



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 17 OF 2014

REPUBLIC.....PROSECUTION

VS

JACOB BUNDI.....ACCUSED

JUDGMENT

Jacob Bundi was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

Particulars are that Jacob Bundi on the 30th day of June 2012 at Kinyanka village, Kiegoi sublocation, Igembe North Sub County in Meru County murdered Stephen Kirimi.

PW2 testified that he witnessed accused and the deceased quarrelling. That accused went home and came back armed with a panga which he used to cut his brother the deceased on the neck. PW2 said that after deceased had fallen accused cut him again. He said no one approached the scene as accused was armed with a panga. That after committing the murder accused left the scene after 5 minutes police picked the body the following morning.

PW3 sister in law to PW1 accompanied her to Eastleigh where the deceased had been killed. PW3 said from home to Eastleigh is 5 minutes walk. She said they found the deceased had been cut on the neck and body was lying besides the road bleeding profusely. She said the body was collected and taken by police to Maua Methodist Hospital mortuary.

That on 1.7.2012 he led police to Jacob Bundi's house and photographs were taken. PW3 said accused is her brother and they had no grudge. She said she didn't find accused at the scene. She said accused and the deceased had not differed. She said accused was a driver and didn't stay much at home.

PW4 Dr Charles Njeru produced PM Report prepared by Dr Kangethe who conducted autopsy as the boy of the deceased herein at Maua Methodist hospital mortuary on 3rd July 2012. Dr Kangethe observed that the deceased head and neck almost cut off from the rest of the body as it was held by some muscles. He observed like there were repeated cuts to separate head from the body using a sharp object. He concluded that cause of death was as a result of massive blood loss after decapitation. He said an object that could cut through bones was used to inflict the injuries.

PW5 Elizabeth Oyiengo Government Analyst examined blood sample from the deceased. Clear Yellow jacket belonging to the accused, sky blue T-shirt belonging to the accused; green pair of trouser belonging to the accused as well as blood sample from accused and established that DNA profile generated from blood stains on the accused persons T-Shirt and Trouser matched the DNA profile generated from the blood sample indicated as of the deceased. She produced DNA Report EXP2.

PW6 the Investigating Officer P.C Joshua Kiambathi investigated the offence and preferred a charge against the accused. He said when they visited the home of the suspect they found his mother and sister who showed them accused persons house and on breaking into the house which was locked with a padlock recovered a yellow jacket with blood stains. There was also a sky blue T-shirt with blood stains. There was also a green trouser with blood stains. He said what they recovered was identified as clothes the suspect was wearing prior to committing offence. PW6 said accused had escaped by then.

PW6 arranged for post-mortem from which blood samples were taken from body of deceased and forwarded together with accused persons clothes to government Chemist for DNA profiling.

PW6 said that accuse was traced and arrested in Timau area on 3.2.2014 1 ½ years after committing the offence. PW6 said he didn't recover the weapon used to cut the deceased.

When accused was placed on defence he gave sworn statement and said that on 29.6.2012 at 11.00am his brother the deceased called and

asked where he was and he told him he had taken the vehicle to the garage in Maua. That the deceased told him to find him a bar in Maua. He said he met the deceased at Maasai bar and they had drinks together. He said each bought drinks for the other. He said they remained in the bar upto 6.30 pm after which they left and went to Eastleigh area. That before they got to Eastleigh they went to Kanthari where the deceased was wanted to pick his jacket and panga. He said the deceased tucked the panga in the jacket. He said they passed through miraa farm to Eastleigh shopping centre where they entered a bar where they continued drinking beer, Guinness and allsops and at about midnight he told the deceased they should go home but the deceased wanted to continue staying at the bar.

He said when owner of bar wanted to close; they went to buy cigarettes from Faula's. That while at Faula's place a young man known as Morris came and the deceased wanted to fight him because he had been told that Morris stole his miraa but he separated them. He said that the deceased wanted to produce a panga but held him and they crossed the road and started walking home. That when they got to Roberts shops the deceased insisted he could not leave Morris and he knew he had stolen miraa.

That he tried to restrain him and in the cause of the struggle, they fell down while still holding the panga and in the process realised when he pulled that it had cut the deceased. He threw panga and started screaming. That James Mugambi and Faula went to scene. He said he was shocked and when he saw a crowd gathering he went home due to fear and had the blood stained clothes changed. He said he was drunk and he went to Nyayo Tea zone and sat down and slept.

That when he gained consciousness after 3 hours he decided to go back home. When he found people crying he was so saddened that he took a matatu and came to Meru town. That he took another matatu to Nanyuki. That he stayed in Nanyuki for 1 ½ years. He said he used to go home at night. He said he went back home on 7.12.2013 after a pastor in a church in Nanyuki prayed for him and was being hired to take miraa to Maili Tabu. He said he was arrested on 3.2.2014 when he was watching football at Maua. He said that his relationship with the deceased was cordial and they had never differed. He said his deceased brother's wife and children have no grudge with him. He said that panga cut his brother while they were struggling over it. He said he didn't know extent of injuries inflicted on his brother as it was at night.

He said he was drunk but went home and changed blood stained clothes. He said he was drunk and fell besides the road in the tea plantation and slept. He said he didn't report to police because he feared people could have harmed him.

DW2 James Mugambi testified and said that accused and deceased went to drink at his bar at 11.00 pm. When they were already drunk and sold to them only once as he was about to close. He said the deceased insisted that he sells to them and he refused. That the accused and the deceased left together and he remained in the club with 2 other customers. He said they left between 11.00 pm and 11.15 pm and after 10 minutes he heard screams and when he went out to see what was happening he saw someone stand across the road.

