



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 14 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MUEMA MUSAU K. MWAU.....1ST ACCUSED

VINCENT SILA JONA.....2ND ACCUSED

KYALO MUSYOKA.....3RD ACCUSED

JUDGEMENT

1. The three accused persons herein **MUEMA MWAU KIMWELI**, **VINCENT SILA JONA** and **KYALO MUSYOKA** have been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on unknown dates between 8th and 14th January 2011 at Kathyaka Sub-Location in Kibwezi District within Makueni County jointly with others not before court murdered **PHILES NDULU KINUU**.

2. The prosecution called witnesses in support of its case. The brief summary of the case is that neighbours of the deceased got suspicious when they found her animals tethered for too long while others roamed neighbouring farms without a caretaker. They proceeded to her house and found her body sprawled on the kitchen floor. The area Assistant Chief was alerted who in turn alerted the police. The scene was visited and the body collected. A post mortem was later conducted and the cause of death established as severe cerebral/head injury. Investigations led to the arrest of the accused persons who were subsequently charged with the offence herein. The summary of the evidence by the said 9 witnesses is as follows:-

3. **Agnes Mulekye Mutunga (PW1)** stated that she went to her farm on the 14/1/2011 and found the deceased's goats roaming about and she chased them away. She teamed up with other neighbours and untied the deceased's sheep and cows that had been tethered in a nearby thicket and abandoned. She later accompanied her neighbours to the home of the deceased where they stumbled upon her body sprawled on the floor of her kitchen and it was full of maggots. She identified the photographs taken at the scene.

4. **Daniel Mutisya Nthombe (PW2)** stated that he accompanied the neighbours to the home of the deceased where he saw the body and he alerted the assistant chief.

5. **Benjamin Mukola Mutiso (PW3)** stated that he too visited the scene and saw the body of the deceased. He alerted the area chief and waited for the police to arrive. Later the body was collected by the police officers.

6. **John Kioko Kinuu (PW4)** was a son to the deceased. He stated that he received a telephone call to the effect that his mother had been killed. He rushed home and found the kitchen floor was bloodstained and with maggots. He opened the main house and he learnt that the deceased's mobile phones had been stolen as well as a bicycle and a solar panel plus a sony radio. He proceeded to Makindu Hospital mortuary where he positively identified the body of his mother. He also furnished the police with the deceased's mobile numbers 0726[particulars withheld] and 0720[particulars withheld] as well as the empty mobile phone porches and sim card holders that he managed to obtain from the deceased's house. He also furnished the mobile phone IMEI number [particulars withheld].

7. **No. 46796 PC William Muthama (PW5)** was the initial investigating officer. He stated that upon receiving the report, he proceeded to the scene where he found the body of the deceased lying in a pool of blood and in a state of decomposition and full of maggots. He secured the scene and formed the opinion that the deceased had been attacked outside her house and dragged into the kitchen. He also recovered a blood stained mortar near the body which he suspected to have been one of the murder weapons. He organized for photographs to be taken and had the body taken to Makindu Hospital mortuary. He later witnessed the post mortem conducted by Dr. Aluvala. He later handed over the file to chief inspector Samuel Agutu for further investigations.

8. **No. 75602 PC Joseph Mutie (PW6)** was the officer who visited the scene and took photographs. He produced the said photographs as

well as the certificate.

9. **No. 231192 Chief Inspector Samuel Agutu (PW7)** stated that he took over the investigations file from PC William Muthama. He visited the scene and met a son of the deceased who gave him the mobile numbers that the deceased used. He then engaged the mobile number phone operator namely Safaricom to provide him with the details of the current mobile phone number user as well as the call data records. Upon receipt of the identification card number of the current user of the mobile phone, he conducted investigations at the National Registration Bureau which revealed the name of one Muema Mwau of Makeni County and with the call data he was able to trace the said Muema Mwau in Nairobi and promptly arrested him. He recovered from him a mobile handset with serial IMEI-354220396746640 which belonged to the deceased. He interrogated the said Muema Mwau who claimed that he had bought the handset from his younger brother Boniface Mwau. The said Muema Mwau led the police officers to the arrest of the said Boniface Mwau, Vincent Sila Jona and Kyalo Musyoka who were all arrested but however one of the suspects namely Boniface Mwau escaped from lawful custody. One of the suspects herein Vincent Sila Jona later recorded a confession complicating all the suspects in the murder of the deceased. He stated that he charged the accused persons since he was of the opinion that they had a common intention to rob the deceased and steal her property.

10. **Dr. Aluvala Eliud Seme (PW8)** performed the post mortem on the body of the deceased. He noted multiple skull fractures due to blunt force applied on the skull. He also established that the chest ribs were fractured. He formed the opinion that the cause of death was severe head injury. He produced the post mortem report.

11. **No. 231782 Chief Inspector James Rasugu Ongera (PW9)** stated that he received a confession from the 2nd accused herein Vincent Sila Jona. The confession was recorded by the said accused in the presence of his aunt one Tabitha Kambua Peter and which implicated the rest of the accused in the murder of the deceased herein. He produced the confession recorded in Kiswahili language as exhibit No. 2. He maintained that the confession was done properly without any compulsion.

