



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 27 OF 2015

(FORMERLY MERU HIGH COURT HCCR NO. 8 OF 2014)

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN MUINDI.....1ST ACCUSED

WILLIAM KIMATHI.....2ND ACCUSED

J U D G M E N T

1. This is a case of murder where **MARTIN MUINDI** (1st accused) and **WILLIAM KIMATHI** (2nd accused) are charged with the said offence contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars of the offence as per the information presented are that on the 7th February, 2014 at Ngaita village, Ganga Location within Tharaka Nithi County jointly with others not before court murdered F M (hereinafter to be referred to as the deceased).

2. The prosecution's case against the two accused persons is that they subjected the deceased person, a person they knew as a neighbor and also mentally challenged, to a mob justice and set him on fire after killing him on suspicion that he was a robber.

3. The prosecution called a total of 7 witnesses during the trial to prove their case against both the accused persons herein. David Njagi (PW4) gave evidence and told this court that the deceased who was a cousin to him went to his house on the night of 5th February, 2014 at around 9 pm and after being served with food, he was shown where to sleep and locked therein as PW4 reportedly knew that he was mentally unstable. He further added that he left him in the room and went to pick his wife at Ciakanyinga. However on getting back at around 11 pm his children informed him that the deceased had disappeared. He further stated that he went looking for him in Ngaita village but did not trace him. He came back to sleep and later at around 4 am he was informed by Muriungi that M (deceased) was dead and that he went and confirmed the fact at the scene of crime where he found the body of the deceased being placed on a police vehicle.

4. Dickson Mwenda Nyaga (PW1) in his evidence testified and told this court that he was asleep in his house on 7th February, 2014 when at around 2 am, he heard shout of "**mwizi! "mwizi!"**" and on going out he heard the noises emanating from the house of deceased's father known as Mutegi and on going there he found the deceased dead with blood all over his face. He further told this court that he found many people at the scene including his sister Josphine Muthoni. He told this court that he could not establish who had beaten the deceased, a person he knew to be mentally challenged.

5. The evidence of Lenah Kangai (PW2) directly linked the accused persons herein with the murder. She told this court that she was asleep at home on the material date when at around 2 am, she heard screams emanating from the locality and she woke up her sisters Muthoni, Kanini and her brothers Mwendwa and Mwicwiri and headed to the scene where he found the 2nd accused with a blood stained machete saying "**tumemaliza kazi**". She further added that the 1st accused was standing side by side with the 2nd accused and that they were both standing beside the body claiming that the body belonged to "**Alshabaab.**" PW2 further stated that when he switched on a torch to have a look at the body, he identified that it was M (deceased) and that she informed the first accused that the person lying dead was M, but the 1st accused asked his wife to bring fuel as he gathered dry leaves placing them on the body before setting it on fire. The witness further testified that the police shortly arrived and asked those present to put off the fire and that it was the first accused who poured water to put off the fire.

6. Caroline Kawira (PW3) is another witness who directly linked both the accused persons with the murder of the deceased. She testified and told this court that on the material night at around 1 am, as she was sleeping she heard screams outside and on coming out she ran towards where the scream's emanated which was Ngaita junction PW3 further testified that on reaching there she saw several people and two people

dragging something from their compound and that he recognized the two as the 1st and 2nd accused persons. She added that there was moonlight and so she recognized the two accused persons and that on closer look on what they were dragging, she noticed that it was body of a person whom they referred to as "**Alshabaab**". She also added that Kangai (PW2) directed her spotlight on the body and she discovered that the body was M (deceased) and not "**Alshabab**." According to PW3, the 1st accused told Kangai to switch off her torch before proceeding to burn the body insisting that it was alshabaab despite pleas from her that it was M (deceased). She stated that she was able to recognize M (deceased) because of his deformed legs. She insisted that Muindi (1st accused) is the one who asked his wife to bring paraffin which she did and that the 1st accused dosed the body and dry leaves around the body with paraffin before setting it on fire.

7. The doctor (Dr. Justus Mutuku Kitili - PW6) who performed post mortem examination on the body of the deceased confirmed that the body had 100 % external burns but according to him what caused the death was not the burns but deep cut and severe injuries to the head which caused fracture of the frontal skull bone and subdural haematoma. He tendered post mortem report which he had prepared as P.Exhibit 1 which showed that the deceased died as a result of "**cardiopulmonary arrest due severe hemorrhage following deep cut and severe head injury**".

