



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 129 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

STELLA NZISA MAWEU.....1ST ACCUSED

ANCENT KIMANTHI MAWEU.....2ND ACCUSED

JUDGEMENT

1. The accused persons were charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya.
2. Particulars being that on 26/1/2016 at Senda village, Muvau Sub-Location, Muvaa Location within Makueni County murdered Francis Maweu Kivuva.
3. The accused persons pleaded not guilty and matter went into full trial.
4. After closure of the prosecution case, the court found the accused persons had a case to answer and they were put on their defence. They both opted to give unsworn testimony and called no witnesses.
5. The prosecution called 6 witnesses. **PW1 Peter Musembi Maweu** is son of the deceased and the 1st accused. He is also brother to the 2nd accused. He stated that on 26/1/2016 at 10 pm while in his house which was about 70 metres from his parents' he heard screams emanating from his parents' home whereof he heard his father Francis Maweu Kivuva screaming. He was saying "***Stella and Kimanthi you want to kill me?***" He went to call his uncle Matheka Musila. It took about 5 minutes to go to his uncle. He rushed with his uncle to his parents' home.
6. Upon arrival they found alot of blood and a jembe at the corner of the house but outside. It was bloody. There was also blood outside the door. There was nobody in the house though they never entered the house. They went to look for help whereof on the way they met Gibson Wambua Kioo who gave them the chief's telephone number.
7. They called chief and also a neighbour. They proceeded back to the parents' home where they found 1st accused washing with water and bloom the blood. The accused No. 2 was just walking around. The chief asked 1st accused where her husband Francis Kivuva was whereof she said that they fought with accused No. 2 and then ran into the bush. The chief mobilised people to look for the said Francis.
8. PW1 together with other people followed footsteps and by a near river bank found his body. It had injuries on nose, on the head, leg, left hand. They took 20 minutes from home to where the body was lying. He was with among others; his cousin Paul Metho, Makiti Nthokol neighbour. Chief was left at deceased's home. The OCS Makueni was telephoned and informed and thus police came to the scene. By this time the 2 suspects now accused persons were tied with ropes. He later recorded statement with police.
9. On cross examination, the PW1 stated that he was 40 years old. That his father the deceased had allocated him part of the family land with the aid of the clan members. He said that when he heard screams, he was with his wife. His compound is separated with that of his parents by offence. He said he did not know whether his father and mother shared a bedroom/house. That they used to fight. PW1 was put to task as he could not show in his statement where he stated that he heard deceased say "***Stella and Kimathi mnataka kuniua***".
10. **PW2 Margaret Mutheu Musembi** wife of PW1 and a daughter in law of accused 1 and deceased testified and stated that while in her house with PW1 on 26/1/2015 at 10 pm, she heard voice saying "***Stella unataka kuniua ukiwa na Kimathi***". She recognised the voice as that of Francis her father in-law. She went out from the house and as there was moonlight she could see 2 people outside the father in-law house in the compound. She could see it was a man and a woman.

