



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 85 OF 2016**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**ZACHAYO MURUNGI M'IWETA.....ACCUSED**

**JUDGMENT**

1. The accused person, namely Zachayo Murungi M'Iweta was charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on the night of 3<sup>rd</sup> and 4<sup>th</sup> November 2016 at Lubuene village in Kiegoi Location in Igembe South Sub county within Meru County murdered Ayub Mwiti

2. **PW1 DR. KENNETH MUTHURI** carried out a post-mortem report on the deceased body. He compiled a report thereto dated 7<sup>th</sup> November 2016 and reported that the deceased cause of death was asphyxia due to possible strangulation of the neck. He therefore confirmed the death of Ayubu Mwiti was due to an unlawful act.

3. **PW2 ROSE KARAMBU** testified and told the court that the deceased is her husband. On 3<sup>rd</sup> November 2016 the deceased left to go to work in the morning but he did not return. At around 10:00 pm she went out to get fresh air as the house was hot and while outside, she heard people passing by saying that someone had been cut. She however returned back into the house and slept till the following morning. When she went to Kathau to inquire about the person who and been cut she was referred to Kaithiria who told her that Mwiti was stealing some trees and he was the one who was cut. She went back home and told her brother and they started searching for him. They got other people to assist. On the way her brother informed her that they had found her husband's body at Kitoro forest. Thereafter she went and reported that matter to the chief

4. **PW2** further testified that on 7<sup>th</sup> November 2011 she went to identify the body of the deceased and witness the post mortem. The accused person is her neighbor. His home is across the road from her home. The forest is about 20 to 25 minutes' walk from her home. She was not aware of any dispute between the deceased and the accused. The deceased had a panga when he left in the morning and the panga was not recovered.

5. **PW3 JOSHUA KABERIA** testified and told the court that he is the chief of Kiegoi location. On 4<sup>th</sup> November 2016 he got a phone call from the assistant chief of Mboone sub location, Grace Nkirote who informed him that she got information from the village elder that someone had died in Lubuene village. He called the assistant chief of Ngunduene sub location Justus Mugambi to accompany him to the scene. Mugambi informed him he had also gotten a report from someone who said he had been attacked by unknown people at his home. That person had a blood stained panga. The assistant chief told him it was Zakayo Murungi who made the report. Together with Justus they proceeded to the scene and confirmed the deceased as Mwiti. He was bleeding from the left leg, he had also been hit on the head. The police came to the scene and collected the body and arrested Zakayo Murungi as a suspect.

6. **PW 3** further added that he knew Zakayo who is a resident of Kiegoi which is in his jurisdiction. The deceased married a girl from his location and he had called him to his office to warn him because he had been stealing trees and selling them elsewhere. The deceased was a habitual thief as he had stolen arrow roots and there was a time he stole a cow from his mother in law

7. **PW4 JUSTUS MUGAMBI** testified and told the court that he is the assistant chief of Ngundune sub location and has been an assistant chief for 21 years. On 4<sup>th</sup> November 2016 he was in the office when Zakayo Murungi came and reported that Mwiti was reported to have stolen his trees. While Zakayo was still in his office the chief called and informed him that there was someone who had been found dead in the forest. PW4 suspected that the deceased had fought with Zakayo as he was in his office with a panga. Zakayo also had an injury on the forehead at that time.

8. **PW4** together with the village elder and the chief they proceeded to the scene. They found that it was Mwiti who had died. The chief made a phone call to the OCS at Maua Police station and the body was collected and taken to the mortuary. The deceased was known to him as he hailed from Tigania he got married to Rose who hailed from Mboone. He also settled domestic disputes between the deceased and his wife. The accused is also known to him as he had told him severally he had caught Mwiti stealing his trees. However, it came out in cross

examination that the accused complaint was not recorded.

9. **PW5 PATRICK MWIRIA** No. 76883 testified and told the court that he did not investigate the case but he knows Inspector Shadrak Mumo who investigated the case. Inspector Shadrak Mumo was however transferred to Lamu. PW5 is however conversant with this matter. On 4<sup>th</sup> November 2016 he was in the office when inspector Mumo instructed him to accompany him to the scene of the crime. The body had a deep cut on the left leg behind the knee and there were bruises on the face. They then took the body to Meru Level 5 Mortuary.

