



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CRIMINAL CASE NO. 68 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD MURUVA.....ACCUSED

JUDGMENT

1. *Bernard Muruva Alias Chekuku* faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. It is alleged that on 6th October, 2011 at Siksik Village in Nandi County, he murdered *Japheth Miheso Serende*.

2. The accused denied the charges. In support of its case, the prosecution called a total of fourteen witnesses. In summary, the prosecution case is that the deceased was a teacher at Siksik Primary School. According to the evidence of PW1, *Vincent Adanga*, on 6th October, 2011 at around 3pm, he was in the school's *shamba* when he decided to go to a nearby river to take water. He was in the company of some standard one pupils. As they were in the river drinking water, the accused person appeared and ordered them to drink the water quickly and leave. PW1 knew the accused well previously as *Chekuku* as they used to play football together.

3. PW 1 recalled that when the accused appeared, he at the same time saw his teacher walking towards the river. He immediately hid in a nearby bush to avoid being seen by the teacher as he had failed to comply with his instructions to take a *jembe* to school. He saw the teacher exchange greetings with the accused as they bypassed each other. After walking for a short distance, the accused turned back and followed the teacher. According to PW1, he saw the accused cut the teacher on his right hand. The teacher, the deceased in this case, offered the accused money and a mobile phone but instead of taking the items offered, the accused cut off his head. He then threw the deceased's lifeless body into the river, picked his head and put it in a white sack he had been carrying. In the course of his evidence, he identified the *panga* used to assault the deceased (Exhibit 1) and the sack in which the severed head was placed (Exhibit 2).

4. After witnessing the incident, PW1 ran towards the school and told other people including other pupils what he had seen. Those people started screaming attracting the attention of PW2 who operated a kiosk near the river. The river was near a road and it bordered Siksik Primary School. Since the noises and screams were coming from the direction of the river, PW2 ran to the river. Inside the river, he saw the deceased's headless body. He also saw the person suspected to have killed the deceased running away raising a *panga*.

5. In his evidence, PW2 recalled that he was able to see and identify the suspect as the accused in this case. He testified that the accused was his village mate who was known in the village as *Chekuku*. He had known him since he was a child. He is among the people who chased the accused upto Kapkagani Administration Police Post where he surrendered to the police.

6. On his part, PW8 *Meshack Hesbon* testified that on the material date at around 3pm, he was walking towards the river using a foot path neighbouring Siksik Primary School. He saw the deceased talking to two school girls. As he continued walking, he met with the accused holding something inside a sack. After they bypassed each other, he heard screams. He decided to turn and walk back to see what had happened. On getting near the river, he was surprised to see the accused holding the deceased's head preparing to put it into the sack. He shouted for help. By the time neighbours and other people responded to his screams, the accused was walking away carrying the sack on his shoulders and a *panga* in his hand. Among the people who responded to PW8's screams was PW7. They started throwing stones at the accused. He dropped the sack he was carrying and ran towards Kapkagani Administration Police Post.

7. PW6, *Jackson Marengo* and PW4, *Rebecca Siringi* on their part recalled that on the material date at around 5pm, they saw a man being chased by school children. According to the evidence of PW4, the children were screaming "*mwalimu; mwalimu*" chasing a man who was running on a footpath which was outside her house. PW6 was at the time walking on the same footpath proceeding to his home. Both witnesses recalled that they saw the man being chased by the children at close quarters and they were able to identify him as the accused in this case. He was holding a *panga* on one hand and a mobile phone on the other hand. PW4 noted that the accused was carrying a bloodstained sack which did not appear empty. She watched him as he threw the sack in a nearby tea plantation.

8. From the evidence of PW2, PW7, PW11, PW12 and PW14, it is clear that the accused was chased upto Kapkagani Chief's camp where he was arrested on the instructions of PW11 the area chief. According to the evidence of PW11, accused surrendered to him the bloodstained *panga* he was holding which he handed over to PW14 *Corporal Jonathan Leting* who was in charge of the Police Post. PW11 had earlier on received information concerning the teacher's murder and he relayed the same to the office of the District Commissioner, Nandi Central. Police officers thereafter visited the scene of crime, collected the deceased's body and head and took them to Kapsabet District Hospital mortuary in the company of PW9, the deceased's brother. They also re-arrested the accused and took possession of the bloodstained *panga* from PW14. The *panga* and the sack in which the deceased's head was recovered were identified by most of the prosecution witnesses before they were produced as Exhibit 1 and 2.

9. On 7th October, 2011, a post mortem examination was performed on the deceased's body by *Dr Kiplagat* who noted that the deceased had suffered severe facial and head injuries. The body had a deep neck cut wound involving the vascular vessels and trachea; there was complete transection of the head at the level of the upper jaw. The head was separate from the rest of the body. He also noted a cut wound on the right elbow joint; a fracture of right lower humerus and a cut wound on the left arm. In his opinion, the cause of death was severe multiple cut wounds resulting to severe head and neck injuries. He completed a post mortem form which was produced as Exhibit 3 under *Section 33 (b)* of the *Evidence Act* by his colleague, *Dr Titus Sang* who testified as PW10.

10. Though for some undisclosed reasons the prosecution failed to call as a witness the police officer who investigated this case, it would appear from the evidence on record that in the course of investigations, the *panga* used as the murder weapon, the gunny bag used to convey the head of the deceased, a T-shirt allegedly recovered from the accused and blood samples belonging to the accused and the deceased were taken to the Government Chemist for forensic analysis.

11. The Government Analyst who conducted the analysis testified as PW13. She testified that the gunny bag (Item B) and T-shirt (Item C) were heavily stained with human blood while the *panga* (Item A) had light blood stains. She stated that attempts to generate DNA profiles from the gunny bag were unsuccessful. The blood sample said to belong to the deceased yielded a partial DNA profile. After her analysis, she found that the DNA profiles generated from the blood stains on the *panga* and the T-shirt matched the DNA profile generated from the blood sample indicated to belong to the accused person.

12. In her evidence under cross-examination, PW13 asserted that if the *panga* was the murder weapon, she would have expected that the DNA profile from the blood stains on the *panga* would have matched the one generated from the deceased's blood sample. She documented her findings in a report dated 28th November, 2012 which she produced as Exhibit 4.

13. After the close of the prosecution case, I determined that the accused had a case to answer and I accordingly put him on his defence. In his defence, the accused elected to give a sworn statement. He did not call any witness.

14. In his defence, the accused gave a brief statement narrating how he was arrested on 6th October, 2011 at around 3pm for no apparent reason by an undisclosed Administration Police Officer. He claimed that at the time of his arrest, he had just emerged from a hotel at Kapkagani Trading Centre and that despite his protests, he was taken to Kapkagani Police Post and later to Kapsabet Police Station. At the police station, he was surprised when he was asked to record a statement about the murder of the deceased which he refused to do as he knew nothing about it. In a nutshell, the accused denied having murdered the deceased as alleged.

15. At the close of the defence case, learned counsel for the accused *Mr Miyianda* made brief oral submissions. Learned prosecuting counsel *Ms Kigagi* elected not to make final submissions.

16. I have carefully evaluated the evidence on record in its entirety. I have also duly considered the submissions made by the accused's counsel and all the authorities cited. Having done so, I find that a reading of *Section 203* of the *Penal Code* which creates the offence of murder reveals that for the offence to be established, the prosecution must prove beyond any reasonable doubt three essential elements of the offence. These are:

- i. The death of the deceased;
- ii. That the death was caused by the accused's unlawful act or omission; and
- iii. That in committing the unlawful act or omission, the accused had malice aforethought.

17. Malice aforethought refers to the intention or *mensrea* to kill another person. The circumstances from which Malice aforethought can be ascertained are provided in *Section 206* of the *Penal Code* as follows:

“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;

(c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

18. In this case, given the evidence on record, I have no doubt in my mind that the prosecution has proved beyond any doubt the death of the deceased and the injuries that caused his death. The only question left for my determination is whether the prosecution has proved beyond reasonable doubt that it is the accused who inflicted the fatal injuries on the deceased.

19. It is worth pointing out at this stage that this being a criminal trial, the burden of proof lies on the prosecution to prove the charges against the accused beyond any reasonable doubt. It is trite law that this burden remains on the prosecution throughout the trial and never shifts to an accused person. See: *Section 111 of the Evidence Act; Abdalla Bin Wendo & Another V Republic, [1953] EACA 166.*

20. With the above principles in mind, I now turn to consider whether or not the prosecution has proved the charge proffered against the accused person in this case to the required legal standard.

21. Having evaluated the evidence on record, it is my finding that the prosecution's case is based on both direct and circumstantial evidence. I say so because there is the evidence of PW1 who swore that he witnessed the accused assaulting the deceased on the hand and neck with a *panga*. The assault on the neck was with such brutal force that it dismembered the deceased's head from the rest of his body killing him instantly.

22. All the other prosecution witnesses did not claim to have witnessed the assault on the deceased. They were however consistent in their evidence that they saw the accused running away from the direction of the river raising a *panga* and carrying a blood stained gunny bag on his shoulders. It should be remembered that it was besides the same river that the offence was committed.

23. On his part, PW8 recalled that though he did not see the accused assaulting the deceased, he saw him as he prepared to put the deceased's severed head in a sack. He shouted for help as the accused ran away from the scene carrying the sack on his shoulders and holding a *panga* in his hand.

24. The other witnesses who saw the accused running away from the scene are PW2, PW4, PW6 and PW7. They all claimed that they saw the accused dropping the sack near a tea plantation after the people chasing him started throwing stones at him. PW2, PW3, PW7 and PW9 all went to the river soon after receiving news of the teacher's death and they found his headless body in the river. They also found the sack the accused was seen dropping near the tea plantation and inside it they found the deceased's head.