11. Also there were torch flashes but did not identify the 2 persons she saw. Then she saw them carry something through the place where chickens are kept. They were carrying some luggage jointly though she did not know what it was. She returned to the house after being out of the house for about 30 minutes. Later she heard voices of people including that of the chief and went to the parents' place where the voices were coming from.
12. The chief asked 1st accused where deceased was but she said she did not know. The chief then told people to search for the deceased. After a while the group came back and said that they had found the body of the deceased.
13. On cross examination by the accused persons advocate, PW2 said that she had bad relationship with 1st accused as she used to insult her. She said that with her husband the deceased allocated them land via clan intervention. They never used to go to the parents place. She said that after hearing screams, she heard a voice say "*Stella and Kimanthi mnataka kuniua*" which was loud voice. Her husband told her that he was going to tell his uncle. Stella had told PW1 and PW2 not to be going to the parents' home. She said accused No. 1 and deceased had separate houses.
14. **PW3 Peter Matheka Musila** brother to deceased testified that on the material night of 26/1/016 at 10 pm while at his house, PW1 reputed to him that there was something happening at his father's place and thus requested him to go and find out. PW1 accompanied PW3 to the same place. PW1 also told him that he had heard screams from his parents' place thus he came for him (PW3). They proceeded to the same and found the doors open but there was nobody; present.
15. Then they saw alot of blood and a blood stained jembe. There was a pool of blood at the doorstep. They checked around but found nobody. They left compound via the gate and proceeded to the kiosk. As they found nobody, they decided to walk back to deceased's pace.
16. While on the way back they had people behind them who turned out to be Gibson Musembi Matheka and a neighbour. They told them to call chief who after a short while plus another people. He told people they all go back to the deceased home.
17. On arrival, they found kitchen fire was now light. They also found the blood had been washed away. They asked accused 1 and 2 who were present where deceased was, and they said that after he had quarreled them, he ran away.
18. Meanwhile there PW3 saw jembe handle burning in kitchen fire. The chief told people to look for the deceased. The body was found but the witness did not go to where body was save at the time it was being collected. He saw head injuries on the same.
19. On cross examination by defence PW3 stated that he was with his deceased brother same evening from 8 – 9 pm at Kwa Katheka market. He used to take alcohol. He knew deceased was not in good terms with his son PW1 due to the land issue. This is because PW1 objected to sale of land by accused 1 and deceased. The clan intervened and PW1 was allocated a portion of law by his deceased father. Accused barred his son PW1 from going to his home. That is when PW1 heard screams he called his uncle PW3 to accompany him to the same place. Deceased and accused No. 1 used to live in separate house. The blood they saw was at the house where accused 1 used to live in. the crowd tied accused persons with ropes on their hands.
20. **PW4 Dr. Emmanuel Laiposha** a Medical Doctor produced postmortem report. Same showed the injuries observed principal on the head, ribs and he formed opinion that the cause of death was due to severe head injuries. On cross examination by defence he stated that the injuries were caused by blunt and sharp objects.
21. **PW5 David Muli Musyoka** the area chief testified that on 26/1/2016 between 10 and 11 pm he got a call from one Gibson Wambua who told him there was a problem at deceased home. He proceeded there. He was told that there were screams at deceased's place. He was told Stella had said that deceased came home drunk and beat her plus her son Kimathi and then went away.
22. There were other people at the scene. He saw clothings in the toilet. He instructed people to search for the deceased. The deceased body was found thus accused 1 and 2 were tied by ropes and PW5 called the police. Accused 1 was questioned and she stated that her and her son Kimathi killed deceased and disposed the body to the place it was found. A paper bag was retrieved from the toilet. The same had clothings which were blood stained. Photographs were taken.
23. On cross examination he stated that night he was called by Gibson Wambua a neighbour and also by Matheka brother to deceased. PW2 told him of seeing people at deceased's home and also hearing screams from the same place. The people who went to look for the deceased came back and reported they had found the body. PW5 accompanied police to where the body was lying and witnessed taking of the photographs. They then collected the same. They also carried exhibits and the suspects.
24. **PW6 Samuel Mbat**i testified that he is a gazetted scene of crime officer and that on 27/7/2016 at 2 am he met OCS at Makueni Police Station and Corporal Nyaga at Senda village at a scene of murder of deceased herein. He took photographs showing the body of the deceased and the visible injuries. They also recovered bloody jacket of deceased and a polythene paper and synthetic sack. He produced certificate and photographs taken. He said the items mentioned were retrieved from the toilet.
25. **PW7 PC Kariuki** investigating officer was then the area DCIO on 27/1/2016 at 1.30 am he was in office when the OCS telephoned him and asked him to join him at the scene of murder. He found the area chief and other people. Area chief was holding 2 suspects. He interrogated them and then took him to the scene where body was lying. The body was photographed. Accused 2 told him that they had damped in pit latrine ganny bag, polythene paper and a pull over.
26. The chief gave PW7 partly burnt jembe handle and a blood stained lessso which he said he got it from the accused No. 1. He gathered during investigations that accused 1 and deceased had fight which attracted attention of accused No. 2 who wake up and held deceased and accused 1 hit deceased with a jembe in the head. He produced exhibits; jembe handle Pexh 2, jembe hoe Pexh 3, blood stained lessso Pexh 4. Witness statements were recorded later.

27. On cross examination he stated that the items recovered were not examined chemist. The accused 1 and deceased had marital problems the fight ensued when deceased entered accused 1's house and demanded conjugal rights – the killing appeared to be unplanned/unmediated.

28. The prosecution closed its case.

29. **DW1** accused No. 1 unsworn said that on 26/2/2016 she was in house at night while with her son co-accused. She was awakened by brother in-law PW3 who asked her the whereabouts of her husband. She said she did not know as they slept separately. They went to the bush to search for him and found his body. She was arrested and brought to court. She said she did not hear the screams alleged by PW1 and PW2.

30. **DW2** on 26/2/2016 he was asleep in his mother's house. He had not seen deceased before he slept. Between 1 – 3 am he heard voices at the house. There was Matheka, his wife and Musembi who asked them to open the door. PW1 asked the whereabouts of the deceased. Accused 1 said she did not know and thus Musembi went to look for him at his house.

31. He said he was not there. Later they went to the bush and came saying that they found him dead in the bush. They accused 1 and 2 were arrested and charged. He denied ever hearing screams in their home that night. He claimed to have misunderstanding with PW1 who is his brother. He denied killing his father.

32. The parties agreed to file submissions. By the time of preparing the judgement, no party had filed the same.

33. After going through the evidence on record I find the issues are:-

(i) Whether the ingredients of murder have been proved beyond reasonable doubt?

ANALYSIS AND DETERMINATION:

34. The offence of murder has 3 elements to be established for prosecution to secure a conviction. See **Anthony Ndegwa Ngari vs Republic [2014] eKLR**. These are:-

(a) The death of the deceased occurred.

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice aforethought.

35. On the first element, PW4 a Medical Doctor Emmanuel Laiposha did postmortem report after examining the deceased body. He observed heard and ribs injuries and formed opinion that the cause of death was due to severe head injuries. Also the witnesses called all were unanimous that they say the body of deceased. The accused persons also saw the body of the deceased at the scene it was dumped. The cause of death is not contested.

36. The court finds that the first element of prove of death has been established to the required standard.

37. The second element is that, the prosecution has to be prove that the accused committed unlawful act which caused death of the deceased. PW1 stated that in the material night he heard at his parents' home screams then heard deceased saying ***"Stella and Kimathi you want to kill me?"*** He rushed to call his uncle (brother to deceased) to go to the parents' home as he had been barred by deceased from going to the same place.

38. On arrival in company of his uncle PW3 they found a lot of blood outside the door. There was nobody in the house. This aspect was confirmed by PW3.

39. After they returned to the same venue after going to seek help, they found 1st accused washing blood while accused 2 was just walking around. When asked by chief the whereabouts of the deceased, accused 1 said the deceased fought accused 2 and then ran in the bush. Then chief mobilized people to look for the deceased and his body was traced lying a distance in which PW1 took 20 minutes to walk. PW2 who was PW1's wife and in the same home with him (PW1) also heard deceased's voice saying ***"Stella unataka kuniua ukiwa na Kimathi"***. She recognized the voice of the deceased (her father in-law).

40. PW1 and 2 shared same land with parents but different compounds. The parents' home was within a hearing distance. PW2 even saw 2 people after hearing aforesaid words. They were outside the house and carried a something she could not identify what it was outside parents' compound. See was aided by the moonlight to see what the 2 people were doing.

41. PW5 local chief confirmed that when he questioned accused 1 and 2 they stated that they killed the deceased and disposed the body to the place it was found. A paper was retrieved in the toilet containing deceased's clothing which were blood stained.

42. PW7 PC Kariuki also confirmed that when he went to the scene and questioned the accused persons accused 2 told him that they had dumped the gunny bag, polythene paper and pullover in pit latrine. Blood stained lessso was recovered from accused 1.

43. After interrogating the 2 accused persons he gathered that deceased had fought with accused 1 and same attracted attention of accused 2

who woke up, held deceased and accused 1 hit the deceased with a jembe in the head. Prior to eruption of fight, the accused had entered accused No. 1's house while drunk and demanded conjugal rights. The investigating officer concluded that the killing was not pre-meditated. This evidence was neither controverted nor objected to by defense

44. The accused persons in their unsworn defenses they deny killing of the deceased but accused 1 concedes that there was fight between accused 1 and the deceased. They have failed to rebut the pieces of evidence on the fact that there were screams heard of deceased saying the 2 were killing him.

45. They have also failed to rebut that blood was found and in fact accused 1 was found washing the same by pw1 and on the material night. Neither have they contested the fact that the deceased clothing were retrieved from a pit latrine at home .Finally they did not raise any objection when pw7 narrated on what the 2 admitted at the scene.

46. In all the circumstances of the case and the evidence tendered it appears that the accused 1 and deceased were fighting courtesy of drunkenness of the deceased and his forceful demand for conjugal rights. The accused 2 intervened to save his mother (accused 1).

47. Though the accused persons deny the killing of the deceased, the surrounding circumstances including the identified voices leaves no doubt that, the 2 accused persons killed the deceased in the course of the fight and disposed the deceased body to the site it was found that material night.

48. On whether the killing was pre-meditated, the investigating officer ruled out the malice aforethought.

49. This court also agrees in the circumstances of the case that the accused 1 and 2 had not planned to kill deceased but his intrusion into the accused 1's house while drunk and demand of conjugal rights triggered a fight which occasioned his killing in the process.

50. However the accused persons have not tendered any explanation as to why user of jembe was employed in the circumstances. Were they not able to run away from the deceased aggression? The court does not know. When accused 2 held deceased, why didn't accused 1 run away? Did accused 2 try to stop the fight or he just helped the mother to hit his father the fatal strike with a jembe?

51. The court finds that in all the circumstances the accused persons are not guilty of murder but a lesser offence of manslaughter has been established and they are therefore found guilty of an offence of manslaughter.

52. Thus the court makes the following orders:

i. The accused persons are convicted of manslaughter.

ii. They will be sentenced after mitigation.

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

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C. KARIUKI

JUDGE