



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 103 OF 2013 CONSOLIDATED WITH CRIMINAL CASE NO. 108 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

MOSES MAINA GICHUKI.....1<sup>ST</sup> ACCUSED PERSON

SAMUEL MURIUNGI.....2<sup>ND</sup> ACCUSED PERSON

JUDGEMENT

1. On 3<sup>rd</sup> March 2014 Criminal Case No. 108 of 2013 was consolidated with this case the substance of the charge and facts of the case being the same. On 30<sup>th</sup> June 2015 the prosecution made an application to have a *nolle prosequi* entered in respect to Asman Hamisi Kimathi. The same was adopted and charges against Asman Hamisi Kimathi were discharged.

2. The accused persons herein have been charged with the offence of Murder contrary to section 203 as read with section 204 of the Criminal Procedure Code.

3. The particulars of the offence are that between 29<sup>th</sup> November 2013 and 5<sup>th</sup> December 2013 at Ngusishi village, Ngusishi sub-location, Buuri District within Meru County jointly with others not before court murdered Joseph Kithinji.

4. The prosecution presented ten (10) witnesses in support of their case.

5. **Pw1 Esther Wangari Mbaabu** testified that she had employed the deceased herein as a watchman to guard his premises. That on 29<sup>th</sup> November 2013 she called him severally since he had not arrived at the home. She waited until 9:00 p.m. and later sent a lady worker to look for him at his house. He called his phone No. 0723823037 but he did not pick up. On the third day she received a voice call from a person not known to her asking whether she had received his message. She told him she had not received the same and therefore needs time to retrieve it. In the message she said, stated that she should give the caller Kshs. 500,000/= or they will kill him.

6. She stated that she received several phone calls on diverse dates between 9<sup>th</sup> November 2013 to 5<sup>th</sup> December 2013 both from the deceased phone number and from telephone no. 0753891648.

7. It was his testimony that on 5<sup>th</sup> December 2013 she received a phone call from the same person and was told; '*Mama enda uchukue zawadi yako kwa ile nyumba yamawe.*'

8. At the time she had a worker called Kinyua who she sent to the house. She told the court that Kinyua later informed her that he had found Kithinji (the deceased) but he was dead and there was a lot of blood on the wall of the house. She later called the Chief and told him what had happened. When the chief confirmed what had happened she reported the matter to Timau Police station and escorted the Police officers to the scene of the crime.

9. It also her testimony that there were severe injuries on the face of the deceased. She identified the clothes the deceased wore at the time they found him as checked shirt MFI-1 and jacket MFI-2. She was later to be called and informed by the police that they had recovered the deceased phone and knew the person who killed him. She proceeded to the Police station and identified the 1<sup>st</sup> accused person who would come for casual employment in his premises.

10. On cross-examination he testified that the 1<sup>st</sup> accused person was close to his son. That he informed the police officers upon his arrest that he used to send other casual workers so as to establish where she was before he could send the messages.

11. **Pw2 was Samuel Maina Mwangi** he told the court that on 5<sup>th</sup> December 2013 he was at this shop when the 1<sup>st</sup> accused person came and

requested him to transfer money to his wife, Judith Baari. That at the time the 1<sup>st</sup> accused person did not have any money so he offered a mobile phone Nokia 1280 Black in colour as security. That he put his sim card to confirm that the mobile phone was working then removed the same. On the next day the 1<sup>st</sup> accused person refunded him the amount he had sent to his wife (KSH.545/=) and he remitted back to him his phone. The police officer however came to his work place on 17<sup>th</sup> December 2013 and arrested him. He was interrogated and he informed them that it is the 1<sup>st</sup> accused person who had given him the phone. He was later called upon on 20<sup>th</sup> December 2015 following the arrest of the 1<sup>st</sup> accused person and was requested to identify the phone which he did.

12. He stated that he identified the phone; Nokia Make 1280 black in colour out of three phones issued by the police officers.

13. In cross-examination he testified that he had known the 1<sup>st</sup> accused person and his wife for a short period of time. They were neighbours in the village where he resides. That the 1<sup>st</sup> accused person would sometimes come to his shop and share out monies paid out to them after uprooting carrots.

