



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 168 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**JOSEPH MUSYOKA MBITHI.....1<sup>ST</sup> ACCUSED**

**AMOS MUYA KIMENGEI.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. The 2 accused persons were charged with –

**Count I:** Murder contrary to section 203 as read with section 204 Cap 63 Laws of Kenya.

2. Particulars being that on 10/9/2014 at Mbuvo village Kethwonzeni District, Makueni County murdered **Albanus Maingi Mwendo**.

3. **Count II:** They are charged that on the same date, time, and place, they murdered **Patricia Syombua**.

4. They pleaded not guilty and matter went into full trial.

5. On close of prosecution case, the 2 accused persons were placed on their defence and they tendered sworn statement but called no witnesses. Prosecution case was set to be proved by 4 witnesses.

**Prosecution's Case:**

6. **Josphat Mutinda (PW1)** gave evidence that he received a text message from his brother saying that Maingi Mwendo had been attacked by thieves and when he came out he heard noise from Maingi's home that he called the chief (Amos Mukolo) and the Assistant Chief (Joseph Mutuku Musyoki) and then since there was darkness he could not see, he then proceeded to Maingi's home and they found the chief and also police officer from Mbuvo also arrived and on arrival they heard small vices from the house of the deceased and police officers confirmed that the deceased persons are dead. He did not find any child within the house he said he don't know 2<sup>nd</sup> accused.

7. **Samuel Wambua Maingi (PW2)** gave evidence that he knows one Pauline as is his aunt and when they were asleep thieves went and they entered, killed his parents and they left and in the house he saw three people and one was wearing white clothes and the others were wearing black and they demanded money from him and when they did not get the money they left. He said he saw one a bodaboda man at Mbuvo. He said he has never seen the 1<sup>st</sup> accused and does not know him.

8. On cross examination he said he never gave any description to the police in his statement. He gave evidence that he was called out at Machakos Police Station accompanied any his aunt and they were shown two people.

9. **Pauline Ndungwa Mwendo (PW3)** gave evidence that she works at Mbuvo market at her brother's shop the deceased and on 9/9/2014 and while asleep she was awoken by noises at around 12.00 pm. The windows were being broken. She was sleeping at a different house from his brother's but on the same compound and she called the Assistant Chief.

10. She stayed until PW2 came to his house and told her to open for him and he told her that people were beating his father but they have left. He told her that he has known one as bodaboda man and when she peeped through the window she saw neighbours and the police. She gave evidence that she did not understand the child at that time until the account brought Sub-Chief at their home. She explained to the child that the child has claimed he saw 2<sup>nd</sup> accused. She gave evidence that the 1<sup>st</sup> accused is unknown to her then police officers talked to the child.

11. On cross examination she gave evidence that the child told her that one was a bodaboda man and when the 2<sup>nd</sup> accused brought the Assistant Chief then she explained what the child was alleging to the Assistant Chief.

12. **Josphat Kiptanui Langat (PW4)** gave evidence that formerly was a police officer attached to Kathonzweni Police Station and was the investigating officer and on 10<sup>th</sup> September 2014 he was informed by OCPD that there was robbery incident at a place called Mbuvo and they proceeded to the scene and at the scene they found police officers. They secured the place. They entered through the window and they saw two bodies lying on the floor. They called scene of crime officer and when they entered they found that the man had bullet wounds at the forehead.

13. The young boy (PW2) did not mention any name to them and then they commenced investigations and on the following day they were called by one Pauline Mwendwa who informed them that she has seen one of the assailants. Then the Assistant Chief gave them the telephone number of the rider then they followed through that number and arrested the 2<sup>nd</sup> accused. He then produced the postmortem form, the parade identification forms. He said that he don't know why the 1<sup>st</sup> accused was arrested.

#### **Defence Case:**

14. The 1<sup>st</sup> accused **Joseph Musyoka Mbithi** gave sworn evidence he testified that he was arrested by unknown people for unknown reasons and taken to Makueni Police Station and was charged before the court for unknown offence. He gave evidence that no witness mentioned him in court. The investigating officer did not explain to the court why he arrested the 1<sup>st</sup> accused.

15. On cross examination he testified that he does not know the deceased herein and that on the material date he was at home and he don't know how to ride motorcycle and he never reached the scene of crime and even he don't know the place and that he was never involved in any identification parade and he came to know the 2<sup>nd</sup> accused in court when they were charged with this offence.

16. The 2<sup>nd</sup> accused **Amos Muya Kimengei** gave sworn evidence. He testified that on 9/9/2014 he had gone to a school to do his photograph work and the following day 10/9/2014 at about 6.00 am he heard over radio that a prominent business man has been killed and he saw people passing and he joined them at the market who were going to the home of the deceased. When they arrived they found people and police officers.

17. On 13/9/2014 at about 9.00 am while at his place of work the Area Sub-Chief asked him to get a motorcycle of his employer to take them to the home of the deceased and prior to that date they were not in good terms with the Area Chief and when he took the Area Chief to the deceased's home the Sub-Chief requested for his phone number to enable him call him later to take him home and he gave the Area Sub-Chief his phone number.

18. He gave evidence that while at his work at the school he had gone to do phot taking someone called him with a strange number and when he went to his place of work he was put in a police vehicle and the police asked him to take them to his home and when the investigating officer was giving evidence he said the number that was given to him by the Area Sub-Chief to call the accused he gave evidence that nothing was recovered from his home and at the police station the police officers demanded bribes to release him and since he had no money the 5<sup>th</sup> day of his arrest he was charged with the offence before the court.

19. He gave evidence that PW2 alleged in court that he know him but in his witness statement recorded by the police he never informed or record that he knew any of the assistants also he never gave any description in his witness statement and when an identification parade was conducted three times and no one picked him, and the police officer who conducted the parade never came to court to testify. The PW2 witness statement was produced as defence exhibit 1.

20. He gave evidence that the investigation officer testified that the deceased had a gun shots but he don't know how to use a gun and he denied that he is a bodaboda man and he don't know the PW2 and the PW2 said he came to know the 2<sup>nd</sup> accused at Machakos Court.

21. On cross examination he testified that he knew the deceased as a prominent businessman and the distance between his place of work and the deceased's shop is about 200m and before he did not know the deceased's home and he knew his home on 10/9/2014 when he did follow people to know the person allegedly announced over the radio and he had been a photographer for more than 2 years and he came to know the 1<sup>st</sup> accused at Machakos G.K. Prison and he can't remember the last time he talked through his phone and he carried the chief for the first time that day. He gave evidence that he know how to ride a motorcycle but he don't do bodaboda business.

22. The parties agreed to put submissions but only accused put same.

#### **Accuseds' Submissions:**

23. Accused side submitted that the prosecution has not made out its case against them to prove beyond reasonable doubt that the accused persons are responsible for the murder. The accused persons submits that they did not bear any legal burden in respect of the essential ingredients of this offence but it is on the prosecution to prove beyond reasonable doubt that they are responsible. They relied on the case of **Woolmington vs DPP ALL ER 1 AC 462 (HL)**.

24. They contend that they were not at the scene of crime at the time of murder. That their identity at the scene of crime is important in that an accused person should be placed at the scene armed with motive means and opportunity. This has not been done in this case.

25. The 1<sup>st</sup> accused submit that the time he came to meet the 2<sup>nd</sup> accused was at Machakos G.K Prison when they were already charged with this offence. Their cases were later consolidated. The 1<sup>st</sup> accused submits that he was arrested and no reason was ever explained to him or the

court when he was arrested.

26. The 2<sup>nd</sup> accused evidence is that he was asked by the Area Chief to give him his phone number for purpose of contacting him to give him a lift from the deceased's home and the same number was given to the police and later was arrested.

27. He submits that there was no evidence totally that placed the accused persons at the scene of crime neither was there any eye witness account to affirm that position.

28. He cites **Woolmington case**, where the court observed that just as there is evidence on behalf of the prosecution there may be evidence on behalf of the prisoner which may cast doubt as to his guilt. Neither case, the prisoner is entitled to the benefit of doubt. But while the prosecution must prove the guilt of the prisoner there is no burden laid on the prisoner to prove his innocence and it's sufficient for him to raise a doubt about his guilt. He is not bound to satisfy anybody of his innocence.

29. It is the accused submits that there were a lot of gaps that have been left from the evidence adduced in court. There is no evidence that shows they were at the house of the deceased on the material date. That it is not their duty to fill the gaps since the burden of proof never shifts to the defence. They rely on the case of **Miller vs Minister of Pension [1947] 2 ALL ER 372, 373.**

30. They further submit that for the court to convict them on circumstantial evidence there must be evidence that points irresistibly to them to the exclusion of any other persons. They cite the case of **Kipkering Arap Koske vs Republic [1949] 16 EACA 135.**

31. The accused thus submit that these circumstances have not been met in the case against them so as to warrant their conviction.

32. They submit that, the allegation by the witness that the 2<sup>nd</sup> accused was a bodaboda man and he was taking PW2 to school was not proved. The dates when he took PW2 to school as alleged was never disclosed. The school to which it is alleged he was taking the PW2 was never disclosed. It was never proved that the 2<sup>nd</sup> accused is a bodaboda man. The motorcycle registration number that was being used for the bodaboda purposes was never proved.

33. The circumstance that the 2<sup>nd</sup> accused once feasted a goat ago at the deceased's home was not proved. The date was never given and there is no connection with the 2<sup>nd</sup> accused to the deceased.

34. Further no evidence was adduced as to why the 1<sup>st</sup> accused was arrested. His connection to this case was never explained. The accused persons further relied on the case of **Teper vs Republic [1952] AC 480 at 489.**

35. PW2 testified in court that he identified a person by the name Amos as one of the assailants. They submit that PW2 had not made a report as to the description of the accused. The 2<sup>nd</sup> accused produced the witness statement of the PW2 to the police and in that statement PW2 never mentioned the name Amos or given any description of the alleged attackers to the police. Further the name Amos is a common name. The description of a bodaboda man is also common as there are many people who are known as Amos bodaboda men.

36. Further although the investigation officer talked of identification parade, the PW2 never gave evidence that he identified the 2<sup>nd</sup> accused in a parade. His evidence is silent on what he told the police also description or identify of any of the people who he alleges he saw. Such report is crucial in testing the correctness of the identification of the accused and such evidence is lacking in this case.

37. The witness who conducted the identification parade never testified and since PW2 never talked of participation in an identification parade, there is doubt. The 2<sup>nd</sup> accused testified that no one picked him from the parades and he never signed any form of identification parade.

38. They submit that if PW2 had noted any special mark on the assailants (2<sup>nd</sup> accused) he should have described it to the police and/or recorded it in his statement. His failure to do so meant that he was not sure of what he was telling the court.

39. Further PW3 told the court that 2<sup>nd</sup> accused was seen by PW2 when he brought the chief to the deceased's home. Then they purport to have conducted a parade. The parade was not safe as there is framed up case.

40. The evidence of PW2 in court is silent as to whether he positively identified the 2<sup>nd</sup> accused.

41. In this case there is no other evidence produced (circumstantial or direct) that could not be relied upon to support the guilt of the accused and there is no sure of the identity of the person who committed the offence and they submit there is need for testing with the greatest case the evidence of PW2 regarding identification.

42. The nature of light available was never ascertained and since the PW2 failed to give some description or identification of his assailants to the police there is doubt.

43. They submit that the evidence of the single witness of PW2 should be put into test as there is no other supporting evidence pointing to the guilt of the accused.

44. The prevailing circumstance of identifying accused also do not rule out possibility of external influence on the PW2 as this was done before many people who had gone to the home of the deceased and when 2<sup>nd</sup> accused took the chief allegations came that was the person the

PW2 was explaining to PW3 his aunt. The 2<sup>nd</sup> accused number was taken by the chief in pretext that he was to pick him but instead the 2<sup>nd</sup> accused number was given to the police who arrested the 2<sup>nd</sup> accused.

45. The accused also gave a defence of alibi that at the material date he was at home. The prosecution did not displace the defence of alibi and did not show that the accused were present at the scene of crime and at the time the offence committed the only evidence of PW2 which as analyzed above raises doubt as to possibility of error and which does not dislodge the accused persons defence.

**Issues for Determination:**

***i. Whether the prosecution at the close of the case has proved its case beyond reasonable doubt.***

***ii. Whether the prosecution failed to call essential witnesses.***

***iii. Has the circumstantial evidence adduced met the standards that such evidence must meet to form the basis of conviction.***

***iv. Whether the identification evidence is doubtful as the PW2 had not given a description to the police.***

46. The 3 ingredients of murder are set out in case of **Anthony Ndegwa Ngari vs Republic (2014) eKLR**, the court found the elements of the offence of murder to be:

***(i) That the death of the deceased occurred.***

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

***(iii) That the accused had malice aforethought.***

47. Also in the case of **Republic vs Titus Mbia Singi** the court held that these are the crucial ingredients of the offence the prosecution was required to prove the same beyond any reasonable doubt in the instant case.

