



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO.97 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

TITUS MUTUA KILONZO.....1ST ACCUSED

RICHARD MBUVI KYENGO.....2ND ACCUSED

JUDGEMENT

1. The accused persons were 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 10/3/014 at Yikivumbu village, Kambu Sub-location, Kibwezi District, Makueni County, they both murdered Bernard Mbithi Mwongela.
2. The accused persons pleaded not guilty and matter went into full trial. After closure of the prosecution case the accused persons were both found to have a case to answer and thus put in their defence.
3. The prosecution called 11 witness.

THE PROSECUTION EVIDENCE SUMMARY

4. Rose Muthoki PW1 testified that she was the mother of the deceased. That on 9/3/014 she learnt that the deceased in the matter went with somebody's bicycle and left it at a shop and went to his aunt's place. Richard and Mwongela and his father went to look for him. The deceased came and stated that he left the bicycle at Machinery.
5. On 10/3/014, the deceased and the accused person went to collect it. When they came back the deceased was in bad state of health. His conditions worsened and in few minutes time he died. She reported to police at Mito Andei. The police came and collected the collected the body.
6. The postmortem was conducted to establish cause of death. Those who accompanied him to collect the bicycle were Titus Mutua Kilonzo and Richard Mbuvi. She pointed them in court as the two (2) accused persons (Accused 1 and accused 2 respectively).
7. In cross-examination, she said that the deceased had slept at Mwalimu Musyoki's home the previous day. He had earlier gone with his brother Mwololo and Mawiya Musau. The witness saw him the following day. He appeared assaulted. She was told he was diarrheating. He did not talk to her as he could not talk. She saw him before he passed on. His body was at Musyoka Nganda's place.
8. Mwikali Musyoka told witness to carry the body to her (witness) home. The police collected deceased body at witness home. On re-examination she said he died at Nganda's home. The police found body at her (witness) home as she was directed to carry her child's body to her home.
9. PW2 Jane Kasisi David, sister to PW1 testified that on 4/3/014 the deceased visited her and stayed while in company of Richard Kyego. He stayed for one week. He did not state why he went to her place. He had been chased from school. He was in good health. Later she got a call that he passed on. Richard is Accused No. 2. Prior to leaving her place the deceased was not vomiting or diarrheating.
10. PW3 Elosy Kiende a nurse incharge of Kilimani Dispensary Kibwezi East. She testified that on 10/3/014 at 10.00 am while at work, deceased in company of a man claiming to be his father (identified in court as Accused 1) Titus Mutua, went to the clinic. He told her that while on their way to Machinery Market the boy (deceased) started vomiting.