14. **Pw3 Elizabeth Waithera Ojiengo** was the Government Analyst attached to the Government Chemist Nairobi. She testified that on 11<sup>th</sup> and 17<sup>th</sup> December they received the following samples from Corporal Joshua Mula of Cid Buuri Division; A1- Sword, B2-Blood sample in a bottle indicated as of the deceased, B3- Soil in a Khaki envelope indicated as from the scene, B4- Jacket and stripped shirt in a polythene bag. On 21<sup>st</sup> January 2014 they received B5- indicated as taken from the accused person Samuel Muriuki Baari.

15. She informed the court that the soil sample was heavily stained in the blood whereas the jacket and knife were lightly stained. She conducted DNA on the items produced which revealed that the sample in the sword matched the DNA Sample of the blood of the deceased. The blood stains in the jacket soil and knife did not generate any DNA.

16. **Pw4 Sergeant Francis Musiani** attached to the Director of Criminal Investigation Imenti South narrated that they had received a report from Pw1 informing them of threatening messages which she had received from her telephone number. That the latest of the messages was received on 5<sup>th</sup> December 2013 when Pw1 was texted with the message; *‘Mama enda uchukue zawadi yako kwa ile nyumba ya mawe.’*

17. That they escorted Pw1 to the scene of the crime where they found the deceased murdered in a room upstairs. That they followed the foot prints that led to the home of **Asman Hamisi**. That **Asman Hamisi** was eventually arrested. A simcard and a blood stained knife was recovered from him.

18. He confirmed that the phone lines used to threaten Pw1 was +254 75391648 and the deceased number i.e. 0723823037.

19. In cross-examination he testified that he is not aware of the relation between the accused person and the charges herein.

20. **Pw5 Judith Karambu** testified that he is the mother to the 2<sup>nd</sup> accused person and that her daughter, **Jane Rose** was in a relationship with the 1<sup>st</sup> Accused person. That she had given her daughter her Identity card with which she could register her phone line. That they frequently conversed over the phone. That her daughter and son informed her that they were arrested because of the 1<sup>st</sup> accused person using Jane Rose’s phone to make calls using Sim card that belonged to the deceased.

21. **Pw6 Peter Mbatha** testified that he received the following exhibits from Corporal Joshua Mola; A1-Nokia 1280 phone IME No. 35457705235682, A2- deceased’s simcard No. 89254092341005040169 pin 4911, B1- accused simcard No. 892540295519925 no.84205, B2- Handset, Dual sim Techno used by the accused withdrawal S/NO. 865092013563011 and 865092013563029 with line 2 Pin 3312 and Line 1 Pinless.

22. It was his testimony that they extracted messages from the sim cards and phones between 30<sup>th</sup> November 2013 and 19<sup>th</sup> December 2013. That there were no text messages in the mobile phone i.e. Nokia 1280 nor in the sim card attached to it. They however recovered messages from the accused person’s sim card and his mobile phone. He also recovered messages and outgoing calls from the Techno phone. He produced the Exhibit Memo and Forensic report as **Pexh 1 & 2** respectively.

23. **Pw7 Jane Rose Kagwiria** testified that she is a sister to the 2<sup>nd</sup> accused person and a friend to the 1<sup>st</sup> accused persons with whom they had a relationship. That she is also the owner of the techno mobile phone and bearer of a sim card registered in her mother’s name. That on 4<sup>th</sup> November 2013 she had given the 2<sup>nd</sup> accused person his mobile phone make Techno. The 1<sup>st</sup> accused person had the Nokia Mobile phone. That the 2<sup>nd</sup> accused person went out to make a call but he later came in with the police officers who arrested her and the 1<sup>st</sup> accused person. She told the court that both the accused persons frequently used his mobile phones but she was not aware of the nature of their conversations since they did the same in secret.

24. She confirmed that the 1<sup>st</sup> accused person had a sim card which he used and kept secretly. She confirmed that on 3<sup>rd</sup> November 2013 the 1<sup>st</sup> accused person sent her Kshs. 530/=. That the 1<sup>st</sup> and 2<sup>nd</sup> accused persons became known to each other just one week before their arrest.

25. **Pw8 was Dr. Kenneth Nguere** he was however not familiar with the medical officer’s report so he was stood down.

26. **Pw9 Sergeant Henry Omboga** testified that they tracked the phone of the deceased which was used frequently at 8:00 p.m. that they eventually arrested the 2<sup>nd</sup> accused person who equally had a knife in his socks. That the 2<sup>nd</sup> accused person led her to the 1<sup>st</sup> accused person who confirmed using the same. The 1<sup>st</sup> accused person similarly issued them the sim card of the deceased person. In cross-examination he confirmed that he tracked the 2<sup>nd</sup> accused person using phones used to send messages to the deceased. He stated that the phone is not the one in court.

