



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 80 OF 2017

REPUBLICPROSECUTION

VERSUS

ELOSY KATHURE MUGAMBI.....1ST ACCUSED

MALICERA KANORIO MURIIRA.....2ND ACCUSED

JUDGMENT

The accused persons Elosy Kathure Mugambi and Malicera KanorioMuriira were jointly charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that Elosy Kathure Mugambi and MaliceraKanorioMuriira on the 9th day of September 2017 at Miruriiri area in Igoji in Imenti south Subcounty within Meru County jointly with others not before court murdered James Gikundi.

The prosecution lined up 8 witnesses to support its case that accused persons committed the offence herein. PW1 Dr Kihumba produced post mortem report that was filled by Dr Munyoki who conducted post mortem on 28th September 2017 – Exp1 on external appearance he found a depressed skull with fracture on parietal bone with intracerebral bleeding to the left side. Dr Munyoki concluded that deceased died as a result of severe head injury secondary to trauma.

PW2 Purity Gaiti testified that while she was escorting her sister on 9th September 2017 at around 6.30 pm he got to the main road which borders her land and he saw the deceased playing with Michelle. At that time Kirema the son to A1 was seated on the road crying. She said both Kiremia and Mitchell were children whereas Gikundi was an adult. That Michelle told PW2 that Kirema had hit the deceased who was drunk and he fell and that when the deceased pulled Kirema, Kirema started crying. That the mother of Kirema came with the intention of hitting.

That PW2 told the deceased that someone was going to hit him from behind and the deceased on looking back ran to a higher ground on the road. That when Catherine followed the deceased PW1 told her to stop pursuing him. That the deceased ran through Mitchells grandmother compound and through PW2's land down the valley. That she followed them in company of her grandson Mwandiki but she didn't find them at the river. That while standing in the coffee plantation she met A2's husband armed with a stick and when she asked him what was happening he didn't respond. That at that point she heard A1's mother call A2. That A1's mother was calling from the river where A1 had pursued the deceased. That people passing by asked why A1's mother was calling out at the river at night. That PW2 didn't see the deceased until her daughter Dorine came from the market one Friday and inquired from her who was Senge as Gitonga had asked if she had seen him and she told her that Gikundi was also known as Senge.

PW2 said that when homesteads were being blessed A1's mothers home was skipped by the priest. She said Gikundi's body was recovered from the river. She said the deceased as well as A1 and A2 are her neighbours. She said A1 is sister to A2's husband. She said that on 9th September 2017 Gikundi was alive and it is after 2 weeks on a Friday she learnt the body was found in a river. She said she saw A1 pursue the deceased into the river but she heard A1's mother call out on A2 while in the river. She said the deceased was drunk and was playing with Mitchell and Kirema on the road on the material day. Mitchell Nkatha 8 years old Grade 4 pupil at St. Bernard Academy said on her way to visit her aunt she saw Stella and Kathure chasing someone known as Senge while they were armed with sticks towards the river. She said she heard someone call for help from the direction of the river. She said that later she learnt Senge had died. She said that Kathure and Stella ran into the river while chasing Senge whom they wanted to apprehend. She said she heard the voice of a man calling for help from the river.

PW4 Ephantus Murithi testified that on 15.9.2019 he had gone to visit James Mutwiri followed him and told him she had seen the body of a person in river at 6.00 pm. That he went and reported at the AP Camp and he was referred to police station. That on the way he met Chief and he reported to him and he was also referred to police station. PW4 said that after he reported to police the body was retrieved the following day on 16.9.2017. He said the body was identified as that of Senge. PW4 said he used to see the deceased at the market but he didn't know he was missing. He said the body of the deceased was partly in the water when it was recovered.

PW5 Felista Ngeta Ntobo Assistant Chief of Miruriiri sublocation testified that on 9.9.2017 at about 7.30 pm A1 went to her shop and reported that her son had been beaten by a young man known as Gikundi and she wanted Assistant chief to warn Gikundi not to beat the child again. She promised to warn Gikundi if she met him but since then she never saw Gikundi. That on 10.9.2017 she went to home of A1 to check on the child who was allegedly beaten and she found he had not been taken to hospital and there were no visible injuries on him.

