



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 21 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MARI NTONGAI.....1ST ACCUSED

LUKA MWITHALIE MUROKI2ND ACCUSED

J U D G M E N T

1. **Julius Mari Ntongai** and **Luka Mwithalie Muroki** (“the accused”) were on 31st March, 2014 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*. It was alleged that on 16th March 2014, at Kaumone village, Machungulu Sub-Location, Akirango’ndu Location, Igembe North District within Meru County, the accused murdered **Tonny Kiraithe** (“the deceased”).

2. On 22nd May, 2017, the 1st accused pleaded guilty to a lesser charge of manslaughter, was convicted and sentenced accordingly. The 2nd accused pleaded not guilty and the prosecution went ahead and called seven witnesses to establish its case.

3. **PW1 Margaret Kainyu** recalled that on 16th March, 2014 at about 2am, she heard noises outside her house. When she went to check out where it was coming from, she found that it was coming from the farm of Mary Mbaabu. She went there and found the two accused assaulting the deceased. When she asked them to stop, they refused. She went and called **Grace Munjiru** (the deceased’s mother) from her house which was about 80 meters from the scene. The next morning, when she went to fetch water from **Munjiru’s (PW6)** house, she found the body of the deceased lying by the roadside.

4. **PW2 Mary Mbaabu** testified that on the material day, she was woken up at about midnight by the 1st and 2nd accused, the two guards she had engaged to guard her miraa farm. They informed her that they had caught a thief who was the deceased. Because it was late, she told them to take him to the police and she went back to sleep. The following morning, **Jediel Kaberia (PW4)** told her that the deceased had been killed by her guards.

5. **PW3 Jeremiah Mwiti**, a brother to the deceased stated that, on the material day at about 6am, **PW1** called and informed him that the body of the deceased was by the roadside. That the previous night, she had seen the accused assaulting the deceased. He went and saw that the body was that of his brother, the deceased. Together with other people they looked for and arrested the two accused.

6. **PW4, Jediel Kaberia Ntoiti**, a brother to the deceased testified that, **PW3** woke him up at 6.30am of 16th March, 2014 and informed him what had happened. He went and saw the body lying on the roadside leading to their mother’s home. They went and informed **PW2** that her guards had killed the deceased. The body had an injury on the back. They then looked for and arrested the accused.

7. **Dr. Siad Mohamed (PW5)** produced the post mortem report which was conducted by Dr. Guantai on 19th September, 2014. He testified that the cause of death was opined to be respiratory failure secondary to fracture of cervical spine C2 to C4 after blunt injury to the posterior neck.

8. **PW6 Grace Munjiru**, mother to the deceased, testified that on the material day at about 2.00am, she heard screams from across the road near her house. When she went outside, she found the accused assaulting the deceased with Meru pangas known as ‘*kimee*’ (C –line). She asked them whether they wanted to kill the deceased. They told her that he had stolen miraa belonging to **PW2**. She asked them to take him to **PW2**. She went back to the house and slept. In the morning she found the deceased had died.

9. **PW7 No. 65945 PC Moses Wanjala Kusimba**, the investigating officer, testified that when this case was assigned to him, he went to the scene and found the body of the deceased lying by the road side. The body had some burn wounds at the back and the hands were badly deformed. Photographs were taken and the body was taken to Meru Level 5 hospital mortuary where post mortem was conducted.

10. He drew a sketch plan of the scene and collected the deceased's one shoe (**PEXH 2**) which was identified by his relatives. He also recovered a sword known as C-Line from the miraa farm which was used to injure the deceased (**PEXH 3**). The injuries on the body of the deceased were at the back and there were fresh burns shaped like the C-line sword. The assault took place within the miraa farm and the body carried to the home of the deceased's mother and dumped by the roadside. That the distance from the miraa farm and where the body was lying was about 200 metres.

11. When placed on his defence, the accused gave a sworn testimony. He testified that on 16th March 2014, he woke up and went to where he worked as a day guard at 6.00 am. He found the night guard present. That ordinarily, before the night guard leaves, both guards have to go round and see that everything is ok. That on that day, they saw three trees from which miraa had been stolen. The night guard told him that the said miraa had been stolen at night and that he, the night guard, had arrested the thief and taken him to the owner of the farm. The night guard left him there and went home.

12. At about 7.00 am, the brother of the deceased came with some people who told him to be a witness in respect to a case concerning a person who had been arrested the previous night and had died. He declined whereby they told him that they would include him in the case. They took him to the homestead of the owner of the miraa farm where he saw the 1st accused being removed from the house. They were both tied up and taken to the police station. He denied being at work on the material night. He denied having killed the deceased.