27. He lastly stated that the accused persons killed the deceased because they wanted money from his employer. They had planned to kidnap the employer's only son and demand ransom.

28. He identified the Nokia 1280 and Ntke Techno as the ones presented in court and marked the same as **PMEI-1** **PMEI-2**

29. **Pw10 Joshua Otieno Mola** testified that he received a report from Esther Mbaabu of the demise of the deceased herein. That they proceeded to the scene of the crime where they found the deceased lying dead at a corner in a checked shirt (Pexh6) with hands tied at the back and his face covered with the cap of his jacket (Pexh7). That they later took the deceased to Nanyuki Referral Hospital and Mortuary. That before they left the scene they were given names of two suspects i.e. **Asman Hamisi** and **Moses Maina**. That they went to the house of Asman Hamisi where they recovered a somali sword (Pexh5). They subsequently arrested Asman Hamisi and charged him in this Honourable court.

30. That, Esther Mbaabu also reported that she was still receiving threatening messages being issued to her using the deceased phone. That they tracked the deceased phone. That the sim card being used was 0705028118 that of the 1<sup>st</sup> accused person. That the 1<sup>st</sup> accused person also used Techno phone registered in the name of Jane Rose. Jane Rose phone was registered in the name of her mother, Judith Karambu Bairu.

31. They subsequently arrested the 1<sup>st</sup> accused person and recovered a knife (Pexh9) from him. They also arrested the 2<sup>nd</sup> accused person. The mobile phone were also taken for examinations at the cybercrimes unit whereas a post mortem report was done on the deceased herein.

32. By consent of the parties the Post mortem Report (Pexh11) was produced by the Investigating officer, Pw9 the same indicated cause of death as penetrating head trauma with sharp object.

33. **Dw1 Samuel Muriungi Baariu** testified that he is a brother to Jane Rose Kagwiria. That he borrowed her sister's techno phone to make a call to his wife. That his wife was arrested and was informed to call him. That he later went to her house where he found five (5) police officers who asked him to take them where he got the phone. That he took them to his sisters house. His sister confirmed that she gave him the phone. He denied that he was arrested with the Nokia phone or that he had a knife at the time of his arrest. He also denied being familiar to the 1<sup>st</sup> accused person or being familiar to Aswami Kimathi. He also stated that he does not know Esther Mbaabu.

34. He told the court that he does not understand why he was arrested and the evidence adduced was similarly foreign to him.

35. In cross-examination he stated that he did not know that the 1<sup>st</sup> accused person was his sister's boyfriend. He also stated that he immediately returned his sisters phone to her at and at the time of his arrest he did not have the aforesaid phone.

36. To secure a conviction for murder, the prosecution must prove beyond reasonable doubt the following:

**(i) The death of the accused and the cause of death;**

**(ii) That the accused caused the unlawful act or omission which caused the death; and**

**(iii) That the accused had malice aforethought as defined under section 206 of the Penal Code**

**37. The death of the accused and the cause of death;**

The defence conceded that they do not contest the cause of death. The post-mortem report also reveals the cause of death as penetrating head trauma with sharp object. The cause of death was therefore established by the prosecution.

**38. Whether the accused committed the unlawful act or omission which caused the death of the deceased.**

39. The evidence that links the accused person Samuel Muriungi to the offence herein was adduced by PW9 Corporal Joshua Otieno Mola who said that while at the scene of the murder the chief and members of the public gave them the names of 2 suspects as Asman Hamisi who was initially the 1<sup>st</sup> Accused and who was discharged when Nolle prosequi was entered. PW4 and PW9 said that when they arrested Asman Hamisi the recovered a blood stained Somali sword from him and the said Somali sword was subjected to analysis in comparison to the soil from the scene of murder as well as blood sample from the deceased person. Exhibit P1 produced by PW3 Government Analyst showed that the DNA profile generated from the sword matched DNA profile generated from the blood sample indicted as of the deceased person. It was not explained by the IO or the prosecution why Asman Hamisi was discharged.

