his nephew. With regard to the cap that was found at the scene of crime he denied being the only person who possessed that type of cap.

6. It was the submission of the defence that the Prosecution relied on circumstantial evidence that is founded on a very weak suspicion following a disagreement between the Accused and the Deceased's son **Mwendwa**. That the cap found at the scene could not be categorically stated to belong to the Accused.

7. The State urged that the Accused was the perpetrator of the act that caused the death of the Deceased.

8. The case being murder the State was duty bound to prove:

- i) That death occurred.
- ii) The unlawful act that caused the death was committed by the Accused.
- iii) And he acted with malice aforethought.

9. It is not in doubt that death occurred. A post-mortem was conducted on the body of the Deceased by PW10 **Doctor Cosmas Mutisya** who concluded that the cause of death was severe head injury caused by high energy blunt force. A Death Certificate **No. 384820** was issued in that respect which was proof beyond doubt of the fact of death.

10. There was no direct evidence as to who committed the unlawful act that caused the death of the Deceased. Evidence against the Accused is therefore circumstantial. Therefore, the State had the duty of proving circumstances from which the conclusion of guilt being drawn beyond any reasonable doubt.

11. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated that:

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:*

*(i) the circumstances from which the inference of guilt is sought to be drawn, must be cogently 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.”*

12. In the case of **Musili Tulo vs. Republic Criminal Appeal No. 30 of 2013** it was stated that:

*“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually can prove a case with the accuracy of mathematics.”*

13. The Prosecution adduced evidence confirming the fact of the Accused who had been away at **Mutha** forest burning charcoal having returned home on the night of **18<sup>th</sup> June, 2015**. He used a motor-cycle that was operated by PW4 **Mutuku Mulwa**. This fact is admitted by the Accused though he denies having gone to the home of the Deceased in search of **Mwendwa** who had wronged him. PW1's evidence that the Accused went to their home in search of **Mwendwa** is confirmed by that of PW2 **Kisomo Gedion** who found him at their homestead. And when PW1 prevailed upon him to return the following day to discuss the issue he left having unleashed the stick that he had concealed beneath his shirt, which was described as the size of a hoe-handle though short.

14. The Deceased on the other hand had been angered by the information he got from his son **Mwendwa** that he had been assaulted by the Accused. He left home going to confront him. Both of them seemed agitated.

15. Although the Accused alleged that he went home and slept, it is in evidence that after the body of the Deceased was found alongside the path, PW7 **No. 37394 Sergeant William Kiprop** and the **OCS** were led to the home of the Accused by the son of the Deceased but they did not find him at home.

16. It is the Accused's defence that he woke up, had breakfast and went to look for work at the home of **Onesmus Mulwa Kyamata (PW3)**. It was the evidence of PW3 that he found the Accused at his home on the **19<sup>th</sup> June, 2015** at **6.30 p.m.**

17. The allegation that the Accused was at his home in the morning is disapproved by evidence adduced by PW5 **Kavinde Munguti**, who saw him at about **3.30 a.m.** at **Mutha Trading Centre** as he was looking for food. PW5 knew him and hence referred him to PW6's shop. PW6 **Florence Sofia Kinyili** sold to him soda and bread. According to PW6 he was distressed and having mentioned of an altercation he had with his cousin, she referred him to the police station.

18. Some exhibits adduced in evidence were found where the body of the Deceased lay, a torch that his family members confirmed belonged to him (the Deceased) and a cap stated to belong to the Accused. PW1 did not see the Accused wearing the cap when he went to her home on the fateful night but the cap was found at the scene of the incident. PW4 carried the Accused as a pillion passenger on his motorcycle from the forest to their home. They spent time drinking alcohol at the home of **Nzivo Kimuli** prior to going home. He identified the clothes the Accused was wearing as the ones he had in Court. And he also identified the cap found at the scene as the one the Accused was wearing on the material date. The fact that the Accused wore the same clothes throughout the duration he worked for PW3 was evidence of having not changed clothes from the time he left the forest with PW4.

19. From the foregoing, the chain of events point at the Accused as the person who was at the scene before the struggle that resulted into the injuries that the Deceased sustained and ultimately succumbed to.

20. The Accused disappeared from his home on the material night. His conduct and ultimate conversation with PW6 which was after the incident occurred clearly proved that his conduct was indicative of the fact that he was conscious of what he was doing and what he had done was wrong. (See **Roba Galma Wario vs. Republic (2015) eKLR**).

21. In the premises, the circumstantial evidence on record unerringly points towards the Accused as the person who committed the act that caused the death of the Deceased.

22. This therefore brings us to the issue whether he acted with malice aforethought. **Section 206** of the **Penal Code** defined malice aforethought thus:

*“Malice aforethought shall be deemed to be established by evidence proving 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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent 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.”*

In **Rex vs. Tubere s/o Ochen (1945) EA CA 63** the Court stated that:

*“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted; the conduct of the accused before, during and after the incident.”*

23. The Appellant went in search of the son of the Deceased alleging that he had pushed him an act that made him fall down. He had a weapon concealed beneath his clothes. His conduct suggested an intent to assault somebody. This was a criminal intent. His defence was a denial. The fact of having killed a person other than the one he intended to assault at the outset establishes proof of existence of malice aforethought.

24. Therefore, I find the Prosecution having proved the case against the Accused beyond reasonable doubt. He is guilty of the charge of murder. Accordingly, I convict him as charged.

25. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**