10. **PW5** on inquiry as to why the accused had been arrested the chief told him that the accused had gone to the office to report a case of assault where he alleged that on the night of 3<sup>rd</sup> November 2016 2 men went to his house and asked him to sell them cigarettes which he said he did not have. That when he came out of the house he was hit on the face and he started bleeding, that's when he started screaming for help and his neighbours including one thairu responded. The issue between the accused and deceased was that the accused alleged that the deceased stole his trees.

11. During Cross Examination PW5 stated that the panga which was recovered is the one the accused person went with to the chief's office when he was reporting the assault.

12. **DW1 ZAKAYO MURUNGI** told the court that he knew PW4 as he is the assistant chief who arrested him. He met the assistant chief on the road to Kathera where he was going to fetch grass for the cows. He was carrying a panga rope and a bag. He snatched the panga then hit him on the head which started bleeding. This wasn't the time that he made a report about Ayub stealing his trees. That he did not know Ayub nor did he kill him. That Rose Karambus house is 1Km from his house.

13. Upon consideration of the evidence on record for the prosecution, the evidence by the accused and the defence counsels written submission, the issues for determination are:-

- a) Fact of death
- b) Cause of death
- c) Whether cause of death resulted from an unlawful act and/or omission
- d) Whether the unlawful act and/or omission was actuated with malice aforethought.
- e) Whether accused person has been proved to be the one who committed the unlawful act with malice aforethought.

14. The fact of death of the deceased is not disputed. All the prosecution witnesses alluded to the fact that deceased died and PW1 Dr Muturi produced a Postmortem report in which he opined that the deceased died as a result of a sphyxia due to possible strangulation of the neck. The deceased also had sharp penetrating cut wound bone on the left leg. The deceased also had sharp cut wound involving the skin on the left side of the back.

15. The deceased persons body was found in the forest 25 minutes walk away from the homestead. PW2 said that one Kaithuria told her that Mwiti was found stealing trees and that he had escaped. PW2 said they found the body abandoned in the forest in another village.

16. According to PW4 Assistant chief of Ngundune sublocation the accused went to his office while armed with a panga and reported that Mwiti was reported to have stolen his trees and that they fought and Mwiti Disappeared in the forest. While Accused was still in his office, PW3 the Chief of Kiegoi Location called and asked him to go and accompany him to scene where a body had been recovered in Luguene sublocation. In company of village elder and accused PW4 proceeded to PW3's office and went to where the deceased body was and found it was Mwiti whom accused claimed to have fought with.

17. PW4 said that it was 1<sup>st</sup> time accused was reporting that deceased had severally stolen his trees. PW4 said that the only dispute he had resolved was between the deceased and his wife PW2.

18. PW3 testified that when he got a report of a body found dead in Lubwene Village and proceeded there in company of PW4 and accused who had made a report to PW4, they identified the body as that of Mwiti. Although the accused person denies having killed the deceased, he went on his own while armed with a panga to report to PW4 that he had fought with Mwiti who had formed a habit of stealing his trees and that Mwiti had escaped into the forest.

19. When Mwiti's body was found in the forest a distance of about 25 minutes walk he had a deep cut on the left leg and he was strangled to death.

20. PW2 the wife of the deceased said that accused persons house/home is a cross the road from their house. It cant therefore, be true that the accused who reported having fought with the deceased didn't know him considering they are neighbours. The accused person didn't just cut the deceased. He took him/ or pursued him upto the forest and strangled him to death.

21. This court finds that although he may have caught the deceased stealing his trees, he used excessive force to terminate his life and in an attempt to conceal his unlawful actions took the body to the forest far away from home.

22. This court finds that the prosecution has proved beyond all reasonable doubt that deceased person committed the murder of Ayub Mwiti the deceased herein. He is found guilty as charged and is convicted under S. 322 CPC

**HON A. ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 4<sup>TH</sup> DAY OF JULY 2019.**

**In the presence of :**

C/A:Kinoti

Accused:- Present in person

Ms Mbithe for state

Mr Mokuu advocate for the accused

**HON A. ONG'INJO**

**JUDGE**

**Ms Mbithe**

I pray for a mention date for Records.

**Order**

Mention on 11.7.2019 for records and Mitigation.

**HON A. ONG'INJO**

**JUDGE**