25. The evidence of the above witnesses collaborated the eye witness account of PW1 regarding the identity of the deceased's assailant and the manner in which the deceased met his death. PW10's evidence and the findings of the pathologist in the post mortem report are also consistent with PW1's evidence since they confirm that the deceased died of severe multiple head and neck injuries.

26. Given the foregoing evidence, there is no doubt that the accused was clearly and positively identified as the deceased's assailant. PW1, PW2, PW6, PW7 and PW8 all knew the accused very well prior to the material date since they came from the same village. PW1 recalled that he used to play football with the accused. PW2, PW6 and PW8 had known him since childhood since he was their neighbour. It is important to note that the incident happened at around 3pm in broad daylight. PW1 whose evidence I have no reason to doubt testified that he watched the incident unfold when hiding about ten metres away from the scene of the assault. PW6 recalled that the accused even stopped to talk to him as he ran away from the scene. From the above circumstances, there cannot be any doubt that all those witnesses saw the accused clearly at close quarters and some of them even chased him right from the scene of the crime to Kapkangani Police Post where he was arrested in possession of a blood stained *panga*.

27. Having taken into account all the evidence on record, I am satisfied beyond doubt that the circumstances in this case were conducive to a reliable, correct and positive identification of the accused as the deceased's assailant. Since the accused was well known to PW1, PW2, PW6, PW7 and PW8 prior to the material date, this was a case of recognition which was held by the Court of Appeal in *Anjononi V Republic, [1980] KLR 59* to be more satisfactory, more assuring and reliable than identification of strangers.

28. I have given due consideration to the accused's statement in defence. I find that when compared to the prosecution's case, the accused's defence is without substance and is not worthy of belief. The claim that he was arbitrarily arrested at Kapkangani Trading Centre is clearly false given the prosecution evidence that he in fact surrendered to PW10 and other Administration Police Officers at Kapkangani Police Post as he fled from the wrath of members of the public who had chased him right from the scene of crime. From the foregoing evidence, I am satisfied that the accused was positively recognized as the person who assaulted the deceased causing him the injuries that caused his instant death.

29. Having found that the accused was positively recognized as the deceased's assailant, what remains for my determination is whether in assaulting the deceased, the accused had malice aforethought. Though the prosecution did not adduce any evidence to show that there was any bad blood between the accused and the deceased prior to the date in question, the manner in which the accused assaulted the deceased leave no doubt that the accused intended to either kill the deceased or to occasion him grievous bodily harm. The attack was vicious and brutal and there cannot be any doubt that it was fuelled by the requisite malice aforethought. It is thus my finding that the accused had malice aforethought when he assaulted the deceased occasioning him fatal injuries.

30. Before concluding this judgment, I would like to address two issues raised by learned counsel *Mr Mityenda* in his final submissions. He submitted that the prosecution had failed to prove the charges against the accused beyond reasonable doubt because the prosecution failed to call the investigating officer as a witness and the blood stains found on the *panga* used as the murder weapon were not linked to the accused.

31. In my view, the failure of the prosecution to call the investigating officer as a witness in this case did not by itself render a fatal blow to the prosecution case. I must clarify at this point that I am not in any way downplaying the importance of the evidence of investigating

officers. Their evidence is important but where the prosecution has tendered strong and credible evidence from other witnesses that is sufficient to establish the guilt of an accused person as charged, the absence of the evidence of an investigating officer in such a case would not adversely affect the prosecution case.

32. Regarding the finding of PW13 that the bloodstains found on the murder weapon generated DNA profiles that matched those generated from the accused's blood sample, I must confess that I found this finding very perplexing. It is simply unbelievable. If the *panga* that PW13 analysed was the same *panga* that was used as the murder weapon which was recovered from the accused by PW10 and if the T-shirt was the same one the accused had worn when he was conveying the deceased's head in a sack, the DNA profiles of the bloodstains in those two items ought ordinarily to have matched the DNA profiles generated from the deceased's blood sample since it is his blood that was expected to have stained the murder weapon and the clothes the accused had worn that day.

33. There is no way that PW13 could have reached the conclusions she did unless there was either a mix-up in the labeling of the blood samples extracted from the deceased and the accused or there was deliberate interference with the exhibits and the blood samples submitted to the Government Chemist for analysis. For the reasons stated above, I disagree with the findings reached by PW13. PW13 was an expert witness whose evidence amounted to a mere opinion which is not binding on this court. See: ***Akute V Republic, [2006] 1 KLR 488.***

34. In view of all the foregoing reasons and findings, I have come to the conclusion that the prosecution has proved its case against the accused person beyond any reasonable doubt. I consequently find the accused guilty of the offence of murder as charged and I convict him accordingly.

DATED and SIGNED at NAIROBI this 7th day of June, 2018.

C. W. GITHUA

JUDGE

DATED and DELIVERED at ELDORET this 26th day of June, 2018.

S. M. GITHINJI

JUDGE

In the presence of:

Mr Miyienda: Advocate for the accused

Ms Kigaqi: Advocate for the State

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Court Clerk