13. In **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR**, the court held of murder that: -

“This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-

1. The fact of the death of the deceased.

2. The cause of such death.

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4. Proof that the said unlawful act or omission was committed with malice aforethought.”

14. With regard to the fact and cause of death of the deceased, **PW1** and **PW6** testified that on the material day at about 2 am, they witnessed the deceased being assaulted by the accused. **PW1, PW3, PW4, PW6** and **PW7** saw the body lying by the roadside with injuries on it. **PW4** identified the body before postmortem was carried out on it.

15. According to the post-mortem report, the body had a bruise to the posterior service of the neck and over the right shoulder. Internally, the cervical spine had a fracture and that there was post neck blunt trauma. The cause of death was opined to be respiratory failure secondary to fracture of cervical spine C2 to C4 after blunt injury to the posterior neck. In this regard, the fact and cause of death of the deceased was proved to the required standard.

16. On the third issue, it must be proved beyond any reasonable doubt that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; that is *actus reus*. In this regard, the prosecution must adduce evidence to prove that it is the unlawful act or omission of the accused that resulted in the death of the deceased.

17. **PW1** testified that, when she heard dome noises, she went outside saw the two accused assaulting the deceased. She was able to identify them using the torch she had. Besides, the two were known to her. She spoke to them and they responded. She left them and went and called **PW6** who is the mother of the deceased. According to **PW6**, she heard screams but the deceased's screams were not loud enough. She found the two accused assaulting the deceased. The deceased was lying on the ground and not talking. She could not help the deceased because he was in a very sorry state and they had nearly finished him. She was there for about 10 minutes before she went back and slept.

18. **PW1** and **PW6** testified that they witnessed the two accused assaulting the deceased. They used a torch to identify the two. **PW1** spoke to them and the 2nd accused responded to her. Although it is surprising that **PW6**, who is the deceased's mother, left her child to die and went to sleep without raising any alarm, it may be because of the fear that the accused were armed.

19. According to **PW2**, the two accused woke her up and told her that they had caught a thief of her miraa who was the deceased. Although she never saw them assault him, the following day she found out that the deceased had passed on.

20. In his defence, the accused testified that on the material day, he woke up and went to the farm as he was a day guard. That he was informed by the 1st accused of what had happened the previous night. That the deceased brother and other people came to the farm and sought his help to be part of the case and be their witness. That when he declined, they framed him with the offence.

21. It is for the prosecution to prove its case beyond any reasonable doubt. The prosecution paraded **PW1** and **PW6** who testified that they saw the two accused assault the deceased. Indeed, **PW1** was categorical that she spoke to the accused and asked them to take the deceased to the owner farm, **PW2**. She testified that it was the 2nd accused who answered her that the deceased had stolen miraa. She remained firm and her evidence was not misplaced.

22. The evidence of **PW1** was corroborated with that of **PW2** and **PW3**. **PW2** was categorical that the two accused came to her home that night. That they informed her that they had caught a thief who was the deceased. It is noteworthy to note that the 2nd accused did not

challenge the evidence of **PW2**. Further, he never put to her that he was only a day guard and he was not present at the material night.

23. That being the case, the defence of the 2nd accused cannot stand. It was but an afterthought. It was open to him to put it to his employer, **PW2**, that he was a day guard and the night guard and that it was therefore not probable that he would have been on duty that night. This he did not. In any event, he neither challenged nor displaced the evidence of **PW2** that he was with the 1st accused when they brought the deceased to her home the material night.

24. **PW1 and PW6** were firm on the weapons that the accused used to assault the deceased with. These were C-Line, Meru traditional pangas that are deadly. The cause of death was consistent with the type of weapons that the accused were alleged to have assaulted the deceased with.

25. In this regard, I am satisfied that the 2nd accused participated in the assault that resulted in the death of the deceased. He was clearly identified and place at the scene of the crime. I am therefore satisfied that the death of the deceased was caused by, inter alia, the unlawful act on the part of the 2nd accused.

26. The 4th issue is whether there was malice aforethought on the part of the 2nd accused. The nature of the injuries that were inflicted on the deceased attest to an intention to cause grievous harm upon him. The nature of the weapons used and the nature of the injuries inflicted on the deceased, I am satisfied that the 2nd accused had the necessary malice aforethought in the killing of the deceased. The injuries inflicted were terminal.

27. Accordingly, I am of the view and hold that the accused is guilty of the murder of **Tonny Kiraithe** contrary to *section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya*. I find him guilty and convict him of the charge accordingly.

DATED and **DELIVERED** at Meru this 6th day of June, 2019.

A. MABEYA

JUDGE