That on 15.9.2017 she got information that Gikundi who was a water vendor at the market had not been seen. Together with the Chief they tried to inquire but didn't succeed. That while she was in Nairobi on 16.9.2017 she got information from her colleague that the young man who was missing had been found dead at River Iraru. That on 17.9.2017 when she went to the home of A1 she said she chased the deceased for 50 m and returned home.

However she was directed to the home of PW3 grandmother and she established PW3 saw A1 and her mother chasing the deceased. That PW2 also told her she saw Kathure chasing the deceased into the river.

PW5 said that when she went to home of Lena she found A2 who told her that when incident happened she was at A1's mothers home.

PW5 said the deceased liked joking and whenever drunk he behaved like he had mental incapacity. PW5 said she didn't see the deceased on 9.9.2017 but A1 went to her hardware and reported the deceased had assaulted her son. She said when body was recovered she did go to the river as she was in Nairobi.

PW6 chief of Miruriiri location – Andrew Gitonga testified that her son reported to him that Gikundi who used to clean his bar had not been seen since 9.9.2017. PW6 said he inquired from Assistant Chief – PW5 but she was not aware but that A1 had reported to her on the evening of 9.9.2017 that Gikundi had assaulted her child. That on 15.9.2017 he got phone call from Incharge of Miruriiri AP camp that a body had been seen at river Iraru. That in company of the Administration Police officer they went to scene but it was bushy and the body was not removed as it was also at night.

That he called the police and on 16.9.2017 the body was retrieved from the river and he identified it as that of Gikundi. He said the body was partly in the river. That after PM was done members of public accused the Administration that killers were known but they were not taking action. That accused persons herein were arrested by PW6 and PW5 and taken to police station. He said he didn't see accused persons on 9.9.2017. he said he saw the deceased on Wednesday prior to 9.9.2017 which was a Saturday.

PW7 Joseph Kithinji said the deceased was his son. He said he received report that his son who had gone missing one week before was found dead in water. That he went to Kiandegge Police station on 28.9.2017 and accompanied police to Meru Level 5 Hospital where Postmortem was conducted. He said he saw head of the deceased had injuries. He said that grandfather of the father of accused persons and his grandfather are brothers and he knew them. PW7 said he lives in different location from where his sons body was recovered.

PW8 CPL Jimmy Kitivo testified that while at Igoji (Kiandegge) Police Station on 15.9.2017 at 19.30 hours he received a report from Ephantus PW4 that there was a body dumped at Iraru river. That Police officers visited scene and retrieved the body which was identified as that of James Gikundi. That on 25.9.2017 Post-mortem was conducted and on 6.10.2017 the Chief of Miruriiri Location and Assistant Chief of Miruriiri sub-location went with the 2 suspects to the station and it was reported were planning to protest against the 2 who were suspected to have murdered Gikundi. The 2 were placed in custody and charged. PW8 the Investigating Officer said A1 was seen chasing the deceased towards the river after the deceased was alleged to have beaten A1's child. PW8 said that after A1 had been seen chasing the deceased into the river the deceased went missing and he was never seen alive again.

When accused persons were placed on defence, A1 in sworn statement said that on 9.9.2017 she had send her son Kirema to buy beans. That while in the house she heard him cry and when she went to the road and found him, the child said the deceased had beaten him. that the child didn't have any serious injuries. That she saw the deceased running away. She said it was about 5.00 pm. That she went and reported to Chief and told her to warn the deceased. That the following day Chief went to her place to know what injuries the child sustained and she told her the injuries were not very serious. That after 2 weeks Stella – A2 woke her up so could go and buy for her milk, but when she opened Assistant Chief and Chief entered her house together with Stella – A2 and told her she was required. That she accompanied Assistant chief and chief to Igoji Police Station and they were placed in the cells and later brought to court.

She said she didn't pursue the deceased. She said she knew Purity – PW2 but she didn't hear her say that A1 pursued the deceased. She said she knew Joseph Kithinji but she could not remember what he said in court. She said she had nothing to say about Andrew Gitonga- Chiefs testimony. She also had nothing to say about Assistant Ciefs testimony – PW5 she said PW3 Michelle Nkatha's testimony was also false because he didn't pursue the deceased. She said she didn't see Michelle on the material day.