40. The 2<sup>nd</sup> Suspect that was mentioned by the Chief and the members of the public was Moses Maina – accused No. 2 who escaped from custody and was discharged under S. 87(a) of CPC. Moses Maina was said to be the boyfriend of PW7 who is the sister of Samuel Muriungi the accused person herein. It was claimed that Moses Maina was using the Sim card registered in his name in the deceased persons phone to threaten PW1 and in order to arrest him PW7's phone was tracked in custody of the accused Samuel Muriungi who led the police to his sister's house where Moses Maina was arrested from. According to PW9 on arrest deceased phone and Sim card were recovered from Moses Maina. PW8 and PW9 confirm that the accused Samuel Muriungi was found with Exhibit 9 a sharp kitchen knife in his socks and the said knife was also subjected to analysis but PW3 in her report Exhibit 1 says that several attempts to generate a DNA profile from the blood stains on the soil, the jacket and the knife were unsuccessful. PW6 produced mobile forensic examination report on behalf of Inspector Ezekiel Ade but he could not tell the court the kind of phone that the accused person had been using and could not establish in whose name the Sim card that they retrieved data from was registered. It is therefore apparent that the evidence against Samuel Muriungi is anchored on circumstantial evidence. In **Republic v Michael Muriuki Munyuri [2014] eKLR** the Court made reference to **Abanga Alias Onyango V.**

**Rep Cr. A No.32 Of 1990(Ur)** where the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

41. The evidence of the prosecution in this case squarely falls on the communication of the accused persons with Pw1 using the deceased mobile phone number and the techno phone owned by Pw7.

42. It is clear that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons interchangeably used the techno mobile phone.

43. The evidence of the prosecution however incriminates the 1<sup>st</sup> accused person. Pw1 reveals that he only knows the 1<sup>st</sup> accused person. The 1<sup>st</sup> accused person was mentioned at the scene as of the crime as a suspect. Pw7 also discloses that the 1<sup>st</sup> accused person was the owner of the Nokia mobile phone and that he secretly used a sim card not known to her. The prosecution established that the mobile phone and the sim card belonged to the deceased.

44. The evidence of Pw2 corroborates the possession of the deceased mobile phone by the 1<sup>st</sup> accused person.

45. The circumstances of the case build the inference that the 1<sup>st</sup> accused person was in custody of the phone and sim card of the deceased. He was also known to the deceased prior to his demise and to Pw1. It is therefore clear to this court that it is the 1<sup>st</sup> accused persons who sent the gruesome message to Pw1 and it then follows that the 1<sup>st</sup> accused person caused the unlawful act or omission that caused the death of the deceased.

46. As for the 2<sup>nd</sup> accused person. I believe his evidence to be true, his relations with Pw7 shows his point of contact with the techno mobile phone. His intent was to call his wife and this was corroborated by Pw7. That he was not familiar to the 1<sup>st</sup> accused person is debatable. Pw7 states that they were only known to each other within a weeks' time prior to his arrest. The 2<sup>nd</sup> accused person states he does not know him. This much may be true since a weeks' time is too little a time for one to familiarise yourself with somebody else. Even if the reverse were to be true their familiarity with each other does not in any way provide a link to the death of the deceased herein. The prosecution didn't lead evidence to show that the death of the deceased was done in common with the accused person.

47. The prosecution also sought to allege that the 2<sup>nd</sup> accused person had a blood stained knife during the time of his arrest. He denied this much in his defence. The government analyst did not present any DNA that linked the slightly blood stained knife to the death of the deceased. The cause of death of the deceased was stated to be penetrating head trauma with sharp object. The same hold no relation to the knife allegedly found with the 2<sup>nd</sup> accused person.

48. I therefore find that the prosecution has not tendered sufficient evidence to establish that the unlawful act that caused the death of the deceased was committed by the accused person herein Samuel Muriungi. This court therefore returns a verdict of not guilty and acquits the accused person forthwith.

**HON A. ONG'INJO**

**JUDGE**

**JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 09<sup>TH</sup> DAY OF OCTOBER 2019.**

**In the presence of :**

C/A: Mwenda

State:- Mr Abubakar Advocate holding brief Mr Ngugi Advocated for accused.

Accused:- Present in person.

**HON A. ONG'INJO**

**JUDGE**

**Mr Abubakar**

I pray for copies of judgment.

Order: Copies of judgment to be supplied to state and defence counsel.

**HON A. ONG'INJO**

**JUDGE**