



**REPUBLIC OF KENYA**

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

**HCCR NO. 9 OF 2017 (MURDER)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MIKE MUNENE.....1<sup>ST</sup> ACCUSED**

**ERICK MWITI MUGO.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

1. **MIKE MUNENE & ERICK MWITI MUGO** the accused persons herein are accused of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 26<sup>th</sup> September 2017 at Erimba village, Kirigoni Sub-Location, Mugumango Location within Tharaka Nithi County, the Accused persons jointly with others not before court murdered Kelvin Gitari Kaburu (hereinafter to be referred to as the deceased). Both the accused persons denied committing the offence and case has gone for full trial before this court.

2. The prosecution presented six witnesses to prove their case against both the accused persons. The first witness to be called was the deceased's mother Besebina Gatiria Kaburu (PW1) who told this court that on 26<sup>th</sup> September 2017 (material date) she was asleep that when at around midnight, she heard screams after being alerted by her child and when she got out she saw the 1<sup>st</sup> accused (Mike Munene and 2<sup>nd</sup> accused Erick Mwiti) running towards her with the deceased who was complaining that he had been cut on the hand and hip by both the accused persons. She further told this court that when she screamed both the accused person ran away but promised to come back later. The witness testified that at 2 a.m many people came to their compound and took away the deceased who was crying;

***"Mum they have tied me and I am going to die".***

The witness added that she was threatened when she tried to intervene by both accused persons who were leading the mob. The following day she got information that her son (deceased) had been killed and left at the road side where the police came and picked the body.

3. Pauline Kendi (PW2) a sister in law to the deceased and daughter in law to PW1 also testified and told this court that she heard commotion at around half past midnight on the material date. She stated that she called her mother in law (PW1) and cautioned her not to go towards the deceased house as there was an attack. She further stated that she heard the deceased complaining that he had been cut by the accused persons herein. She further added that at around 1 a.m she heard another commotion coming from the deceased's house and that this time the deceased was asking both the 1<sup>st</sup> and 2<sup>nd</sup> accused not to tie him but that they later left with him and that the following day she learnt that the deceased had been killed but did not know how he was killed. She however insisted that she heard the deceased mentioning both the 1<sup>st</sup> and 2<sup>nd</sup> accused as he was being taken away from the homestead.

4. Mutiria Chabari (PW3) on his part testified and told this court that the deceased was his nephew (a son to his brother) and that both the accused persons are nephews (sons to his sister) who used to reside with them as their parents are deceased. According to witness, his house is about 5 metres away the house where the deceased resided and that on the material date and time, he heard noises from the deceased's house and according to him, the deceased was complaining to both the 1<sup>st</sup> and 2<sup>nd</sup> accused as to why they had attacked him when they stayed together. He further testified that he heard the 2<sup>nd</sup> accused order the deceased to produce the machine (power saw) and that the deceased responded that the accused had cut him. He told this court that he then heard both the accused going away promising the deceased that they would come back later which he added, they did at around 1 a.m and this time, they came with many people. The witness stated they surrounded the deceased house and got hold of him (deceased) before tying him and taking him away. He told that court that he heard the deceased asking for help;

***"nisaidieni naenda kuawa."***

The witness told this court that he could not help as he also feared that they could turn on him. He however added that he identified both the accused persons herein from his house as his house had no walls and the only thing he could do was call the Sub-Area for assistance.

5. Erick Munene (PW4) testified and told this court that both the accused persons on the material date at around 2 a.m. woke him up and requested him to assist them keep a power saw which he did. He further added that the power saw was orange in colour and identified it in court (PMF1) later tendered as P. -Exhibit 2. He added that the accused told him that they would come for the power saw later and told him that they were from the deceased's house who had reportedly stolen the power saw. When the witness the following day heard that Gitari (deceased) had been murdered, and told that the power saw had been picked by the police he stated that he developed cold feet and decided to go to the police to record a statement which he did.

6. Fredrick Muthumo Kaburu (PW5) told this court that he was a brother of the deceased. He added that he lives a bit far around 200 metres downhill and did not hear the commotion at the material time. He testified that he was woken up at around 4.30 am by his uncle Cyrus Mutiria (PW3) and informed that his brother (the deceased) had been seized and taken away by the accused persons herein and had taken him to unknown place. At dawn at around 6 a.m, the same day, he told this court that he went to find out what had happened to his brother and that on the reaching the road he found his brother lying down groaning facing down in pain and only in boxers. He told this court that he rushed home to inform his mother and that her mother went to where he had directed her and that he was later called to take a blanket but on reaching the scene he found his brother dead and that the police came and collected the body after taking photographs of the body and the scene where the body was found.

7. Dr. Justus Kitili (PW6) the doctor who performed post mortem examination on the body of the deceased testified that he did the postmortem on 4<sup>th</sup> October 2017 and observed following injuries on the body of the deceased:-

a) External observations:

Head - Bruises on the left parietal sculp.

