



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 56 OF 2014**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JAIRUS MURUNGA .....1<sup>ST</sup> ACCUSED**

**REUBEN KHAJIRA MURUNGA (DECEASED).....2<sup>ND</sup> ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGEMENT**

**Introduction**

1. Jairus Murunga and Reuben Khajira Murunga were jointly charged with ***murder contrary to section 203 as read with section 204 of the Penal Code***. The particulars of the offence are that on the 26<sup>th</sup> day of October, 2014 at SAOSI Village in Hamisi Sub-County they jointly murdered GODWILL IGADWA MUKUNGA. The two accused persons pleaded not guilty to the charge. During the pendency of this case, Reuben Khajira Murunga died. This judgment therefore concerns Jairus Murunga, whom the witnesses called Jairo in their testimonies.

**The Prosecution Case**

2. The prosecution called 5 witnesses. From the testimonies of these witnesses, the prosecution case is as follows:- On the morning of 26<sup>th</sup> October 2014 at about 10.00am, MUSA YOSIASI, PW3, Chairman of *Nyumba Kumi* in Saosi area received a report from one Marenje Shakhutsa (not called as a witness) that the accused herein, together with Rueben Khajira Murunga were assaulting the deceased. Upon receipt of that report, PW3 (Musa) rushed to the home of Shadrack Swekenyi (Shadrack) and gave him the report. Shadrack Swekenyi was Musa's village elder. The two of them immediately left for the home of the deceased and found him lying on a mattress inside his (deceased's) one roomed house. The deceased could not talk, though he was still alive. His hands were swollen and he was breathing with great difficulty and it appeared to Musa that the deceased was dying.

3. Shadrack who testified as PW2, telephoned the sub-chief before Musa accompanied the village elder to Serem Police Station to report the incident. After making the report to the Police, Musa, the village elder and others were advised to take the deceased to hospital. The deceased was first taken to Muhembe Dispensary and later to Mbale district Hospital. The deceased died later that same day between 1.00 - 2.00pm.

4. Wycliffe Ilavuga, PW1 (Wycliffe) also went to the deceased's house in the morning on 26<sup>th</sup> October, 2014 and found the deceased in bad shape. Wycliffe also made a report to the police but this was after Musa had already made the report. According to Wycliffe, the deceased used to drink a lot. Wycliffe also testified that the deceased and the accused were always quarrelling.

5. Dr. Jairus Arunga testified as PW4. He is the one who conducted the post mortem examination on the body of the deceased. The deceased was about 48 years old. According to Dr. Arunga, there were no visible external injuries. Internally, the lungs and their covering were stuck together, either due to long term smoking or TB or even pneumonia. There was no food in the stomach, the liver was reduced in size, with white patches on the left lobe, which were indicative of viral infection or liver cirrhosis due to alcoholism in a chronic manner. In the opinion of Dr. Arunga, the cause of death was hypocyimia or alcohol intoxication with associated severe pneumonia. The post mortem report duly signed and dated 2<sup>nd</sup> November 2014 was produced in evidence of Pexhibit 1.

6. PW5 was number 70213 Sgt Herbert Majani of Serem Police Station. He is the one who received the report from Shadrack on 26<sup>th</sup> October, 2014. He visited the scene in the company of Chief Inspector Stanley Wanyoike the then OCS of Serem Police Station. When the officers went to the scene, they saw blood on the mattress where deceased had been lying before he was taken to the hospital. On the same

26<sup>th</sup> October, 2014 the accused and his deceased co-accused were taken to the police station at Serem by members of the public. SGT Majani was not able to recover the suspected murder weapon. Sgt Majani also testified that on the fateful day, the deceased was drunk.

7. At the close of the prosecution case, this court ruled that the accused herein had a case to answer and was accordingly put on his defence.

### **Defence Case**

8. The accused gave sworn evidence and told the court that on 25<sup>th</sup> October, 2014 there was an altercation between the deceased and Rueben Khajira Murunga (now deceased). He intervened and the issue seemed to have been resolved, but on the morning of 26<sup>th</sup> October, 2014, he and his brother Reuben were rounded up by Musa and taken to Serem Police Station. They were beaten while being taken to the police station. The accused denied any knowledge of how the deceased died. He also denied ever assaulting the deceased. The accused conceded that the deceased was a drunk but denied that it was because of drunkenness that he (accused) and Rueben Khajira Murunga assaulted the deceased. The accused did not call any witnesses.

### **Submissions**

9. The defence filed their written submissions dated 21<sup>st</sup> May, 2018. I have carefully read through the same. The prosecution did not make any final submissions.

### **Issues for Determination**

10. In this case, and as provided under *sections 203 and 206 of the Penal code*, the prosecution is under a duty to discharge its burden of proof on the following issues:-

- a. that the deceased died and the cause of death.**
- b. that it is the accused herein who killed the deceased; and**
- c. that the act or omission leading to the death of the deceased was unlawful; and**
- d. that in killing the deceased the accused acted with malice aforethought.**

11. *Section 206* which defines malice aforethought provides thus:-

*“206. 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.”*

### **Analysis and Determination**

12. Upon careful consideration of the evidence on record, there is no doubt that the deceased died. All the witnesses testified to this fact and Dr. Amunga who carried out the post mortem examination on the body of the deceased on 2<sup>nd</sup> November, 2014 produced the post mortem report as proof that indeed the deceased died. From the post mortem report, the cause of the deceased's death was alcohol intoxication with associated severe pneumonia.

13. Regarding the third issue, namely whether it is the accused person who killed the deceased, the case for the prosecution is that the accused together with his deceased brother Rueben Khajira Murunga assaulted the deceased and as a result of the assault, the deceased died. Musa testified that when he got to the deceased's house the deceased was lying on a mattress in his single roomed house and was breathing with great difficulty and had both his hands swollen. Wycliffe and Shadrack also spoke of the deceased having swollen hands, though none of them testified that it was accused who had assaulted the deceased. The medical evidence given by Dr. Amunga was to the effect that there were no visible external injuries on any part of the deceased's body. This court is therefore in doubt as to whether the accused person really assaulted the deceased. If such injuries had been inflicted upon the deceased, the post mortem report would have revealed them. Thus, there is no proof that the accused herein is guilty of any act or omission which led to the death of the deceased. The accused denied all suggestions that he assaulted the deceased. He also denied that he failed to take the deceased who was 48 years old at the time to hospital.

14. In any event according to the post mortem examination, the deceased died from causes other than issues of assault. According to Dr.

Amunga, the cause of the deceased's death was hypocycimia, alcohol intoxication with associated severe pneumonia. What the medical evidence suggests is a case of extreme alcoholism on an empty stomach and resultant liver cirrhosis. It is therefore, clear that the cause of the deceased's death is not attributed to any unlawful act or omission on the part of the accused person.

15. The above being the position I also find and hold that the prosecution has failed to prove any malice aforethought on the part of the accused person.

**Conclusion**

16. In the result, and for the reasons given above, I find that the accused person herein, JAIRUS SHANGUYA MURUNGA IS NOT GUILTY of the murder of GODWILL IGADWA MURUNGA. I accordingly acquit him of the same under **section 322(1) of the Criminal Procedure Code**.

17. This follows therefore that unless there is any other reason for holding him in custody the accused shall be set free forthwith.

It is so ordered.

Judgment written and signed at Kapenguria

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Kakamega on this 12<sup>th</sup> day of October, 2018.**

**WILLIAM MUSYOKA**

**JUDGE**

**In the Presence of**

MR. NGETICH for State

MR. INDIMULI for Accused

ERIC/POLYCARP - Court Assistants