12. **No. 73528 PC Quinto Odeke (PW 10)** was a member of the Directorate of Criminal Investigations attached at the Safaricom as an enforcement and liaison officer. He stated that upon request by the investigating officer for the call data records, Safaricom availed the same and it was established that the deceased's handset serial [particulars withheld] changed hands on the 13/1/2011 and took a new number 0727[particulars withheld] as per the call data records which he produced as exhibit No. 10. He also produced the certificate as exhibit No. 5(b) and further added that the call records run from 6/1/2011 to 27/2/2011.

13. At the close of the prosecution's case, the court found that a prima facie case had been made out against all three accused persons and were subsequently placed on their defence. Each of the accused persons tendered sworn testimonies as follows:

14. **Muema Mwau Kimweli (DW1)** was the first accused herein. He stated that he used to be a milk salesman for a certain company in Nairobi and had gone home on 23/12/2010 for Christmas and returned back to the city on the 5/1/2011. He was later joined by his younger brother Boniface Wambua who had a mobile phone and which he requested him to purchase. He later bought it at Kshs. 2,000/- and used it until July 2011 when he was arrested and placed in custody together with his said younger brother Boniface Wambua. He maintained that he was not involved in the alleged murder of the deceased whom he did not know. He further maintained that it was his younger brother to explain how he obtained the suspect mobile phone and he should not be made to suffer for his sins since he was just an innocent buyer. He admitted on cross examination that his younger brother did not have a mobile phone when he left him at home on the 5/1/2011 and further confirmed that the mobile phone was a used one and that he did not enquire from him whether he had a purchase receipt.

15. **Vincent Sila Jona (DW2)** was the second accused. He stated that he used to do casual jobs within Makindu township. He stated that he was arrested on 27/2/2011 while asleep at the home of his aunt Tabitha Kambua and bundled into a police vehicle where he met a stranger whom he later learnt to be Boniface Wambua whom he had known way back in 2008 when he used to work for his father before he left after stealing two cows. He went on to add that they were taken into a thicket where they were severely beaten on allegations that they had participated in the murder of the deceased. He further stated that he was later escorted to see the OCS who ordered him to sign some documents in the presence of his aunt Tabitha Kambua and that he duly signed the same in her presence. He maintained that he was not given time to read the alleged confession which did not emanate from him. He finally maintained that he is not aware that the confession implicated him in the murder and the arrest of the other suspects. On being cross-examined, he stated that he did not read the confession though he knew how to do so. On re-examination by his learned counsel, he stated that the assault weapon was a piece of wood.

16. **Kyalo Musyoka (DW3)** was the third accused. He stated that he used to work at a certain hotel in Makindu from where he was arrested on 28/2/2011. He stated that upon his arrest, he was escorted to Kibwezi police station and then to Makindu Law Courts and subsequently to Machakos High Court where he was charged with murder. He maintained that he was not beaten and neither did he make a confession. He sought for the dismissal of the charges as none of the witnesses mentioned him and further nothing was recovered from him. On being cross examined, he stated that he could not recall where he was between the 8/1/2011 and 14/1/2011.

17. Learned counsels for the parties herein were directed to file written submissions. It is only counsel for the defence who filed brief submissions and sought to rely on their earlier submissions on no case to answer. The defence submissions mainly centered on the issue that none of the witnesses testified to have seen the accused persons committing the offence and further that the confession allegedly received from the 2nd accused herein was not properly and legally obtained and ought to be rejected by this court.

18. I have considered the evidence adduced by both prosecution and defence as well as the brief submissions tendered. It is also not in dispute that there were no eye witnesses to the killing of the deceased within her compound. It is also not in dispute that some items were stolen from the home of the deceased during the robbery incident. It is also not in dispute that one of the stolen items namely a Nokia Mobile Phone was recovered from the first accused herein Muema Mwau Kimweli. It is also not in dispute that the 2nd accused herein Vincent Sila Jona made a confession regarding the murder which confession was produced herein as exhibit No. 2 by Chief Inspector James Rasugu Ongera (PW9). It is also not in dispute that one of the suspects namely Boniface Wambua is reported to have later escaped from lawful custody. After the above deductions, I find the following issues necessary for determination namely:-

- (i) Whether the confession received from the second accused herein was properly and legally obtained from him.

(ii) Whether the prosecution proved its case against the three accused persons beyond any reasonable doubt.

19. As regards the first issue, the recording officer herein Chief Inspector James Rasugu Ongera (PW10) stated that he had complied with the Evidence (out of court confessions) Rules 2009 pursuant to the provisions of Section 25 A(1) of the Evidence Act. The said section provides as follows:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved against such person unless it is made in court before a judge or magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector of Police and a third party of the person’s choice”.

The confession made by the 2nd accused herein was before a police officer in the rank of a Chief Inspector of police and was made in the presence of the 2nd accused’s aunt Tabitha Kambua Peter who oversaw and signed the same. The said confession was made in Kiswahili language which the 2nd accused understood. Indeed the language of interpretation throughout these proceedings has been Kiswahili. The 2nd accused tendered his defence evidence in Kiswahili language and he admitted on cross examination that he knows how to read in Kiswahili language. The 2nd accused in his defence evidence has claimed that he had been tortured and did not sign the confession of his own volition. However he did not say anything about his aunt Tabitha Kambua Peter who was present and who signed the said confession. I find the fact that his aunt oversaw the recording of the confession and duly signed it is a clear indication that all was well with the said confession. In any event the said confession was duly produced as an exhibit by the officer who recorded it. The defence did have an opportunity and cross examined the said witness at length but it did not object to the production of the said confession so as to necessitate a trial within a trial and thereafter the court would then establish whether or not the said confession would be deemed as retracted or repudiated. The production of the confession now became part of the prosecution’s evidence. I find therefore that the said confession was properly and legally obtained from the 2nd accused herein.

20. As regards the second issue, it is noted that all the three accused persons herein face a charge of murder which is defined by Section 203 of the Penal Code as follows:-

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

The above definition gives rise to four crucial ingredients of the offence of murder all of which the prosecution must prove beyond reasonable doubt in order to prove the charge and are as follows:

i) The fact of the death of the deceased.

ii) The cause of such death

iii) Proof that the deceased met her death as a result of an unlawful act or omission on the part of the accused persons.

iv) Proof that the said unlawful act or omission was committed with malice aforethought.

On the fact of the death of the deceased, the same was proved by PW1, PW2, PW3, PW5, PW6 who all visited the home of the deceased and found the body sprawled on the kitchen floor and that the body had decomposed with maggots and flies swarming around it. The body was later photographed by PW6 and that PW5 organized for its removal to Makindu hospital mortuary. All these witnesses indeed confirmed that the deceased had died several days earlier going by the presence of maggots and flies around the body.

On the cause of death, Dr. Aluvala Eliud Seme (PW8) did conduct a post mortem on the body after the same had been identified by PC William Muthama (PW5) and the deceased’s son John Kioko Kinuu (PW4). The said doctor formed the opinion that the cause of death was severe head injury. The post mortem report was produced as exhibit No. 1.

On the question of the unlawful act or omission on the part of the accused persons, it emerged from the evidence that the deceased then aged about 70 years old used to live alone but she had a grounds man namely Boniface Wambua who was one of the suspects who later escaped from lawful custody. The confession recorded by the 2nd accused herein and which was produced as an exhibit gave an elaborate synopsis of how the plot to murder the deceased was hatched by the accused persons. The said plan was indeed executed leading to the killing of the deceased and theft of some of her properties. The deceased’s mobile phone handset was later traced to the first accused herein. It emerged from the confession that the deceased was first fatally attacked before her properties were stolen. The attack clearly was unlawful on the part of the accused persons. The 1st accused’s explanation that he had bought the stolen mobile phone from his younger brother Boniface Wambua who was also a suspect appears not convincing since he admitted on cross examination that he knew that his younger brother had no mobile phone previously and further agreed with the prosecution that he did not bother to ask for a purchase receipt. The said mobile phone was property recently stolen and hence the doctrine of recent possession became applicable. The confession roping all the accused persons to the murder of the deceased therefore put paid the 1st accused’s defence claim of innocence. The call data records showed that the 1st accused had indeed inserted his sim card into the deceased’s stolen mobile phone handset and purported to be the owner of the stolen mobile phone. Hence I find the prosecution proved that the deceased met her death as result of an unlawful act or omission on the part of all three accused persons.

On the issue of malice aforethought, the same is provided for under Section 206 of the Penal Code which defines malice aforethought in terms of any one of the following circumstances on the part of the accused:

(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 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.

The confession by the 2nd accused herein gave a vivid description of how the macabre attack upon the deceased was executed. There was clearly malice aforethought on the part of the accused persons. Indeed the accused persons had earlier met and planned about the murder and on the due date they executed their plans by murdering the deceased. The accused persons who were after the deceased's money and other properties decided to get her out of the way in order to access the said properties. The manner in which the deceased was attacked left no doubt that the intention was not only to do grievous harm but to snuff out the life of the deceased by all means. A blood stained mortar was found beside her body and the kitchen floor was awash with bloodstains. The pathologist noted multiple skull fractures as well as fractures on the ribs. I am satisfied that the accused person had malice aforethought which the prosecution proved beyond reasonable doubt.

The defence evidence did not in any way shake that of the prosecution which is quite overwhelming against all three accused persons.

21. In view of the foregoing observations, it is the finding of this court that the prosecution has proved its case against all three accused persons on the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Consequently, I find all three accused persons guilty as charged and are convicted accordingly.

It so ordered.

Dated and delivered at Machakos this 1st day of October, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Muthama for Kamolo for all accused

Machogu for the state

Josephine – Court Assistant