He got his torch and saw it was the accused who was holding his brother and screaming. That he saw accused leave the scene when people responded to the screams. DW2 said that he saw the deceased person's neck had been cut and he called Assistant Chief for who called Maua Police station. He said family members went to police station and the next morning police collected the body. He said he saw Jacob after 2 months from date of murder incident. DW2 said the deceased used to guard miraa and the weapon usually used is C-Line panga. He said accused and the deceased frequented his bar together and could even drink on credit. He said on the material day both accused and deceased took a bottle of guinness.

DW3 the brother to the deceased and accused said he arrived at Eastleigh at 11.45 pm and found a crowd had gathered and his brother on the ground and his neck had been cut. He said Faulu told him that she heard the deceased and accused quarrel after they had bought cigarettes from her and subsequently heard screams. DW3 said he didn't see the accused after the incident. He said he started communicating with him after 1st year of disappearance. He said the accused was a driver while the deceased used to guard miraa farm. He said the 2 had no differences.

Upon close of defence case the prosecution and defence were given time to file submissions. On 4.10.2018 but none was file and a date for judgment was fixed on 1.11.18. even by the 1.11.18 when court was unable to deliver judgement due to witness still none of the parties had filed submissions.

The issues for this court is to determine to have been satisfied by prosecution were spelt out in the case of **Republic vs James Mwirigi (2016) eKLR** are

1. That death of the victim occurred.
2. That the death was caused by an unlawful act or omission by the accused person and
3. The unlawful act or omission was actuated by male aforethought.

That the deceased person died is not disputed. Accused as well as his 2 witeses DW2 and DW3 as well as prosecution witnesses PW1, PW2,- the eye witness, PW3 the sister to the accused and the deceased and PW6 confiremd that indeed the deceased died.

The evidene of Dr Njeru who produced PM Report on behalf of Dr Kangethe was a confirmation that decaed died and cause of death established as cardiorespiratory arrest due to massive blood loss after decapitation.

That the death was caused by the accused is also not disputed. He confirms he was at the scene and claims that in the cause of restraining the deceased from cutting 'one Morris' they struggled and fell down and that when he pulled the panga it cut his brother on the neck.

That is evidence of PW2 christopher Mwitii who was the only eye witness. When Abraham Keendi called PW1 he told her that the accused had cut the deceased. When examination by Government Analyst was done on blood stained clothes belonging to the accused. It was found

that DNA profile generated from the deceased person blood samples matched DNA Profile generated from the blood stains on clothes recovered from accused persons clothes which he admit having changed after the incident.

Was the unlawful act of decapitating the deceased persons head actuated with malice aforethought? The accused explained that he was trying to restrain the deceased from following and fighting with one Moris as the deceased had even drawn a C-line panga from the jacket but the issue of Moris only came up in his defence. Even his witnesses don't say they heard the deceased quarrel with anyone else.

PW2 said the deceased was in the hotel while accused was in the bar and when accused found the deceased had left the hotel to go home he picked a quarrel with him. That accused went home which is less than 1 km away and which PW3 said is 5 minutes walk from Eastleigh and came back armed with a panga and without saying anything cut the deceased on the neck. That when the deceased fell he cut him again on the neck. The doctors observations in the post mortem report indicate there were signs of repeated use of sharp instrument to decapitate the head. That means it was not an accidental but intentional cut kill. PW2 said the accused was not drunk and he was also not armed when quarrelling with the deceased. He walked home ½ Km away and came back armed with a panga and without talking cut his brother.

PW2 said that deceased was not armed. DW2 and DW3 tried to suggest the deceased could have been armed because he had a jacket and that he used to guard miraa farm while usually armed with C-Line panga but there was no evidence they saw him C-Line or any panga on the material day. If the panga belonged to the deceased, then the question that one would ask is why did the accused leave the scene with it?

After the accused head almost decapitated his brothers neck, he went home instead of reporting alleged "accidental" injury to his brother. He changed the blood stained clothes and left for unknown place. He was only arrested in Timau area on 3.2.2014 and yet his home is in Igembe, North Sub county. He insisted he was in Maua when he was arrested in Timau. He is alias and claims of being saved are tainted with lies to hoodwink the court.

Accused said that they arrived at DW2's bar at 8.30 pm and Dw2 says that they arrived at 11.00 pm and left at 11.15 pm. By changing blood stained clothes this court. By changing blood stained clothes this court can only infer that he was concealing evidence that he was the murders and that a mounts to malice aforethought. His escape from the scene from 30.6.2012 until when he was tracked and arrested on 3.2.2014, 2 years down the line only goes to prove that he didn't have good intentions for his blood brother and as the good book says when the blood of his brother cried out to God he was arrested and charged.

This court finds that the prosecutions 6 witnesses have proved beyond all reasonable doubt that the accused committed the heinous act of murdering his blood brother in a very brutal and inhuman way. He is guilty as charged and convicted under S.215 C.P.C.

HON. A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON

THIS 8TH DAY OF NOVEMBER 2018.

IN THE PRESENCE

Accused – Present

Mr Igweta Advocate for accused – Present in present

Mr Igweta Advocate for accused – present in person

Mrs Mwathi for state

Mr Kinoti – Ct assistant

Mrs Mwathi

I don't have records accused maybe treated as 1st offender.

Accused Mitigation: Mr Igweta Advocate

Accused has 2 wives and 2 minor children. He is remorseful . The deceased was a family member and they have forgiven him. Accused has reconciled with family of the deceased. Accused has been in custody for 4 years since death sentence is no longer mandatory I pray for an alternative.

Order M. 22.11.2018 for victim Impact statement.

HON. A. ONG'INJO

JUDGE