8. The investigating officer on the incident PC Joel Musieke (PW7) testified and told this court that on the material date, he received a call from OCS Ntumu police station regarding a case of murder. He testified that he together with other police officers boarded a police vehicle and headed to the scene of crime where they found a body of a person burning on fire. They found a crowd of people around where the body was burning and among the people in the crowd were both the accused persons in this case. He added that he immediately directed them to put off the fire which was done as interrogated the 1st accused on what had happened. According to the investigating officer the 1st accused reported to him that the deceased in the company of one other person had knocked on his door demanding that he open the door and when he screamed the other person took off leaving the deceased alone and that when he eventually got out, the deceased chased him to a nearby garden where they struggled. He further added that the 1st accused told him that the 2nd accused came to his rescue and assisted in apprehending the deceased as other people joined in. He testified that there were signs of struggle at farm where nappier grass grew and opined that the place was the first scene of the murder. He further stated that the 2nd scene about 20 metres away on a public road adjacent to the compound belonging to the 1st accused person. He further testified that there was no sign of intrusion on the house of 1st accused or any sign that someone had tried to forcefully open or break it.

9. When placed on their defence both accused persons denied committing the offence. The 1st accused (Martin Muindi) on his part testified that on 7th February 2014 he was sleeping in his house when at around 2 am he heard some people talking outside his house and when he peeped outside he saw some three people inside his compound standing with their faces covered. He further told this court that he screamed with his wife and that after they screamed the three people took off but after a while he heard people who had reportedly come to their rescue say that they had caught up with one of the intruders. He further stated that the villagers who had come had caught one of the intruders at his farm as the others escaped and that he did not go near the farm and did not know whether the intruder was dead or alive as all he could remember was that the police were called as the intruder was dragged away from his farm by the villagers to the adjacent road. According to him when the police arrived the crowd ran away leaving him behind to explain to the police what had happened. He faulted prosecution witnesses for lying to court and in particular PW2 and PW3 stating that they had personal differences owing to a stolen goat that was traced to PW2 in a previous occasion. He insisted that he has no idea who murdered the deceased and set him on fire. He also denied reporting to the police that the deceased had chased him from his house to his shamba.

10. The 2nd accused (Kimathi Mutegi William (DW2)) testified that he was sleeping in his house on the material date when at around 2 am, he heard someone hitting the roof of the 1st accused and before long he heard screams and someone shouting "**wezi, wezi**" ("**thieves**", **thieves**!") and since according to him there has been some incidents of theft in the locality previously where he was a victim, he came out and heard a watchman from a nearby Secondary School saying they had arrived. He further stated that he

went to check what had happened to his cousins place (1st accused) when the number of villagers swelled and that is when he discovered that one of the alleged intruders had been nabbed though he could not tell whether he was dead or alive since according to him his face was covered. He faulted PW1, PW2, and PW3 for testifying that they were at the scene when he did not see them at the scene. He faulted PW2 in particular stating that he had quarreled with her over issues to do with their Cooperative Society where he was working as a manager. He further testified that PW2 had severally been nabbed with illicit brews and she wrongly blames him for betraying her to the authorities. He further opined that PW1, and PW2 being related to PW3 may have had a motive to implicate them in the murder to settle old scores. According to him the deceased was a person well known to him and was normal and even a member of this society.

11. This court has highlighted the evidence tendered by the prosecution against the two accused persons herein and the defence raised. The offence facing the accused person is murder and for conviction to be sustained both the defence and the prosecution are in agreement on the position of the law. The following ingredients must be established and proved;

(i) The fact of death of a person

(ii) The cause of death

(iii) Presence of malice aforethought (mens rea)

(iv) Actus reus (unlawful act or omission of the accused cause the death).

12. To begin with the 1st ingredient, there is no dispute that F M (deceased) is dead and that he was murdered and thereafter burnt on 7th February, 2014. The evidence tendered by the doctor (PW6) and the exhibits (P.Exhibit 1) and photographs 2(a) to (d) tendered by the investigating officer clearly shows that the deceased was murdered and his body burnt. The cause of death is also not disputed. The severe cuts to the head caused cardiopulmonary arrest as a result of severe haemorrhage.

13. The defence has contended through written submissions vide their learned counsel, that the state failed to prove or establish who killed the deceased in this case. The state on the other hand has submitted that the attack on the accused person was not spontaneous but carefully planned. The State has contended that the 1st accused initiated the attack and the 2nd accused was an accomplice as he went for reinforcement and came with crude weapons which they used to fatally injure the deceased.

14. Going by the evidence tendered it is however difficult to conclude that the murder of the deceased herein was planned or that it is the accused person who went for reinforcement and came back with crude weapons to commit the act. At the same time, I disagree with the defence contention that the question of deceased mental state was of no relevance in this case. In my considered view the state of mind of deceased may have played a big part in the events leading to his death and the accused persons may not have been candid in their defence. This is a person they knew well because he was from the neighbourhood. I observed both the accused persons as they testified and that demeanor clearly showed that they were trying to conceal the fact that they knew the deceased. The first accused stated that when the police came and inquired from him whether he knew the person who had been nabbed and killed in his compound, he answered in the negative but when he went to the road to put the body on the police vehicle he identified him but again changed the narrative in examination in chief that he did not know who killed the deceased and did not even know him. That inconsistency in my view showed that the 1st accused was clearly trying to conceal something material- knowledge of the deceased in order perhaps make this court buy the defence narrative that the deceased person was an unknown intruder who was killed by mob justice.

15. This court does not believe both the accused persons when they claim that the deceased had covered his face when he intruded into the compound of the 1st accused person. The evidence by the investigating officer who in my view did well in the investigations show that the home of first accused was not broken into. Infact the 1st accused person confirmed in his defence that the deceased did not break into the house. The investigating officer told this court that he was told that the deceased person was mentally unstable and he went ahead and investigated the claim and established that indeed the deceased was being treated for psychotic condition. The evidence given by PW1 and PW4 regarding the mental state of the deceased shows that the deceased had some psychotic disorder and that may explain why David Njagi (PW4) decided to look him in a room after dinner as he went to pick his wife who was working late at Ciakanyinga.

16. Inference can be drawn from the evidence adduced by the prosecution that the deceased may have unknowingly walked into the house belonging to the 1st accused given his state of mind. From the evidence of PW4 and the investigating officer (PW7) it can be easily deduced that given the hour the 1st accused says he was alerted by the presence of some people in his compound (2 am) and the fact that as the 2nd accused states that there had been previous incidents of burglary, it is possible that the 1st accused could have panicked and raised an alarm before getting out armed to pursue "**the intruder**" who happened to have been a person suffering from psychotic disorder.

17. The evidence given by PW2 (Lenah Kangai) and Caroline Kawira (PW3) connects both the accused persons with the crime. PW2 saw 2nd accused standing with a blood stained machete. His reported remark of "**tumemaliza kazi**" coupled with the 1st accused reference to the deceased then lying down as "**alshabaab**" before setting it on fire establishes an irresistible conclusion that the two accused persons were responsible for the death of the deceased. The evidence of PW3 who saw the two accused persons drag the body from first accused farm to the road corroborates and supports that inference.

18. The defence has defended themselves against the evidence by the two witnesses (PW2 and PW3) stating that they have a grudge against them but looking at the evidence of the investigating officer and the observations he made at the scene of crime, it is clear that the deceased was killed within the compound of the 1st accused before being dragged to the road where his body was burnt. PW3 infact stated that he saw the 1st and 2nd accused drag the body to the road. Moreover when both witnesses (PW2 and PW3) testified both the accused persons duly represented by counsel did not challenge their evidence or shake their credibility on account of any of their previous differences with the accused persons. The fact that they only brought up the issue of perceived differences only when put on their defence suggests that the accused persons were only out to discredit the evidence tendered against them. This court finds that the same is without basis as no evidence was tendered by the defence to back up their claims. In addition to this, the defence has also not shown how the evidence of the investigating officer could also have been ill motivated against them.

19. The investigating officer went to great lengths in his investigations including drawing a sketch of the crime scene to really explain what he found out. As I have observed above the deceased appears to have been killed inside the compound of the 1st accused in a farm planted with nappier grass and it was around 20 metres from the 1st accused house. The house of the 2nd accused is around 50 metres away. The two accused persons live quite close to each other and therefore anything happening in either of their houses if loud enough will be heard from the other house. When the 1st accused states that he came out of his house when neighbours (none of whom was called to testify in defence) had nabbed one of the intruders at his compound and that he did not go to where the "**intruder**" had been caught is simply incredible. How did the "**villagers**" gather within seconds or minutes of screaming given the hour (2 am) and managed to apprehend a thief who was running away owing to the screams of the 1st accused and his wife? The narrative given by the two accused persons in my view was at best diversionary. The 1st accused person says he did not go near where the "**intruder**" was caught and mind you this is a '**suspect**' in his mind out to commit burglary or crime against him. Seriously any reasonable person would be curious and interested to know who that person is if he is caught in his farm like he says he was. For him to come to this court and say that somehow the suspect was nabbed and beaten and never bothered to go near and check who it was is another diversionary which really does not anger well with his plea of innocence. The 2nd accused on his part says that he heard his nephew's (1st accused) wife scream "**wezi!**" "**wezi!**" and he came out and that he first took cover in a nearby bush which of course could be understandable given that confronting thieves/criminals at night is not for faint hearted. However when he at the same time says that he heard a watchman from a nearby school assure him that "**tumefika**" but still run to the bush instead of going to assist his next door nephew is suspect particularly when was quick to say he was not armed with anything yet he had stated that the locality had experienced a number of burglaries with himself have been a victim. When this court considers this sort of statement in comparison with the evidence of prosecution witnesses (PW2, PW3 and PW7) it is clear that the prosecution's case is overwhelming against both the accused persons herein. The only inference that I can be deduced from evidence tendered by the prosecution the defence and the circumstances obtaining as captured by the investigating officer show that both the accused persons took part in the killing of the deceased herein. Both PW2 and PW3 states in their evidence that the 1st accused in particular stopped (PW2) from illuminating the face of the deceased with a torch she had and instead told her to switch it off since the deceased was an "**alshabaab**". So the question posed is why would the 1st accused want the deceased not to be identified? Why would one fear a dead person being identified? Why did he ask his wife to

bring paraffin which he used to set the body on fire? It is clear that his intention was to pass of the crime as an act of a mob that had administered mob justice to a suspected thief. I also find the evidence by PW2 that the 2nd accused was standing besides the body of the deceased with a blood stained machete remarking "**tumemaliza**" connects him with the death of the decess as illustrated by the medical evidence (P.Exhibit 1).

20. This court finds that the direct evidence tendered by the prosecution and circumstantial evidence obtaining from the evidence tendered have in my view sufficiently pointed and proved the element of actus reus and connected it with the accused persons herein. Though I find that the element of mens rea has also been to some degree established given that the accused persons tried to conceal their ill thought and unlawful act by setting the body on fire. However the accused persons may not have been candid enough in their defence. It is possible that they may have genuinely thought that the deceased was an intruder given the time he went knocking at the door of the accused person. It is also possible that the accused persons attacked the deceased thinking that he was a thief and may have only realized that they had made a mistake much later. That is the only thing that created a little doubt in my mind when considering the issue of malice aforethought notwithstanding the defence adopted by accused persons. In the premises I find that the prosecution's case has sufficiently established and proved that both the accused persons unlawfully caused the death of the F M (deceased) but the ingredient of malice aforethought though established as I have observed is not beyond reasonable doubt. There is nothing to show that the murder was pre- meditated or planned. The evidence tendered nevertheless sufficiently proves that both the accused persons are guilty of the lesser offence of manslaughter contrary to **Section 202** of the **Penal Code**. This court has no hesitation in view of the sufficiency of the evidence tendered in convicting them for that offence of manslaughter which I hereby do accordingly

Dated, signed and delivered at Chuka this 2nd day of November, 2018.

R.K. LIMO

JUDGE

2/11/2018

Before Hon. R.K. Limo (JO

Mr. Machira - state counsel

C/A Mwaniki

1st accused- present

2nd accused - present

Court:

This court has considered mitigating circumstances and particularly the fact that the accused persons are first offenders and the circumstances under which the offence was committed however an innocent life of a person who was mentally challenged was lost due to the actions of both the accused persons. They need to reflect on their actions and reform. Each accused persons shall serve seven (7) years imprisonment.

Right of Appeal 14 days.

Judgment signed, dated and delivered in the open court in the presence of Murithi for accused and Machirah for state.

R.K. LIMO

JUDGE

2/11/2018.