



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 83 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL MUEMA NYAMAI.....ACCUSED

JUDGEMENT

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63 Laws of Kenya). Particulars being that on 28/2/2014 at Ngondini village, Nguluni Sub-Location, Watema Location, Wee Division, Makueni County murdered Stanley Wambua Muema.
2. He pleaded not guilty to the charge and matter went into full trial. The prosecution called 7 witnesses whereas the accused testified on oath but never called any witness.
3. **PW1 RMM** aged 18 son of the accused and brother to deceased testified that his brother was killed in December 2013 and thrown into a nearby dam. His name was Stanley Wambua Mwema.
4. He stated that one time his father the accused came home at 7pm drank and threatened them with a panga. His late brother rescued them. This was caused by PW1 by him having given out bottles of wines and spirits. The incident occurred in presence of his mother Elizabeth Wavinya Muema, his sister MM.
5. PW1 explained that he had given some to his grandmother and some he sold. This infuriated the accused that he gave PW1 mother (his) last wishes as he wanted to have finished him. However the deceased snatched the panga from the deceased. PW1 and his mother sneaked out via the widow. They left his late brother sister and 2 other siblings. They spent the night out in the bush and returned in the morning.
6. Sometimes in February 2014 accused had not paid school fees to his children and deceased asked him about it. The accused became furious. He chased deceased with a stick.
7. One time deceased left on a Friday to go for money he had worked for via cutting thicket but he was never seen again.
8. On Sunday a body was spotted by the nearby dam. As PW1 and accused were stacking maize and his father having climbed a tree saw crowd of people at dam and he sent PW1 to go and check what was happening. He found out that it was a body in the dam which was attracting attention of people. He returned and told his father. However PW1 did not see the body. He also said that he found out that it was the body of his brother. His mother was called by police to identify the body. The police came home they entered where PW1 used to reside with siblings but recovered nothing.
9. They proceeded to the house deceased was residing and recovered a panga. They went to the house deceased used to reside alone and found same locked. They forcibly opened the same. They found the bed was blood stained and so were the walls. The police took away the mattresses. PW1 identified the photographs produced showing homestead, deceased bed, wall stained with blood.
10. On cross examination he stated that the accused was justified to question the sale of bottles without his permission. That him and his brother after escape they returned same night in the house and slept therein. That the deceased left in February 2014 to check on their land but he never returned home.
11. **PW5 MKM** Form 1 student brother to PW1 and deceased and daughter to accused testified that there was bad blood between deceased and accused. At times accused would instruct deceased not to be given food. She also narrated the incident of sale of bottles by PW1 without accused permission. The accused was furious and while holding a panga deceased snatched from him. PW1 and his mother escaped via a

widow. Later the body of PW1 brother (deceased) was found in dam on 23/2/2014.

12. On time PW1 and deceased demanded school fees from accused and he assaulted them. Accused never used to pay the fees but their mother. When body was found in the dam, accused was called by an old man but he refused to go.

13. PW2 went to the dam and saw deceased body. The police came to their home and entered deceased house where they recovered a blood stained mattresses. They also entered accused's house where they recovered a panga. Later on accused was brought by people from Nguluni.

14. On cross examination, she said that deceased used to insult accused. She said accused used to work by excavating stones but was not paying their school fees. That deceased went to visit PW2 brother who used to live in Malili and he never came back home.

15. **PW3 EMK** 16 years old. She said that on 2/2/2014 at 2 pm, herself and her brother went to collect water and on reaching the dam they saw red T-shirt floating in the dam. She threw stone to it but could not reach it. They went home. She informed her mother about the T-shirt but she was referred to her father Festus Kimeu. They went to the dam and her father got a long stick. He tried to get T-shirt but it turned out to be a person's body. Later police were called. She later recovered statement.

16. On cross examination she said accused was her uncle. She said she was the first to see the body in the dam.

17. **PW4 Festus Kimeu Kiseka** stated that PW3 his daughter came home from collecting water and informed him of the reed cloth in the dam. He went to the dam and by use of a long stick he found it was a human body. He called village elder who came to the scene together with assistant chief. Later police came and retrieved the body from the dam. The body was identified.

18. The body had injuries at the back of the head and face near the ear. Deceased was son of his sister. He accompanied police to accused's home. He saw blood stained wall and under the bed. Accused was not present. He was called from the market. Accused was his brother in-law.

19. PW5 is a cousin to the accused. He is his uncle. He identified deceased body in mortuary for postmortem exercise. He saw injuries cut back of head and left jaw.

20. **PW6 Corporal John Mburu** of Kola Police Patrol Base testified that he was the investigating officer. That on 2/3/2014 at 1.45 pm while at his place of work he received a call from the chief of Watema Location saying that there was a body in the dam within his area. Him and another officer went to the scene. They found the body in the water.

21. They removed it, it was identified and observed injuries (cut at the back and left side of the jaw, they proceeded to the home of the deceased 300m away. In deceased house his mother opened the door. PW6 saw blood on the wall, roof, a pool under the bed.

22. The mattress was also bloody. PW6 enquired on whereabouts of the accused and was told he was at Nguluni market. Officers went to the market arrested him and took him to Kilome Police Station and body was taken to the mortuary in Kilome Funeral Home. Postmortem was later conducted. Photos had been taken at the scene of the crime. PW6 produced photographs and the postmortem report.

23. **PW7 Paul Mulumbe Mutisya** Assistant Chief of area narrated how he received call and went to the scene. He saw the body and also called local chief. The police were called who came to the scene. They did their work as PW6 narrated. He also arrested accused with members of public at Nguluni market. They took him to his house and police re-arrested him.

24. The prosecution closed its case.

25. When accused was put on his defence, he stated on oath that he lived in same land with many other people. Deceased was a Form 4 student. He had no problem with him. PW1 and 2 were his children.

26. On 2/3/2014 he was arrested and taken to Kilome Police Station. He was accused of killing his son the deceased. Deceased had gone a safari. He was shown the body. It had been dumped. Accused was shocked to be told about the killing and dumping in the dam of his son. He said he used to take care of his family.

27. He swore that he could not kill his son. He said he saw deceased last on 27/2/2014. His house was 15m from deceased's house. He saw deceased next dead on 2/3/2014. He said while packing maize his son PW1 had told him of crowd at the dam and that there was body but he was not told whose body it was thus he never went to see it.

28. He went to the market at Nguluni and while there taking alcohol he was arrested. He was taken home but not allowed to enter deceased's house. He was never told of or shown blood in deceased's house. He denied ever threatening deceased in 2013. He said he had no bad blood with deceased.

29. He closed his case on that note.

30. The parties agreed to canvass via written submissions. Only defence filed the same.

31. The prosecution submitted that, case shows that other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards guilt of the accused. As such the evidence against the accused only raises grave suspicion against him, of which

as was rightly pointed out in the case of *Neema Mwandoro Ndurya vs Republic [2008] eKLR*, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

32. Looking at the testimonies it is noteworthy that it is PW1 and PW2 who amongst the witnesses last saw the deceased when he was alive. One thing which stands out from the testimonies is that they saw the deceased on the day he left their home for Kiu/Malili to visit his brother.

33. However, it is notable that their testimonies have some contradictory information as to what transpired thereafter. We can note that whereas PW2 states that the body was discovered on 23/2/2014 all the other witnesses state that the body was discovered on 2/3/2014.

34. Whereas PW1 states that he went to the dam after seeing people there, PW2 states that they got information that there was a body in the dam.

35. Whereas PW6, the investigating officer stated that from the dam they were accompanied by the mother of the deceased to their home the said mother did not testify to confirm how she got the information about the deceased's body being at the dam. It is notable that EM is the one who says that she was the first to discover the body of the deceased in the dam.

36. It is also clear that PW1, PW2 and PW6 give contradictory information as to how they gained access to the house of the deceased. Whereas PW1 alleges that the police forcibly opened the door, PW2 and PW6 state that the mother to the deceased gave the key to the police which they used to open the door.

37. It is also notable that though it alleged that there blood stains in the deceased's house, no testing was done to establish whether or not the deceased was indeed killed in his house and his body carried to be thrown at the dam. This is so noting that the deceased was last seen when he told his siblings that he was leaving for Kiu/Malili.

38. It is also important to note that though there is an allegation that a panga was recovered from the accused person's house, the said panga was never produced as evidence nor was there any evidence led to show that indeed the panga was the murder weapon.

39. Being guided by the above cases and the evidence on record, counsel humbly submits that nothing links the accused person to the death of the deceased. The unexplained contradictions in the key witnesses clearly point to the fact that they cannot be believed to show that the accused had in any way a hand in the death of the deceased.

40. Also the fact that no screams were heard noting that the deceased, his mother, his siblings and the accused person all leave in the same compound cannot be wished away. Mere suspicion is not enough.

41. In criminal trials that burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exists a case discharging that burden of proof.

ISSUES, ANALYSIS AND DETERMINATION:

42. I have read through the evidence tendered and the submissions on record. The emerging issue is;

i. Whether the prosecution proved offence of murder was committed by the accused.

43. In the case of *Republic vs Dorothy Awuor Juma [2018] eKLR* the court held that the ingredients of murder are:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the 'mens rea' of the offence.

44. On proof of death:

Almost all the prosecution witnesses testified that, the lifeless body of the deceased was retrieved from a dam on or about 2/3/2014. The fact of death is also confirmed by the postmortem report dated 12/3/2014 by Dr. Okinyi. In the same report, it is articulated that the cause of death was due to head injury caused by cuts.

45. The defence does not contest the fact that the death occurred as established by the prosecution side.

46. As to whether the same was as a result of the unlawful act or omission on the accused side, the prosecution case is that the accused murdered the deceased who was his son. There is no direct evidence as to what happened by the evidence tendered thus circumstantial is relied on by the prosecution.

47. In the case of *Republic vs Samson Lotukei Loitasia [2017] eKLR* the court held:

“A case annexed on circumstantial evidence as this one, must satisfy the three test laid in the case of *Abanga alias Onyango vs Republic Cr. Appeal Number 32 of 1990 (UR)* that is;

- 1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- 2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- 3. The circumstances taken cumulatively and circumstantially 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.”**

48. The prosecution case shows that other than the accused person there were other persons who equally had opportunity to kill the deceased who were not exonerated from suspicion of having committed the offence by the prosecution so as to leave evidence pointing unerringly towards guilt of the accused.

49. First we have PW1 & 2 who testified that they were the last to see deceased alive. This was on the day deceased left their home for Malii to visit his brother. However there is variance between the 2 witnesses’ testimonies on what transpired. PW1 said the body was discovered on 23/2/2014 with all the other witnesses talking of the body been discovered on 2/3/2014.

50. PW6 investigating officer said that from the dam they were accompanied by mother of deceased to their home where she opened the door to the house of the deceased for them. Upon entry, they found blood stained mattress, pool of blood under the bed and blood splashes on the walls. The mother of the deceased was not called as a witness.

51. Even on the piece of evidence by PW1 & 2 that at one time accused threatened deceased after he had taken his bottles and deceased snatched panga from the accused, the mother was not called to testify on the same facts yet it was stated that she escaped with PW1 through the window.

52. The blood stains allegedly spotted on the mattress and the wall in deceased house was not tested to confirm it was human blood and that it was of the deceased blood group. This could have created an inference that perhaps deceased was killed inside his house and the body thrown into the dam.

53. It is also notable that though there was evidence that a panga was recovered from the accused person’s house, the same was never produced as an exhibit nor was there evidence led to show it was a murder weapon.

54. The totality of the prosecution evidence on record provides no link to the accused person to the death of the deceased. It is also notable that no screams were heard from deceased house yet the deceased, his mother, siblings and accused all lived within the same compound.

55. Nothing on record shows indeed that the accused committed the murder offence. Thus the court finds that the prosecution did not prove its case beyond reasonable doubt.

56. Thus the court makes the following orders:

- i. The accused is acquitted and set free unless otherwise lawfully held.***

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

C. KARIUKI

JUDGE