A2 Malcera Kanorio testified that on 9.9.2017 she went to buy milk. That when she got to her mother in laws place she woke up Kathure so she could go and buy for her milk. That as Kathure A1 was washing milk container. Assistant Chief and Chief arrived and told them they were required. That they were told that both her and Kathure were required. They were escorted to Police station where they were asked about Nthenge and she said she didn't know him. that she told police she had stayed in Nkubu for 7 years and had never stayed in Miruriiri. That she remained in police cells for 3 days after which she was taken to court and charged. She said PW3 – Michelle was not known to her. She said she had nothing to say about Joseph Kithinji's testimony. He said Kithinji was their neighbour. She said she had nothing to say about Andrew Gitonga PW6's evidence. She said she didn't chase the deceased. She said she was at the market and didn't see the deceased. She said she last saw the deceased in June 2017. She said she was married to Leonard Kaburu the brother of A1. She said she knew the grandmother of Michelle.

At the close of defence case date for judgement was taken with directions that written submissions be filed within 14 days from 11.6.2019. form the evidence on record for the prosecution the evidence by accused persons and defence counsels written submissions this court is to determine whether prosecution has proved beyond all reasonable doubt all the ingredients of the offence of murder as provided under S. 203 of the penal code to wit:-

- a) Fact of death
- b) Cause of death
- c) That death occurred as a result of an unlawful act and/or omission
- d) That the unlawful act and/or omission was actuated with malice aforethought
- e) That the unlawful act actuated with malice aforethought was committed by the accused persons.

The fact that James Gikundi died is supported by the evidence of all the prosecution witnesses. The deceased went missing from 9.9.2017 and the wife of PW4 found his body partly in the river on their farm.

As to the cause of death the postmortem report is very explicit that he had a depressed skull fracture on the parietal bone and as a result of the examination on the body Dr Munyoki formed the opinion that the cause of death was severe head injury secondary to blunt force trauma.

When the deceased body was found, evidence was adduced that his head was in the water. There was no evidence that he probably hit the head on a stone or a hard object that could have caused a fracture observed by Dr Munyoki. It therefore follows that the act that resulted in the depressed skull fracture was not accidental but intended to cause harm to the deceased. The deceased must have been injured on the head before being pulled into the water thus making it possible for him to be rescued as the area was bushy to conceal what had happened to him.

Accused persons who were said to have been seen by PW2 and PW3 chasing after the deceased are relatives and A1 even went late in the evening at 7.30 pm to report to Assistant chief PW5 that she should warn the deceased not to beat her son but failed to tell Assistant chief where she left the deceased and in what condition.

PW2 saw A1 chase the deceased, she told the 1st accused to leave the deceased alone but she pursued him down the river. PW2 heard A1's mother calling A2 from the river where A1 had pursued the deceased and A2's husband came from river and met PW2 at the coffee plantation but didn't respond when PW2 asked what was happening in the river. It is apparent that A1, A2, A1's mother and A1's brother who is also husband to A2 were all involved in the commission of the felony herein and subsequently kept quiet even when Assistant chief went to ask how A1's child was fairing. It appears that A1 only went to report to PW5 the Assistant chief to pre-empt suspicion.

When as the perpetrator of the heinous murder of the deceased herein. PW2 and PW3 saw accused persons pursuing the deceased down the valley through PW2's farm into the river, PW3 said she heard the voice of a man calling for help in the bushy river and PW2 said she heard the voice of A1's mother call out the name of A2 from the river. She said it was already getting dark when she heard A1's mother call out the name of A2 and subsequently saw A2's husband who was armed with a stick and when he asked him what was happening he didn't respond.

This court is convinced that the evidence of the prosecution is overwhelming that accused persons committed the offence. The same has not been challenged by the evidence of accused persons which were mere denials. The 2 accused persons are found guilty as charged and they are convicted under S. 322 CPC.

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED THIS 4TH DAY OF JULY 2019

In the presence of:

CA: KINOTI

Accused 1 Present in person

Accused 2: Present in person

State: Ms Mbithe for state

Mr Wamache Advocate for accused persons.

HON. A.ONG'INJO

JUDGE

Ms Mbithe

I pray for mention to confirm if accused persons have past criminal records.

Order

Mention 11.7.2019. Accused remanded in custody for records and Mitigations.

HON. A.ONG'INJO

JUDGE