- Swelling of the left eye

- Bruises on the right side of the neck.

- Two cuts on the right shoulder.

- Deep cut on the right wrist joint measuring 4 cm long.

- Bruises on the right forearm.

- Multiple bruises on the chest and abdomen

- A deep cut on the left hip measuring 3 cm long

- Bruises on both thighs and legs.

b) Internal Examination

- Head- Fracture of the left parietal skull bone

- Blood clot on the left side of the brain.

In doctor's opinion, the deceased died as a result of severe head injury inflicted by a blunt object. He tendered the post mortem report as P. Exhibit 1.

8. John Maingi Masero (PW7) the investigating officer in the case told this court that on the material date at around 9.40 am he received a call from the Assistant Chief Kiringoni Sub-Location informing him that a dead body had been found lying near Kerogo Church along Mukui- Mumbani Road in Irimba village. He testified that he immediately in the company of his colleagues rushed to the scene where they found a lifeless body of a male adult lying beside a road. He added that the body had visible injuries but there were no signs of struggles at the scene. He observed a deep cut on the right wrist joint and visible stab wound on the hip joint. He further told this court that the bodies head bruises all over and blood was still oozing from the injuries/wounds on the body. The investigating officer then interrogated the bystanders he found at the scene including those relatives of the deceased. The investigating officer then told this court that he recovered a power saw without a blade at the house of one of the witnesses (PW4) and that he was able to connect the power saw with the cause of the killing of the accused owing to the statements he recorded from the witnesses. He further added that he was able to establish that the accused persons suspected the deceased for having stolen their power saw but that the accused informed him on interrogation that a fight broke out between the deceased and the accused persons when the accused inquired from the accused about the whereabouts of their power saw. The investigating officer stated that he gathered that the power saw belonged to the parents of the accused though he was unable to crack the meaning of inscriptions "*JMM*" on the power saw. The investigating officer also told this court that the accused persons may have sought help from other youths in the locality who went and forcibly took the deceased from his home but could not tell where he was murdered.

10. When placed on the defence the 1<sup>st</sup> accused Mike Munene (DW1) testified on oath and denied committing the offence. He raised alibi as his defence insisting that on the material date he had gone to see his ailing father at Chogoria hospital and that he was with his father until 11pm when he went and booked a room at a place called Neema House. He however could not produce receipts when put to task by the prosecution. He also denied anything to do with the power saw (P. Exhibit 2) stating that he did not know the owner.

11. The 2<sup>nd</sup> accused Erick Mwiti (DW2) on his part also testifying on oath raised *alibi* stating that on the material date he had also gone to see his ailing father at Chogoria Hospital. He supported the evidence or the narrative given by his brother and co-accused in this case. He also stated that he had no receipts or witness to show that he had slept at Neema Lodge on the material time and date. He also denied anything to do with the power saw stating that he did not know the owner and denied having quarrelled with the deceased over it.

12. The accused person in their written submissions through counsel Mr. PM. Mutani Advocate contended that the deceased had been killed by a mob of around 100 people on allegations of theft of a power saw. They contend that they were not at the scene of crime at the material time as they had gone to check on their father who was ailing and admitted at Chogoria Hospital. They have submitted that there is no evidence that connects them with the crime and that both elements of *actus reus* and malice aforethought have not been proven against them.

13. On the other hand the Director of the Public Prosecution through Ms Jane Maari the learned prosecution counsel submitted that they had proved their case to the required standard of beyond reasonable doubts. It is the contention of the State that all the crucial ingredients of murder have been proved against both the accused persons. The Director of the Public Prosecution has cited the decision of **Republic vs- Mohammed Dadi Kokae & 7 others [2014] eKLR** where the following ingredients in an offence of murder were listed as follows:-

- a) The fact of death of the deceased.
- b) The cause of death
- c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and lastly
- d) Proof that the said unlawful act or omission was committed with malice aforethought.

14. The State has contended that there was a conspiracy between the accused persons who had a common intention to cause harm to the deceased. The State has cited the provisions of **Section 10** of the **Evidence Act** and **Section 21** of **Penal Code** contending that the witnesses they have presented in this trial established that both the accused persons were at the scene of crime and though there were other people involved **Sections 20(1)** and **21** of the **Penal Code** and **10** of the **Evidence Act** deem that the accused persons had taken part in the murder and that they are equally guilty of that offence having executed a common intention with other accomplices in attacking and causing the death of the deceased. It is further contended that the attack was neither random nor spontaneous but carefully planned by both the 1<sup>st</sup> and 2<sup>nd</sup> accused who went to the house of the deceased while armed with crude weapons accusing him for having stolen a power saw. The State submit that both the accused person first attacked the deceased before leaving and were later to come back with a group of people who forced their way into the deceased house before descending on him and beating fatally injuring in the process before leaving him for dead on the road.

15. On the defence of *alibi*, the State has faulted the same stating the accused persons did not tender any evidence to prove that they had spent the night at a particular facility on the material night. It is further contended that the defence never called any witness to back their respective claim and defence of *alibi*.

16. I have considered both the prosecution's and defence case including their respective submission. In law, it is trite that for an offence of murder to be established, three necessary ingredients must be established and proved beyond reasonable doubt by the prosecution. The ingredients are;

- a) The death of the deceased person.
- b) That the accused committed the unlawful act that caused the death of the deceased and
- c) That the accused had malice aforethought or that the act causing the death was activated by malice or intention to cause grievous harm.

17. (a) **The death of the deceased**

It is clearly obvious in this case that Kelvin Gitari Kaburu the deceased herein died on 26<sup>th</sup> September, 2017. The fact of death was proven by PW1- Besebina Gitiria Kaburu, Fredrick Kaburu (PW5) and Dr. Justus Kitili (PW6). The investigating officer John Maingi Masero (PW7) corroborated the evidence of the witnesses. He told this court that he found a lifeless body at the scene and collected it and took it to Chuka Hospital Mortuary. Justus Kitili (PW6) in his evidence confirmed that he performed postmortem examination on the body of the deceased and that in my view established the 1<sup>st</sup> element of death of the deceased beyond reasonable doubt.

17. (b) **That the accused committed the unlawful act which caused the death of the deceased.**

The prosecution's case in respect to this crucial element hinged on the evidence of the deceased's mother, Besebina Gitiria Kaburu (PW1), Pauline Kendi Kaburu (PW2), Mutiria Chabari (PW3) and to some extent Erick Munene (PW4). PW1 and PW2 told this court that they identified both the accused person with PW1 stating that he saw his son passing by her house as he was being led away saying;

**"Mum they have tied me and I am going to die."** She was very clear that she recognized the accused persons who was among the mob that were leading the deceased away. This evidence of positive recognition was corroborated by PW2 who told this court that he clearly heard the commotion at the deceased's house and heard the deceased calling out on Munene (1<sup>st</sup> accused) and Mwiti (2<sup>nd</sup> accused) pleading with them not to tie him. PW1 confirmed that she saw her son being led away with his hands tied. Mutiria Chabari (PW3) was more elaborate in

his evidence. He said his house is just five metres away from the deceased's house and more tellingly he gave a vivid description of his humble house stating that his traditional with no walls and this court takes judicial notice of the fact some people in lower parts of Tharaka actually still live in such simple huts perhaps due to high temperatures characteristic of the place. PW3 told this court though he did not get "out" of this dwelling, he could still observe what was going on at his nephew's (deceased) house. He also heard his nephew lament that the accused persons herein had come to attack him yet they stayed together. The witness confirmed that both the accused stayed with them because they were orphans because both of their parents reportedly died and the witness added that both are his nephews (sons of his sister). They were well known to him and close relatives. PW3 heard the accused persons and in particular Mwiti (2<sup>nd</sup> accused) state:-

"*Utatoa machine*" before he heard the deceased cry out:

" *mumekuja kuniuwa mmenikata.....* "

This narrative of the 1<sup>st</sup> attack at around midnight and connecting the accused persons is fully corroborated by both PW1 and PW2 who were also at the scene at the material time. The evidence that cleared any doubts and brought the issue of identification to rest is the evidence of Erick Munene (PW4). Who told this court that he was woken up at around 2 am by both the accused persons herein. He stated that he woke up and put on electric lights and had a conversation with both accused who requested him to keep a power saw (P. Exhibit 2) for them. They told him that they had brought the power saw from the home of the deceased person. When one considers the time the deceased was led away from his home as per the evidence of PW1, PW2 and PW3 one can easily see the chain of events which in my view leads to irresistible conclusion that both the accused were jointly with others involved in the acts that caused his death though no one saw them actually committing the unlawful act. PW3 heard the deceased cry out at he was being led away.

" *Nisaidieni naenda kuhuawa* "

and the following day his brother (Fredrick Kaburu PW5) found him lying down groaning in pain before he shortly passed on.

18. This court finds that the issue of identification of the accused person was proved beyond doubt. In the case of *Anjononi & 4 Others -vs- Republic (1980) KLR* the Court of Appeal held as follows:

".....*recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*"

PW1, PW2 and PW3 knew the accused very well as they were close relatives. There is no basis laid by the defence to show that the said prosecution witness had reason to lie against both the accused persons.

19. The defence of *alibi* raised by both the accused persons in my considered view was an afterthought as the same was unsupported. This court is alive to decision in *Kiarie -vs- Republic [1984] KLR* where the Court of Appeal held as follows:-

" *An Alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.* "

In this case however the accused persons failed to establish that their father was actually admitted at Chogoria Hospital or that they had gone to see him. They did not call any witness to support their *alibi*. They tendered no receipts of the lodging they alleged to have spent the night on the material date. The evidence of Erick Munene (PW4) who stated that he was woken up by both accused person completely dissipates the defence of *alibi* raised by both the accused persons. They obviously could not have been in Chogoria when more than four prosecution witnesses stated that they were at the scene of crime. This court is convinced beyond reasonable doubt based on the evidence I have highlighted above that both the accused person was present at the scene of crime at the material time.

20. The defence counsel has urged this court to find that the deceased died at the hands of a mob which is a probability but that notwithstanding, the involvement of the accused persons in light of the provisions of **Section 10 of Evidence Act** cannot be ignored. The sections states as follows:-

" *Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by anyone of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.* "

21. Furthermore the provisions of **Section 21 of the Penal Code** states as follows:-

" *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose, an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed offence.* "

The evidence tendered by doctor (PW6) who performed post mortem and the investigating officer (PW7) indicates that the deceased suffered multiple injuries and while it is true that the deceased having been led away by a mob including the accused persons and therefore difficult to pinpoint who caused what injury, it is quite clear that both the accused person based on the evidence tendered conspired and went to look for a back up from other people perhaps after failing to overpower the deceased in the first attempt executed at midnight of the material date. Both the accused persons came back as per the evidence of PW1, PW2, and PW3 at around 1 am and backed by a mob they

took away the deceased after tying him up. The accused persons clearly conspired planned and jointly with others not before court executed their heinous plan of causing grievous harm to the deceased. It is quite apparent that as they went on to execute their plan, they made it abundantly clear to the deceased on the fate awaiting him. He cried out to his mother as he was being led away;

**" Mum they have tied me and I am going to die."**

This was after crying out aloud in his house as narrated by PW3 who heard vividly the deceased cry:

**"nisaidieni naenda kuhuawa"**

The contention by the defence that the deceased was killed by a mob cannot absorb the accused from culpability in the light of the provisions for the law I have cited above. This court finds that the element of *actus reus* has been proved beyond doubt.

23. (c) **That the accused had malice aforethought.**

The provisions of **Section 206** of the **Penal Code** provide as follows:

**(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 cause or not, or by a wish that it may not be caused.**

**(c) An intent to commit a felony."**

The testimonies of PW1, PW2 and PW3 showed that both the accused persons visited the deceased's home twice on the material night of the incident and each time they harmed him. In the 1<sup>st</sup> incident, they cut him on the hand and PW1 and PW2 were categorical on that. PW3 heard the 2<sup>nd</sup> accused tell the deceased.

**" utatoa machine"** and shortly heard the deceased state;

**" Mmekuja kuniuwa mmenikata"**

It is apparent that the accused persons went to the deceased's house seeking to recover from him a power saw machine because at around 2 am the same night they handed the same Power Saw to PW4 and told him that they had fetched it from the deceased's house. They asked him to keep it and since he had no idea on what had befallen or about to befall to the deceased, he agreed. The next day at around 11 a.m he heard that the police had been to his house to collect the Power Saw and that threw him into a panic and that is why he decided to take himself to the police station where he was to record a statement and turned out to be a star witness to the prosecution. With his evidence one can clearly piece together the chain of events that led to the commission of the offence of murder. The element of malice aforethought in my considered view was established and positively connected to the heinous acts committed by both accused person. Those heinous acts are well captured by the post mortem report tendered by the doctor (PW6) who performed post mortem examination on the body of the deceased. The post mortem examination revealed that the deceased had suffered various deep cuts, several bruises on his body and a fractured arm. According to the doctor's opinion the deceased died as a result of severe head injury caused by a blunt object. From these severe injuries one can draw an inference that those injuries were definitely caused by a persons who harboured ill intention or malice aforethought to cause either greivous harm or murder. As I have observed above, the evidence tendered directly and indirectly point at both accused persons and it is quite apparent that when the law (read **Section 10** of **Evidence Act** and **Section 23** of the **Penal Code**), catches up with you there is literally nowhere to hide. Not in a mob like the accused have tried here, or any other place. When you are culpable the law will eventually catch up with you.

The long and short of this is that this court finds that all the ingredients of murder have been established and proved beyond reasonable doubt against both the accused herein. They may have been offended by a loss of their power saw but they chose a wrong option of addressing their concern and unlawfully took away the life of a young man who was at his prime. They are guilty as charged and I have no hesitation in my mind in convicting them for the offence of murder. They are hereby convicted accordingly.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> day of July, 2019.**

**R.K. LIMO**

**JUDGE**

**18/7/2019**

Judgment signed, dated and delivered in the open court in presence of Momanyi for State and Mutani for both accused persons.

**R.K. LIMO**

**JUDGE**