



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 33 OF 2013

REPUBLIC.....PROSECUTOR

-VS-

SOLOMON KATHURIMA.....ACCUSED

JUDGMENT

1. **Solomon Kathurima (“the accused”)** is charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya*. The particulars of the offence are that, on the 22nd March, 2013, at Ruriine sub location in Imenti North District within Meru County, the accused murdered Veronichah Koki. The accused denied the charge with the prosecution calling a total of 7 witnesses.

2. **PW1 was Faith Mukami**. It was her evidence that on the material day, she was at home in the kitchen at around 7:30pm when two men came and asked her where her mother was. One of them was the accused. She told them that her mother was in the table room. She had known the accused for about 9 years as he was her cousin. The two visitors entered the table room but after about five minutes, she heard her mother scream. She ran to the table room and found the accused cutting her mother. The mother was seated on a chair when being cut. PW1 picked a jembe and hit the accused on the upper back. She then ran to the home of **George Mbogori (PW4)** to seek help. They returned together and found that some few neighbours had gathered. They took the deceased to hospital but she was pronounced dead on arrival. On their way home, they found the accused’s accomplice being beaten and on the next day she heard that he had died.

3. In cross-examination, she told the court that when she ran to **PW4**, she told him that the people who had earlier on assaulted her father had returned. That the kitchen had a solar bulb.

4. **PW2 Samuel Mtirika** testified that on 22nd March, 2013, at about 7.00pm, he was at home with his wife (the deceased) and his children **PW1**, Kevin Mutembei and the deceased’s mother. He left them preparing supper and went to the bedroom to rest. He was later awakened by screams from the table room. He got out to the table room and he found the accused cutting the deceased. He screamed and the accused ran away. He knew the accused since childhood as he was a son to his brother. It was his evidence that they had a long history of disharmony. He had killed the accused’s father for which he served two years in jail. He had been assaulted on 4th March, 2013 by unknown assailants.

5. **PW3 was Ruth Mukami**. She testified that she had come to visit her daughter (the deceased). On the material day, she was in the sitting room with the deceased and her children. There was a knock in the door and when the deceased opened the same, two people came in. The house had small bulbs from solar lighting and that the accused was one of the two people who came in. All of a sudden, the accused attacked the deceased with a panga and cut her on the head. The witness was also cut with a panga and got confused and did not know what happened thereafter. She, together with the children screamed and the attackers took off. The deceased was taken to hospital. The next day she learnt that the deceased died before reaching hospital.

6. **PW4 George Mwiti** testified that on 22nd March, 2013, at about 7.00pm, he heard screams from Janet’s house, a neighbor. **PW1** jumped over the fence and told him that they “had come again”. He did not know who they were though her father had been assaulted by some people weeks earlier. He used his vehicle to take the deceased to hospital but on reaching Thimangiri he handed her over to an ambulance. The deceased was pronounced dead on arrival.

7. **PW5 Serrafin Mugendi Mbogori** a driver of an ambulance with the Ministry of Health testified that on 22nd March, 2013, he got a call from his sister in law to go and collect a lady who had been cut. On reaching Thimangiri market, he met **PW4** and the deceased was transferred to the ambulance. He took her to hospital but she was pronounced dead on arrival.

8. **PW6 Michael Mwathe** was the investigations officer. On the material day, he was informed by his OCS of a murder report at Thuura. He and another officer rushed to Meru General Hospital casualty where they found a lady who was injured had succumbed to her injuries. They then proceeded to the scene whereby they found a lot of blood on the floor of the house. They interviewed **PW1** at the scene who said that she had been able to identify her cousin as the one who had gone to the kitchen and asked for the deceased.

9. They then received a call that somebody was being beaten at Thuura. On reaching there, **PW1** identified that person as one of those who had gone to her home although she did not know his name. They took him to hospital but he was pronounced dead after 20 minutes. He later summoned witnesses for interrogation. He established that **PW2** had a land dispute with the accused's father.

10. **PW7 Dr. Michael Onyango** a doctor at Meru Level 5 General Hospital produced a post mortem report dated on 28th March, 2013 in respect of the deceased. According to the report, the body had multiple deep cuts on the face and the sculp. There was traumatic amputation of the right distal forearm. Internally, there was fracture of the lower jaw with four incisors missing and 3 upper incisors missing. On the skull, there was a fracture on the temporal bone and intral cerebral haematoma. The pathologist concluded that the cause of death was severe head injury and hemorrhage secondary to multiple cuts.