48. The accused persons do not bear any legal burden in respect of the essential ingredients of this offence but it is on the prosecution to prove beyond reasonable doubt that they are responsible. See the case of **Woolmington vs DPP ALL ER 1 AC 462 (HL)**.

49. On the first ingredients of murder offence, the officer 11. Josphat Kiptanui Langat (PW4) who was the investigating officer testified and produced the postmortem reports which showed the cause of death of the 2 victims of murder subject herein.

50. The same was produced by consent of both sides as occurrence of death was not contested. In any event the officer also visited scene and saw the same 2 bodies which they collected and took to the mortuary. Thus the first ingredient of murder was proved beyond reasonable doubt.

51. On whether the accused persons committed the unlawful act which caused the death of the deceased persons, is the core bone of the matter in the contest herein. The only eye witness identification of the attackers and especially of identification of Accused 2 is the epicenter of the contest.

52. According to Samuel Wambua Maingi (PW2) in the material night while asleep thieves entered their house, killed his parents and they left and in the house he saw three people and one was wearing white clothes and the others were wearing black and they demanded money from him and when they did not get the money they left. He said he saw one a bodaboda man at Mbuvo. He said he has never seen the 1st accused and does not know him.

53. On cross examination he said he never gave any description to the police in his statement. He gave evidence that he was called out at Machakos Police Station accompanied by his aunt and they were shown two people.

54. Pauline Ndungwa Mwendu pw3 sister to pw2 late father testified that, the child had claimed that he saw 2nd accused. She gave evidence that the 1st accused is unknown to her then police officers talked to the child.

55. On cross examination she gave evidence that the child told her that one was a bodaboda man and when the 2nd accused brought the Assistant Chief then she explained what the child was alleging to the Assistant Chief.

56. Joseph Kiptanui Lagat pw4 testified the young boy (PW2) did not mention any name to them and then once they commenced investigations, on the following day they were called by one Pauline Mwendu who informed them that she had seen one of the assailants.

57. Then the Assistant Chief gave them the telephone number of the rider then they followed through that number and arrested the 2nd accused. He then produced the postmortem form and the parade identification forms. He said that he didn't know why the 1st accused was arrested. No other person mentioned the 2<sup>nd</sup> accused nor purported to identify any of the accused persons.

58. Both accused persons denied the offence and tendered defences of alibi. For accused No. 1, no witness has mentioned him and even investigating officer did not know why he was arrested thus he is exonerated from the commission of offence herein.

59. As for accused 2, we are having a scenario of visual identification .Thus we have to look at the parameters set by law on visual identification. The same in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:

**“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”**

60. In Nzaro vs Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

61. PW2 did not make a report as to the description of the accused nor give accused 2 names to the police. The 2nd accused produced the witness statement of the PW2 to the police and in that statement PW2 never mentioned the name Amos or given any description of the alleged attackers to the police.

62. Further the name Amos is a common name. The description of a bodaboda man is also common as there are many people who are known as Amos bodaboda men.

63. Further although the investigation officer talked of identification parade, the PW2 never gave evidence that he identified the 2nd accused in a parade. His evidence is silent on what he told the police also description or identify of any of the people who he alleges he saw. Such report is crucial in testing the correctness of the identification of the accused and such evidence is lacking in this case.

64. The witness who conducted the identification parade never testified and since PW2 never talked of participation in an identification parade, there is doubt. The 2nd accused testified that no one picked him from the parades and he never signed any form of identification parade.

65. On the validity or otherwise of an identification parade, I rely on the pronouncement in John Mwangi Kamau vs Republic (2014) eKLR where the Court of Appeal held as follows:

***“Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu vs Republic – Criminal Appeal No. 68& 69 of 2008.***

66. In sum the court finds that the second ingredients of murder has not been proved beyond reasonable doubt. That having failed there is no point of going into the second ingredient as same exercise would be moot.

67. Thus prosecution has failed in establishing the 2 of the ingredients of murder to warrant conviction of the accused persons. The court therefore makes the following orders;

***i) The accused persons are found not guilty and thus acquitted of the offence charged and are set at liberty unless otherwise lawfully held.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2019.**

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**C. KARIUKI**

**JUDGE**