11. She examined him and noted he was foaming on the mouth. She referred him to Kibwezi Sub-County Hospital. She also noted he had been injured and had been vomiting. Later after 2 days police informed her the boy had died. On cross-examination, she stated that they boy was vomiting and she did not see physical injuries. The blood pressure was high. He said he had not been beaten.
12. PW4 Benedict Mule Nyamai, a hotel operator at Machinery stated that on 10/3/012 while at work he found a bicycle left outside his hotel. He decided to put it in his hotel for a night so that the owner could collect it next day. He had kept it from previous night to 10/3/012. On 10/3/012 Accused 2 told him he was looking for a bicycle.
13. He was in company of Accused 1 and a boy (deceased). He went inside hotel to take bicycle out. He noted the boy was standing near a tree and was unwell and vomiting. The witness told Accused 2 to take him to hospital. They left. Later he learnt that the boy had died. On cross-examination, he said he saw boy vomiting. He did not talk to him.
14. PW5, Benedict Musivia Nganda a teacher testified that he had employed deceased on 28/1/014 but he stayed only for 1 day. He left him at his home and went to Kijabe where he had clinic on 14/2/014. The deceased was sent by one Kimani, using a bicycle but never came back. This he was told by his son.
15. On 28/3/014 he went back home. He called deceased's brother and asked him to inform his father that deceased was not at his home and that he wanted his bicycle back. The father said that he be given some time to follow up the matter. On 9/3/014 the village elder advised parents of deceased to come to his home.
16. They came with elder called Mwololo who informed him that the boy was in Makindu at his father's sister. Two (2) people of Policing Community, Richard Mbuvi Accused 1 and Mutua Accused 2 were sent the next day to go and collect the bicycle. At 11.00 am Richard came back with bicycle and informed him that the deceased had fallen sick and was hospitalized at Kelimani Health Centre.
17. At 2.00 pm the deceased came back accompanied by Accused 1 and his brother. He was weak and could not talk. He rested at witness home 3-4 hours, and at 4.00pm his conditions worsened and died in his house. He was later taken to the mortuary.
18. Police later came to his home. On cross-examination he stated that he did not know whether Accused 1 and Accused 2 assaulted him. When the boy came home he was vomiting. The witness did not see physical injuries.
19. PW6, Francisca Mwikali Musyoki testified that, the deceased was her employee. He used to herd her animals (cows). On 27/1/014, he had agreed with his parents to allow him work for her. On 8/2/014 they came back as she had gone with her husband, PW5. Her husband PW5, told her the boy escaped and went away with the bicycle. The next day the boy's father and village elder came to her home.
20. The village elder sent Community Policing group to search for the deceased. Through deceased's brother he (deceased) was traced at Makindu. He said the bicycle was at Machinery market. The next morning the boy and community policing people went for the bicycle. Richard and Mutua and deceased had gone for the bicycle.
21. On return to her home Richard reported that the boy was vomiting and diarrheating, and that he left them having gone to see a doctor. Accused was left in hospital/dispensary. His brother Mwololo proceeded to the hospital with clothing and he came back with the deceased.
22. He was weak. His mother covered him with a *leso*. The boy was vomiting whitish substance and died at about 4.00pm. The parents took his body to their home. She said Accused 1 and Accused 2 are her neighbors. On cross examination, she said his body had no physical injuries.
23. PW7, Paul Mawiro testified that on 9/3/012 he was in a village elder meeting when Richard Accused 1, was sent to look for Mwololo, deceased's brother to explain where deceased was after he had escaped with a bicycle. He went with Richard.
24. On 10/3/014 they got Mwololo at Machinery. They went back with him to village elders at Musyoki Nganda's home. He said the boy was in Makindu. They went for the boy and came back at night with him. He spent at night at Musyoki Nganda's home. He was fine then. In the morning he was told that Richard, Mutua and the boy went for the bicycle.
25. They came back at 2.00pm. Richard called the witness and told him they got the bicycle and the boy was sick and vomiting. When Richard brought bicycle he said that the boy was in hospital. Later Mutua, boy's brother Mwololo, and the boy went back to Nganda's home.
26. Then elders said they could not talk until the boy was well. He left the boy at Nganda's home. At 4.00pm he was called by Nganda who told him to go back. He informed him that the boy had died. On cross-examination he said he did not see injuries on the boy.
27. PW8, Alice Wambua stated that on 11/3/015 she got an SMS text from Funeral Chairman (Daniel) of the area. She went and found his wife who told her the son had passed on. She went to Mwangela's home and was told what had happened. She also saw his body.
28. PW9, Mwangela Kilonzo, father to the deceased stated that his son had visited his aunt and later learnt he had escaped from school. He found him at his (witness) sister. When he took him home, he was fine. He learnt of a bicycle which was missing. He said he had taken it and he took him where it was, then got it and went back with it home.
29. He later learnt that he was unwell and was vomiting. He deceased collected the bicycle while he was vomiting and he appeared sick. They took bicycle to Musyoki home and that's where he continued vomiting and later died.