11. The accused gave sworn testimony and called two witnesses. He denied committing the offence and stated that he did not know the deceased. His evidence was that on the material day, he was in Munitu at her auntie's house carrying out wiring work. He stayed there from 8.00am to 4.00pm when he went back home. He went to a local beer den and later proceeded to Ntarara's place where he found Patrick Gitonga and Morris. They stayed there until 2.00am. They then went to Patrick's house where he stayed until morning. On 11th April, 2013 he was arrested at Mutuati market where he lived with his family.

12. It was his evidence that according to the charge, the incident occurred at Thuura. That was the place he was born. However, in 1985 his family migrated from that place when he was only 3 years old after his father was killed by his uncle (**PW2**). He denied knowing **PW1** who had testified that she was his cousin and stated that the first time that he saw her was when she testified in court. He further denied having ever known **PW3** (the deceased's mother) and denied having ever been with Joseph Karangania on the material day.

13. **DW2 was Patrick Gitonga**. He testified that on the material day, he was at his home at Munitu when the accused passed by at 8:00am while going to work and requested him to pluck some miraa to chew in the evening and he obliged. That at 7.00pm, he went to *kwa Ntarara*, a village club where the deceased joined him later and they chewed miraa up to midnight. That at about mid night, they went to his house and chewed miraa up to 3.00am and the following morning each went his separate ways.

14. **DW3 was Beth Naito**, the eldest sister to the accused. She told the court that previously, their family lived at Thuura at her father's home but they left in 1985 after **PW2** killed their father over a land dispute. It was her evidence that when they left Thuura, the accused was 2 ½ years old and that they had never gone back there since. She insisted that the allegations against the accused were being made by **PW2's** with an intention to disinherit the accused the land of their grandfather.

15. It was submitted by Ms Nelima for the accused the prosecution had failed to prove its case beyond reasonable doubt. That the evidence was full of contradictions. That the circumstances for identification were not conducive since the incident occurred at night. She submitted that **PW1** could not have known the accused for 9 years as she said she was 24 years at the time she testified while the accused was 33 years. That the accused had never returned to Thuura since 1985 and only saw **PW1** when she testified in court.

16. With regard to **PW2**, he had been assaulted by unknown persons on 4th March, 2013. **PW1** told **PW4** it is those assailants who had come back in the present incident which occurred on 22nd March, 2013. If **PW1** had recognized the accused as one of the assailants, she would have given his name to **PW4**. Finally, she submitted that there was no identification parade that was held for the accused in respect of **PW3**.

17. On the other hand, it was submitted by Mr. Kiarie for the state that the prosecution had proved its case beyond reasonable doubt. That the accused was related to the deceased and that on the fateful night, **PW1** stated that she saw him. That he knocked on the kitchen door and asked her where the deceased was. She directed them to the sitting room and that **PW3** stated that immediately thereafter, the accused started cutting the deceased. That **PW2** heard screams and rushed to the sitting room and found the accused cutting his wife on the head using a panga. That the police found the accomplice of the accused being lynched and that the accused's defence of alibi was an afterthought.

18. I have carefully considered the testimonies of the witnesses and the defence of the accused. I have also considered the submissions of Learned Counsel. The accused faces a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

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

19. Flowing from the definition of the offence of murder, the issues for determination are; **the fact of death of the deceased; the cause of death; whether the death was caused by an unlawful act on the part of the accused and whether the accused had malice aforethought.**

20. The burden lies with the prosecution to prove its case against the accused on the standard of proof beyond any reasonable doubt. On the first and second issue, **PW1** stated that on the material day, she was in the kitchen when two assailants came and asked for the deceased. She directed them to the sitting room where one of them viciously attacked the deceased with a panga. **PW3** testified that when the attackers entered the sitting room, they took no time before attacking the deceased with a panga on the head. **PEX1**, the postmortem report revealed that the deceased died as a result of severe head injury plus haemorrhage secondary to multiple cuts to the face and head. I am therefore satisfied that the prosecution was able to prove the fact and cause of death to the required standard.

21. As regards the 3rd issue, **PW1** testified that on the material day at about 7.30pm, two people came to the kitchen where she was, greeted her and asked her the whereabouts of the deceased. One of them was the accused. She ushered them to the table room where the deceased was. After about 5 minutes, she heard the deceased screaming. She rushed to the table room and saw the accused cutting the deceased on the head. The other person ran away and left the accused cutting deceased. She hit the accused with a jembe but he attacked her whereby she ran away and called **PW4**. That she had known the accused for 9 years. In cross examination, she stated the accused used to come and visit their

grandmother who died in the year 2008.

22. On the other hand, **PW2** was in the bedroom sleeping when he was awoken by screams from the table room. He got out and found the accused cutting the deceased. That from 1976, he next saw the accused in 2005 when they came to bury **PW1**'s mother. That after his mother died, the accused came again thrice to bury his other mother. He admitted there being bad blood between him and the accused's family he having killed their father. **PW3** was with the deceased when two people entered the table room. It did not take a minute before the accused attacked the deceased with a panga.

23. **PW1, PW2 and PW3** were eye witnesses. The incident took place at night. **PW1** did not see the attackers with anything when she ushered them in. They were wearing jackets but it was not explained whether the jackets could hide a panga beneath them. She stated that after hearing the deceased scream, she went and attacked the accused who however, overpowered her. When **PW2** heard the screams, he ran to the table room and found the accused cutting the deceased. He did not see either **PW1** or **PW3** or any other person in the table room except the accused and the deceased. On her part **PW3**, the mother of the deceased told the court that when the accused attacked the deceased, she and the children screamed and the neighbours came.

24. If the incident took place as explained by the three witnesses, why didn't **PW2** find **PW1** in the table room when she allegedly went to help the deceased? Where was **PW3** when **PW2** came to the table room? .

25. On identification, **PW1** said she had known the accused for 9 years. That the accused used to visit her grandmother in 2007. That he had come to visit them for 2 to 3 days in 2002. That their relationship was not bad. According to **PW2**, from 1976, he next saw the accused in 2005 when **PW2**'s mother died. He again came thrice when **PW2**'s 'other mother' died. He admitted having killed the accused's father.

26. On his part, the accused told the court that his family shifted from Thuura in 1985 when he was barely 3 years. That he has never gone back there since then. That he first saw **PW1** and **PW2** in court when they came to testify against him. His testimony was corroborated by that of his sister, **DW3** who told the court that out of fear for their lives, the accused's family shifted from Thuura in 1985 after their father was killed by **PW2**.

27. **PW2** alleged that he was imprisoned for 2 years in 1976 or a year he could not recall for killing the accused's father. **PW1** who is said to have been born in 1986, admitted that while she was young **PW2** was jailed. That places the killing of the accused's father around 1985 as testified by **DW3** and not 1976 as alleged by **DW2**.

28. I saw both the accused and **DW3** testify, they were firm and consistent that after their family shifted from Thuura in 1985, none of their family members has ever gone back there. Having run for their lives, since their father had perished in the hands of **PW2** because of a protracted land dispute, there was nothing to take them back there. Indeed, **DW3** produced **DEx.1**, a Certificate of Confirmation of grant in the **Meru HC Succ Cause No. 345 of 2013, In the Matter of the Estate of Iruri Anjuri Alias Iruri Anjugi (deceased)** wherein **PW2** had distributed the entire estate of his father without providing for the family of the accused's father, whom he had killed.

29. From the foregoing, this court is satisfied that the testimonies of **PW1** and **PW2** that the accused was a regular visitor to Thuura was not true. It was meant to give credence to **PW1**'s allegation that she knew the accused for 9 years.

30. As regards **PW3**, the material day was the first time she was seeing the accused. According to her, it did not take a minute, after intruders entered the table room, before the accused attacked the deceased. How was she able to identify him? There was no identification parade that was held for her to identify him. Her's was dock identification which is very unsafe to rely on.

31. One other thing, **PW1** who alleged to have seen the attackers, when she had the first opportunity to disclose their identity told **PW4** that the people who had attacked her father (**PW2**) earlier on had returned. **PW2** had been attacked three weeks earlier. The identity of those attackers remained unknown even at the time of trial. If **PW1** had indeed identified the accused and knew him as his cousin as she alleged in court, it is expected in the ordinary cause of events that she would have named him to **PW4** When she rushed to his home for assistance. This she did not. She only did later on after she and her family must have sat and reflected on the attack. There was no suggestion that the accused was one of those who had attacked **PW2** three weeks earlier nor credible.

32. This court finds the evidence of the prosecution as to what happened on the material night to be inconsistent and contradictory. There is real doubt whether it is the accused who attacked the deceased. The attempt by the prosecution to place the accused at the scene of the incident is not cogent.

33. In view of the doubt that this court entertains, I resolve the same in favour of the accused.

34. I therefore find the accused not guilty and I acquit him of the charge of murder under **Section 215 of the Criminal Procedure Code CAP 75 of the Laws of Kenya**. He is to be released unless otherwise lawfully held.

DATED and **DELIVERED** at Meru this 20th day of September, 2018.

A. MABEYA

JUDGE