



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL CASE NO. 63 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MARTIN KILIMBO NGUNGI.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with an offence of murder contrary to section 203 as read with section 204 Penal Code Cap 63 Laws of Kenya.
2. Particulars being that on 22/12/2012, at Mukuyuni Sub-Location, Ukia Location, Makueni District, Makueni County murdered Kilimbo Ngungi.
3. The prosecution called six (6) witnesses. PW5 the doctor via testimony and the postmortem report confirmed the death of deceased occurred and the same was, through the injuries occasioned by an attack by a sharp object.
4. The postmortem was produced and the photographs showing the external injuries.
5. As to who could have caused it, the witness PW2 a granddaughter of deceased and niece of the accused narrated the background of the relationship between the accused and the deceased which made her conclude that the accused killed the deceased who was his father.
6. She said he was constantly stealing and beating the deceased and police would arrest him for that.
7. She witnessed severally the accused beat the deceased prior to the fateful night when deceased was killed.
8. PW3 witnessed the deceased and accused quarrel in his presence as deceased refused to buy accused beer. That night the deceased was killed.
9. PW4 a son of deceased and brother to accused also witnessed accused beat deceased severally since 1996. Accused would also threaten to kill deceased constantly.
10. PW6 investigating officer investigated the case and formed opinion that the accused killed the deceased. Thus charged him with the offence.

**DEFENCE:**

11. When accused was put in his defence he made a sworn statement and called one witness who is a local chief for the area.
12. He testified that he was not living at home at the material time as his house had been demolished by rains.
13. At the material night the deceased was murdered, he spent a night at a place owned by Muteti Kitavi where he used to put up. He went home the following morning 3 Kms away.
14. He found his late father dead. He called a neighbour one Mwololo Malire to ask him whether he had anything in the deceased home that night. He informed him of the fact that he had just found his father murdered.
15. The neighbour accompanied him to the scene. Then he told accused to go and report to the police the incident. He contacted Corporal

Ekutu who told him to go back home and wait at home. This time it was at 8 am. Later 2 police officers went to the scene and viewed the body and also observed the broken into deceased house. He was told to search his father and he recovered title deed, ID and land map from deceased pockets.

16. The officers asked him to take blanket and cover deceased body they left and came back at 2 pm to collect and did collect the same. He was also taken to the police station where he was locked in.

17. His local chief came and tried to seek his release but in vain. The police said they were investigating the case. He was taken to Makueni and charged.

18. The accused further stated that the deceased had a land dispute with one Kimongo and Kyanzia. Kyanzia had died and remained unburied for almost 5 years due to land dispute. Kimongo continued case with deceased. He later died in December and was due for burial the day deceased herein died.

19. The accused stated that his deceased father had warned him not to attend Kimongo burial as he would be killed by his family members who were very hostile to deceased's family over land dispute.

20. Accused said had problem with his father over deceased denying him cultivating family land but that had reconciled by time of his demise.

21. Accused used to live alone. Accused said that accused left the day he met his death and went to the market to buy tobacco. He was in good terms with accused then. They had met that same day morning section. He died that night. Accused used to buy him alcohol as both used to take alcohol on the material night he went to take alcohol in Kavumbu after he had parted with deceased in the morning of 22/12/015. He left bar at 10 pm and went to sleep the usual place he was putting up. He denies over killing his father and he claims to be pursuing the killers.

22. On cross examination, he died meeting his father the material night at New Kenya Bar. He conceded he had previous cases including one where he had just been put on probation over assault of his father.

23. He said he reported case of the murder of his father to the police and that he never absconded after learning of murder of his father.

24. DW2 Reuben Ndambuki – local chief testified that deceased was one of his residents in his area of jurisdiction. He knew him and the accused.

25. On 22/12/2012 he was called to go to the scene of murder where he saw deceased body. He found police had already collected the body.

26. He was surprised that accused was arrest as he never knew of any problem between deceased and his son the accused. The police told him they were holding accused for investigation exercise.

27. DW2 knew of land dispute between deceased and one Kimongo Kioko where he had helped to fix boundary. The Kimongo family was very hostile to deceased and even the government officers who did fix boundary.

28. Though by time of the demise of the deceased, Kimongo was dead, Kimongo family was still very hostile and chief suspected they could have been the main suspects in deceased murder.

29. In cross examination he confirmed that the Kimongo family was dissatisfied with border fixing by chief and government officers. He doubted the accused killed his father.

30. The defence was closed at this stage.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

31. In the instant matter where accused is charged with offence of murder, the prosecution is duty bound to prove;

**a. That the deceased Kilimbo Ngungi died.**

**b. That his death was unlawfully caused by the accused; and**

**c. That the crime of murder occurred via malice act or with malice aforethought.**

32. The deceased was found dead in his home where he lived alone. Nobody witnessed the killing. Thus the case rests on circumstantial evidence.

33. On cause of death, PW6 Dr. Makau Alex testified and established that the deceased died and the cause of death was severe head injuries caused by multiple cuts the defence does not contest the fact that death occurred. The court thus holds that the death and the cause have been proved beyond reasonable doubt.

34. As to whether same was caused by the unlawful act or omission of the accused, the court has to look at the entire circumstantial evidence on record.

35. In the case of *Mohamed & Others vs Republic [2005] 1KLR 722* the court stated:-

**“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which offered a basis for a reasonable inference of occurrence of the fact at issue. The circumstances must be such as to exclude every hypothesis by the one proposed to be proved.”**

36. PW2 laid background of the deceased relationship with the accused which made her believe accused could have killed the deceased. She stated that accused used to steal from deceased and also beat deceased thus used to be arrested for the same. However no evidence was adduced to establish any charge on alleged stealing and beating of deceased by the accused.

37. PW3 only stated that he witnessed accused quarrel deceased in his presence after deceased refused to buy accused beer. This was night prior to the deceased death.

38. PW4 talked of witnessing accused beat deceased in 1996 and also threaten to kill deceased. However their testimonies have no relevance to what transpired on 22/12/2012. The PW2 and 4 used to be a way for long from home. PW4 had been away from home of deceased for a closer to 12 years. Similarly PW2 was also away since 2008.

39. The incident in a bar at Mikuyuni alluded to by PW3 allegedly witnessed by one Michael Mutua and a bar maid was not corroborated by the said 2 persons as they were not called as witnesses. Only PW3 alleged of quarrel of accused and the deceased in a bar.

40. The panga produced from the scene next to the deceased body by PW6 PC Nyongesa was never taken for forensic analysis thus it cannot be held to be a murder weapon.

41. The accused demeanor on what he did on discovery of his father’s death did not create any inference he was the killer.

42. On 22/12/2012 vide his sworn testimony accused found his father dead and immediately called a neighbour one Mwololo who advised him to report to the police. The accused reported the incident and came back with police to the scene. On an advice of police he covered his father with a blanket.

43. He stayed home until police brought a motor vehicle to take deceased body to the mortuary. He accompanied police to the police station but was locked up as a suspect.

44. Accused testified that he was in good relationship with his father. He returned home after had sent for him from Machakos.

45. DW2 corroborated the accused’s testimony in relation to deceased land dispute with Kimonge Kioko. DW2 area chief was of the view that the land dispute resulted to incident which could have led to the murder between deceased and Kimonge Kioko. The security had to be taken to the area of dispute between the two to fix their land’s boundaries. The police just arrested accused (son of deceased) without first investigating all the event surrounding deceased’s death.

46. The prosecution evidence did not meet the threshold of circumstantial evidence to warrant finding accused guilty of the offence charged.

47. Thus the court makes the following order:

**i. He shall be set at liberty unless otherwise lawfully held.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

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**C. KARIUKI**

**JUDGE**