30. He witnessed postmortem exercise and doctor told him that he had 3 broken ribs. He said injuries were caused by blunt object used to beat him. He also told him the genitals had been injured.
31. PW10, Meshack Nzioki, Medical Officer of Health Makindu hospital testified and produced postmortem report by his colleague Doctor Douglass Makali who was on study leave in Moi Referral Hospital. On examination by the doctor it was noticed that the skull had depressed fracture, fractured 3rd, 5th and 6th ribs, rupture of the spleen, there was blood in chest and abdominal cavity and hemorrhage in brain. The cause of death was due to hemorrhage due to trauma.
32. PW11, Patrick Nguyo, Officer in DCIO Office stated that he visited murder scene and home of Mwongelo in respect of deceased herein. He found the body and observed that it had bruises backside and chest. Photographs were taken. He began investigation.
33. He recorded witness statements. He learned deceased was a worker of Musyoka Nganda. He gathered information from the witness which enabled him to mount the charges the accused are facing. He was the Investigating Officer.
34. When prosecution closed case the court ruled that the accused had a case to answer. They both tendered sworn testimonies but non called witnesses.
35. Accused 1 stated that he was a member of Community Policing group that on 10/3/014 they were sent by elders to collect bicycle at Machinery. They went him, PW2 and Accused 2. They found it at PW4 place.
36. There and then the deceased who was with them started foaming. The father said they take him to hospital. He was taken to Kelimoni Dispensary. This time they were him, deceased, Richard, and Mwongela PW9. He was still foaming. He was treated and referred to Kibwezi hospital.
37. They went to Nganda's place. They were told parents will take him to hospital. So they left i.e. accused 1 and accused2 and went home. Later 6.00 pm they got a call saying they go back as there was a problem.
38. On arrival he was told to call his co-accused they assist deceased father to take him to their home. He told his co-accused that it was police case. He went home. He was later arrested and charged.
39. On cross examination, he said that when they were going for the bicycle, the boy was in good condition but when picking bicycle his health deteriorated. PW4 told them to take the boy to hospital. When at dispensary, the boy said he was not beaten.
40. DW2 Richard Mbuvi stated that on 10/3/014 they were sent to collect bicycle by the elders. It was him, Accused 1, deceased and his father. They proceeded to PW4 place where on arrival the boy started foaming. PW4 told them to take him to hospital.
41. They took him to Kelimani Hospital. They entered but his father remained outside. They were referred to Kibwezi Hospital after doctor saw condition of the child. They went back to Nganda's home, where he died.
42. The elders said the cause of death had to be established. On cross-examination he denied interrogating the boy on the way to collect the bicycle. The conditions of the deceased developed at the Machinery place at PW4 Place.
43. At the close of the defence, no party offered or tendered submissions. Thus court proceeded to prepare judgment.
44. After going through the evidence on record, I find the singular issue for determination is; **whether ingredients of murder have been established?**
45. In the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR the court held that the elements of the offence of murder are as follows:
- (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.**
46. From the evidence on record, it is not denied that the deceased died. All witnesses concede that. PW10 the doctor produced the postmortem report and testified on observed various injuries on examination of the deceased body.
47. Same were occasioned by blunt object, thus the deceased died due to hemorrhage trauma due to the beating and infliction of injuries noted. Thus, the first ingredient of murder has been established.
48. On the second limb of ingredients, the court looks at the facts which may connect accused persons to the infliction of the injuries which occasioned death of the deceased.
49. It is not denied by accused persons that on 10/3/014 the 2 accused person and the deceased left to go to collect the bicycle at Machinery. The deceased had no problem and was fine. He was in good conditions. He had spent at home of Nganda.

50. While at Machinery, PW4 place, where they were collecting the bicycle, PW4 noted that the boy (deceased) was unwell. He was vomiting. He told accused persons to take him to hospital. The Accused persons said that they took the boy to the nursing home where his conditions were noted to be serious. Thus, they were referred to Kibwezi hospital.

51. However they took him home (Nganda's place) instead of taking him to Kibwezi hospital. He later on died that day in the home they had taken him. Between the time they left to go for the bicycle and arriving at Machinery place to collect the bicycle, the 2 accused persons never stated what transpired yet they never parted company with deceased.

52. They started the journey while he was in good conditions. Thus, then the injuries noted by the doctor must have been inflicted in the course of the journey to Machinery. There was no eye witness as to what happened to the deceased. Thus the court employs the elements of circumstantial evidence to determine who possibly occasioned deceased injuries.

It is trite law that circumstantial evidence must satisfy the three test laid in the case of Abanga alias Onyango vs Republic Cr. Appeal No. 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 circumstantively, should form a chain so complete that there is no escape form the conclusion that within all human probability the crime was committed by the accused and none else.**

53. In another case of Republic vs Kipkering Arap Koske & Another 16 EACA 135, regarding circumstantial evidence the court held that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”

54. The prosecution case shows that no other than the accused persons who equally had the opportunity to occasion the injuries which occasioned the death of the deceased. The prosecution witnesses and defence testimonies did not exonerate accused persons from suspicion of having committed the act inflicting noted injuries, thus leaving the evidence pointing unerringly towards guilt of the accused persons.

55. The noted injuries in the circumstance must have been inflicted by the 2 accused persons. The court thus holds that the circumstance of the infliction of the injuries points at the 2 accused persons and no other person. The infliction of injuries was unlawful and thus the 2nd ingredient of murder has been proved.

56. As to whether there was malice aforethought, Section 203 of the PenalCode provides:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

57. Section 204 provides that, **“any person convicted of murder shall be sentenced to death.”**

58. Section 206 on Malice aforethought states:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

59. The injuries inflicted were very severe namely the skull depressed fracture, fractured 3rd, 5th and 6th ribs, rupture of the spleen. These were grievous harm and in terms of the provision of the Penal Code above fit within the definition of malice aforethought elements above.

60. There was no justification to visit the boy such injuries yet the bicycle had been known of its whereabouts. The callous acts by the accused persons were brutal and cruel and no wonder deceased was not talking but foaming and vomiting. Instead of talking him to the hospital as referred by the nurse at Kelimoni nursing home, they took him to Nganda's home despite being informed that he was in bad conditions.

61. Thus the court finds that the offence of murder has been established beyond reasonable doubt and the accused are accordingly found guilty and convicted. They shall be sentenced after mitigation.

62. Thus court makes the following orders;

i. The accused persons are here by convicted of murder.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE