



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 63 OF 2015**

**KALELU KAVUSUKI.....1<sup>ST</sup> ACCUSED**

**KYAMBI KALELU.....2<sup>ND</sup> ACCUSED**

**MUNEENI MUTHENGI.....3<sup>RD</sup> ACCUSED**

**MWANGANGI MUTEMI.....4<sup>TH</sup> ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. **Kalelu Kavusuki, Kyambi Kalelu, Muneeni Muthengi and Mwangangi Mutemi**, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused respectively, are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya**. Particulars of the offence were that between the **31<sup>st</sup> day of October, 2006** and **1<sup>st</sup> day of November, 2006** at **Kimangao Location** in **Mwingi District** within **Kitui County** murdered **Julius Kilonzo Muthengi** (Deceased).

2. Facts of the case are that on the **31<sup>st</sup> day of October, 2006** the Deceased passed by his parent's home on his way to his home. Later in the evening, PW1 **Rosalia Kalundu Muthengi** his mother saw him in company of the 4<sup>th</sup> Accused going towards the home of the 1<sup>st</sup> Accused person a husband to the 2<sup>nd</sup> Accused. It rained heavily throughout the night. The following morning his body was found on the banks of **Mugoo Seasonal River** within **Kyuso**. The police were notified. They visited the scene and took away the body which was subsequently taken to the mortuary. Investigations were carried out that culminated into an inquest being held. A recommendation was made for the arrest and charging of the Accused persons, hence this case.

3. To prove the case the Prosecution called **eleven (11)** Witnesses. PW1 the mother of the Deceased saw him going towards the home of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. It rained heavily that evening until the following day at **10.00 a.m.** In the course of the day she got information about a body that was found on the banks of **Mugoo Seasonal River**.

4. PW2 **Benedict Muthengi Nguro** the father of the Deceased was approached by two (2) individuals **Kitheka Mutemi** and **Mulandi** who asked him to go to **River Sugoo**. He went there only to find mortal remains of his son.

5. PW3 **Jemima Kasyoka Kilonzo** the wife of the Deceased stated that the Deceased went home on the **31<sup>st</sup> day of October, 2006**. Between **4.00 – 6.00 p.m.** he went home and left with a panga saying that he was going to cut timber for construction at his father's homestead. To reach his father's homestead he had to cross a seasonal river. Prior to leaving he called her and she found him with the 4<sup>th</sup> Accused and **Mutisya Syanda**. However, he left with the 4<sup>th</sup> Accused his close friend. The following day his body was found at the banks of **Mugoo River**. A year later he saw the 1<sup>st</sup> Accused's son wearing a Muslim white hat that she identified as for the Deceased. She notified the D.C.I.O. who investigated the matter. In the course of investigations, a panga was recovered from the home of the 1<sup>st</sup> Accused.

6. PW4 **Christopher Mutembi Mutheki** parted ways with the Deceased on the **31<sup>st</sup> October, 2006** after they left school. The following day he heard of his demise.

7. PW5 **Robert Mutemi Mutheki** saw the body of the Deceased at the banks of **River Mugoo**.

8. PW6 **Marietta Tamaka** identified the body of the Deceased to the Doctor who performed the postmortem.

9. PW7 **Christine Mbuli** stated that a year after the demise of the Deceased the 2<sup>nd</sup> Accused requested her to say that they were at some meeting when the Deceased died, if summoned by the police. She went and told the family of the Deceased.
10. PW8 **Samson Iyatova** the then D.C.I.O. Mwingi who had since retired stated that in **October, 2009**, he got a report from relatives of the Deceased that a phone, a **Nokia 110** that belonged to the Deceased had been recovered. He wrote to Safaricom seeking data but they failed to get any information since it had not been in use for a very long time. He failed to connect the recovery of the cellphone to any user. Thereafter the wife of the Deceased went and reported that they had seen the son of the 1<sup>st</sup> Accused wearing a Muslim hat that they suspected belonged to the Deceased. He went to his home to find the son of the 1<sup>st</sup> Accused wearing the same hat. He took possession of it as **Musyoki** the son of the 1<sup>st</sup> Accused did not give him any explanation. Later on a panga stated to belong to the Deceased was taken to the station by **Chief Mangau**. On cross examination he stated that he took no action against **Musyoki** who ought to have been charged.
11. PW9 **John Musyoki Kalelu** stated that on the **31<sup>st</sup> October, 2006** the Deceased his teacher was at their home with his parents the 1<sup>st</sup> and 2<sup>nd</sup> Accused, a mason and the 3<sup>rd</sup> Accused. When it stopped raining he heard people leaving the house. The following day he heard the Deceased had passed on.
12. PW10 **Damaris Kalunda Kalelu** said that on the material date the 4<sup>th</sup> Accused was the mason constructing for them a kitchen.
13. PW11 **Doctor Macharia Benson** did an autopsy on the body of the Deceased on the **15<sup>th</sup> November, 2006** after the first postmortem was done seven (7) days before. On examination the body was slightly decomposed. The body had a 5cm abdominal incision that he believed was as a result of the previous postmortem. There were bruises on the left side of the head and at the back of the head towards the left side. There was a lot of blood clot around the spinal cord at the level of thoracic spine No. 12 and lumbar spine No. 4 with clots around the spinal cord and the neck bones C7 and T1. There were bruises on the chest cavity at the backside. However there were no fractures. The liver and brain had decomposed. There was bleeding around T12 and L4. He concluded that the cause of death was haemorrhage due to multiple injuries sustained from blunt trauma. Drowning could not be ruled out due to decomposition. Further, he stated that he had to do the second postmortem because the previous autopsy done was not satisfactory to the relatives of the Deceased. On cross examination he stated initially the Investigating Officer had indicated that it was a case of drowning but later on changed to a case of assault. That the decomposition did not enable them to establish drowning which could however not be ruled out.
14. When put on their defence all the Accused opted to give sworn evidence. The 1<sup>st</sup> Accused stated that on the **31<sup>st</sup> November, 2006** the Deceased went to his home to shield from the rain which started between **5.00 – 6.00 p.m.** He found him with his co-accused. The rain subsided at **9.00 p.m.** and he insisted on leaving. Thereafter the 3<sup>rd</sup> and 4<sup>th</sup> Accused left. They slept. The following day in the evening his cousin **Mutemi Mutheki** passed by his home and told him that the body of the Deceased had been found at **Mugoo River**. Further, he stated that the Deceased had gone to his place with a panga and since he was drunk he advised him to leave it and collect it the following day. Regarding the Muslim hat he stated that it belonged to his last born son.
15. The 2<sup>nd</sup> Accused stated that the Deceased was his neighbor and also uncle. That when he shielded himself from rain at their home he had a coat and panga. He took the coat and left the panga. She denied knowing the witness who alleged that she told her not to reveal that she had not seen her.
16. The 3<sup>rd</sup> Accused stated that when he went to the home of the 1<sup>st</sup> and 2<sup>nd</sup> Accused he found them sitting outside their house with the 4<sup>th</sup> Accused. When it started raining they entered the kitchen. That the Deceased arrived covering a coat on his head. It rained until **9.00 p.m.** When the rain subsided the Deceased left. Thereafter he (3<sup>rd</sup> Accused) left with the 4<sup>th</sup> Accused. The following day he heard of his demise.
17. The 4<sup>th</sup> Accused stated that the 3<sup>rd</sup> Accused found him at the home of the 1<sup>st</sup> Accused. It started raining and the Deceased arrived covering a coat and carrying a panga. After the rain subsided at **9.00 p.m.** the Deceased decided to leave saying he was going to sleep at his father's home. They advised him to leave the panga since the ground was slippery and he complied. Soon thereafter he (4<sup>th</sup> Accused) also left with the 3<sup>rd</sup> Accused. The following day he returned to the home of the 1<sup>st</sup> and 2<sup>nd</sup> Accused where he was constructing a kitchen. At **5.00 p.m.** they got information from **Mutemi** the cousin of the 1<sup>st</sup> Accused that the Deceased had passed on. That he participated in funeral arrangements and even constructed his grave. On cross examination he denied the allegation that he was the one who asked the Deceased to go to the home of 1<sup>st</sup> Accused to partake alcohol.
18. At the close of the case, it was the submission of **Mr. Ngala Mulonzya**, learned Counsel for the Accused persons that the Deceased was not murdered but drowned at a seasonal river that was swollen within the locality as he attempted to cross on the way to his home as he came from the home of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons where he sheltered from rain that poured from **6.00 p.m. to 9.00 p.m.** That although PW9 saw the Deceased and Accused person at **6.00 p.m.** he never presented any circumstances surrounding the death of the Deceased and evidence of other witnesses was hearsay.
19. That the first postmortem report was deliberately hidden from the case by the Prosecution with a view to confuse and frame the cause of death of the Deceased.
20. Regarding exhibits produced, it was urged that none was relevant to support the case and sustain the charge. Only the panga that he left behind upon advice was relevant. That the defence put up, it had varied and was unsafe for the Deceased to cross the river so as to reach his home. That no grudge was demonstrated or established that could lead to the Accused person murdering the Deceased.
21. It was urged on behalf of the State that circumstantial evidence adduced pointed at the guilty of the Accused persons who possessed malice aforethought. That evidence adduced showed that the Deceased had injuries inconsistent with drowning. That the behavior of the Accused after they got the information of the Deceased's demise did not show innocence on their part as they did not condole with the family of the Deceased and they failed to help the police and family to know the last known moments of the Deceased.

22. I have considered rival submissions of the Defence and State.

23. Issues to be determined are:

- Whether death occurred.
- Whether the Accused persons committed the unlawful act which caused the death of the Deceased.
- Whether the Accused persons had malice aforethought.

24. The body of the deceased was found at the banks of River Mugoo. A postmortem was conducted on the body by PW11 who confirmed the fact of death.

25. None of the witnesses who testified witnessed the act that resulted into the demise of the deceased. Therefore evidence adduced by the prosecution against the Accused persons is circumstantial in nature.

26. The principles of relying on circumstantial evidence has been enunciated in various judicial authorities. In the case of Sawe –vs. Republic (2003) KLR 364 the court of Appeal rendered itself thus:

**“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**1. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**2. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

3. ....

4. ....

5. ....

**6. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”.**

27. In the case of Teper VS. Republic (1952) AC 489 the court stated that;

**“circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference”**

28. It is admitted that the last persons who saw the deceased while alive were the Accused persons herein. PW1 saw the deceased in company of the 4<sup>th</sup> Accused. Ultimately they ended up at the home of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. Both the prosecution witnesses and the Accused persons agree that on the fateful night there was a heavy downpour. Some prosecution witnesses stated that indeed it rained throughout the night. The accused persons on their part stated that the rain subsided at 9.00 pm that is when the deceased insisted on leaving. According to them the deceased left on the fateful night and having been found on the bank of the seasonal River meant that he drowned as he attempted to cross the river in order to go to his home.

29. The prosecution on the other hand sought to establish that the Accused persons who were with the deceased must have done an unlawful act or omission that resulted into his death. A panga the deceased was in possession of as he left his home was found at the home of the 1<sup>st</sup> Accused which they readily agreed that the deceased had it but they (1<sup>st</sup> and 2<sup>nd</sup> Accused) prevailed upon him to leave it as it was not conducive for him to move around with it. The panga was handed over to the investigation officer by a chief who was not treated as a witness, therefore circumstances in which it was handed over remain unexplained.

30. The prosecution adduced in evidence a Muslim hat that PW3 said belonged to the deceased while the 1<sup>st</sup> and 2<sup>nd</sup> accused stated that it belonged to one of their sons who was found wearing it. The individual who was found in possession of the hat was neither treated as a witness or an accused in the matter. PW3 stated that she stitched a patch on it but did not allege that the deceased had it on the fateful evening. Without evidence of the person who was in possession of it the court is left in doubt as to what the individual would have stated regarding the hat.

31. It has been argued that the body of the deceased had injuries that were inconsistent with drowning. Indeed the repeat postmortem conducted on the body of the deceased established the presence of bruises on the head and massive hematoma on the back and the right side posteriorly. The Doctor was of the view that the multiple injuries were caused by blunt trauma and drowning could not be ruled out.

32. This was a repeat autopsy. PW11 stated that the family of the deceased disputed the initial report. The initial postmortem report was not

adduced in evidence.

33. The obligation to adduce sufficient evidence to prove the case herein lay on the prosecution. Section 107 of the Evidence Act provides that;

**“ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.....”**

34. This is a case where the prosecution was duty bound to prove the initial findings of the Doctor who performed the postmortem. PW11 had no opportunity of seeing the initial postmortem report. On cross examination he stated that initially the deceased's case was reported as of drowning then later on it was indicated as a case of assault. PW8 who took over the case in 2009 does not seem to have been privy to what actually transpired regarding the postmortem that was conducted. Therefore there is no explanation as to what happen and the findings that had to be concealed from the court.

35. Blunt trauma may be caused by an object hitting or striking but drowning was not ruled out, therefore it was important for the prosecution to produce evidence of the results from postmortem that was conducted. Without such evidence, it can only be suspected that the accused herein did the act or omission that caused the death of the deceased. The suspicion may be strong as the Accused persons were the last persons to be seen with the deceased but this was mere suspicion which cannot prove the case against the Accused persons.

36. The possibility of drowning in the swollen river that the deceased was required to cross prior to reaching his home is a circumstance that weakens the chain of circumstances that were relied on by the prosecution.

37. In the circumstances the prosecution has failed to prove the case against the accused beyond any reasonable doubt. In the result, the Accused persons stand acquitted of the offence of murder.

38. It is so ordered.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of October, 2018.**

**L. N. MUTENDE**

**JUDGE**