



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.48 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**THOMAS KIMATHI NKOROI.....ACCUSED**

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

1. **THOMAS KIMATHI NKOROI** (“the accused”) has been charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya*. It was alleged that on the night of 20<sup>th</sup> May, 2013 at Ndamene location in South Imenti district within Meru County, the accused murdered **TIMOTHY MUCHWERI MARETE** (“the deceased”). The accused denied the charge and the prosecution called seven witnesses to establish its case.

2. **PW1 Mburuki Mkuu Manene**, told the court that on the material day at about 5pm, he was on his way home from Nkubu, he met a group of about 15 people at Nguvuvu assaulting the deceased. They had tied the deceased’s hands to the back with a rope and they flog marched him around the village alleging that he was a banana thief. The witness recognized four people out of the group of 15 whom he named as **Kimathi** (the accused), **Junto Nkoroi** (a brother to the accused), **Mwirigi** and **Njogu**.

3. The witness further told the court that when the people reached near the area manager’s home, they assaulted the deceased with a log and stones as a result of which the deceased died. He identified the log (**PEXh.1**) and stones (**PEXh.2 (a) and b**). He was able to recognize those involved using the natural light as well as the full moon later that night. He also identified the jacket (**P Exh 3**) which the deceased was wearing at the time. After killing the deceased, the crowd attempted to set his body on fire. He left the scene at about 8pm and went home. The next morning, he and his family reported the incident to the police.

4. **PW2 NO.231872 CIP Peter Okello** told the court that at the material time, he was the OCS of Mitunguu Police Station. He recalled that on 21<sup>st</sup> May, 2013, he received a call from the Chief of Ndambene location who told him that there had been a murder in his area and the body was lying near his office. Accompanied by Pc Geoffrey Tanui and driver Oguti, he proceeded to the scene. He found the body lying on the side of the road. It had a severe injury and a dent on the back of the head. The hands were tied to the back and it was facing down.

5. There was a tree branch and several stones beside the body. He opined that there had been an attempt to burn the body from the presence of dry banana leaves and black spots on the skin of the body. He recovered the body, the tree branch and the stones. The body was taken to Meru Level 5 Hospital Mortuary for postmortem. He produced the tree branch and the stones as **PEXh.1 and PEXh.2 (a) and (b)**, respectively.

6. He returned to the scene on 23<sup>rd</sup> May, 2013 and his investigations revealed that, the deceased was taken around the village before he was eventually killed. There were around 15 people who dragged the deceased around alleging that he was a banana thief. He tried to find out from whom the deceased had stolen bananas but did not find any. He established that the accused was among the fifteen people who caused the death of the deceased. The other suspects were Joel Njogu, Joseph Kirimi and Sebastian Mwirigi, whom however, after interrogating them he found nothing to connect them to the incident.

7. **PW3 NO.83838 PC Rachel Nyambura** told the court that she has been working at Mitunguu police station since 2015. She was the one who took the photographs to the scene of crime office as instructed by the OCS Raphael Mutua. She did this in 2015.

8. **PW4 Jediel Kiunga** was the brother to the deceased. He told the court that on the material day at around 17.00hrs, he was coming from work when he heard one Mwirigi tell Njogu that the deceased had stolen some bananas. The two left using a motorcycle to look for the deceased. They later returned with the deceased with his hands tied with a rope. They started beating the deceased as they headed to the direction of the area manager’s home. They were alleging that he had stolen a fork jembe.

9. **PW4** further testified that those who assaulted and killed the deceased were Mwirigi, Njogu and Njuto who were arrested but later

released. He exonerated the accused from the incident.

10. **PW5 DR. James Kihumba** told the court that he was a medical officer working at Meru Level 5 hospital. He produced the post mortem report that was conducted by Dr. Njuguna on 24/5/2013. According to the report, the body of the deceased had multiple cuts to the sculp and face, multiple fractures to the frontal bone, the occipital bone (back of the head) and the left parietal (above the ear). In the nervous system, there was intravascular hematoma but all other systems were normal. The conclusion was that the cause of death was due to the severe head injury due to multiple cuts to the head.

11. **PW6 NO.77780 PC Geoffrey Tanui** told the court that, at the time of the incident, he was based at Mitunguu Police Station. He accompanied **PW2** to the scene where they found a body lying on the side of the road. Beside the body, there were stones, a tree branch and sticks which were half burnt. On examining the body, they found that the hands had been tied to the back with a sisal rope and there was a cut on his head. They recovered the body and took it to Meru Level 5 Hospital. According to him, the accused was placed in the scene of crime by **PW1, PW2** and **PW3**.

12. He testified that he arrested Kirimi Nkoroi, a brother to the accused. That the accused was arrested the next day at the station when he came to answer the call by the OCS.

13. When put on his defense, the accused told the court that on the material day, he had gone to work at the farm of **James Mwiti M'Itonga** where he worked the whole day. That after work, **Mwiti** drove him back to Mitunguu at about 20.00hrs. They went to **M'Itonga's** pub where they stayed up to about 23.00hrs when **M'Itonga** took him home.

14. On his part, **DW2 James M'Itonga Mirianga** testified that on the material day, the accused with others worked in his farm at Mitunguu from 09.00hrs to 17.00hrs. After work, they went to his pub to talk. After that, he drove the accused home and only heard of the death of the deceased the following morning.

15. I have carefully considered the evidence on record. The accused is facing a charge of murder under *section 203 as read with section 204 of the penal code* which rise to four ingredients that must be proved by the prosecution beyond reasonable doubt. These are:-

a) the fact of death of the deceased;

b) the cause of death;

c) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; and

d) proof that the said unlawful act or omission was committed with malice aforethought.

16. The law places an obligation on the prosecution to prove each of these ingredients of the offence beyond reasonable doubt. See **Okechi Okale and Others V Republic (1965) EA 555.**

17. On the fact and the cause of death, **PW1 and PW4** told the court that on the material day, they saw the deceased in the hands of a group of people totaling about 15. That the group went around with the deceased in the village while assaulting him using a tree branch (**PExh.1**) and stones (**PExh. 2 (a) and (b)**). That as a result of the injuries he sustained, the deceased died. The post mortem report produced by **PW4** showed that externally, the deceased suffered multiple cuts to the sculp and face. Internally, he suffered multiple fractures to the frontal bone, the occipital bone (back of the head) and the left parietal (above the ear). The cause of death was opined to be as a result of severe head injury due to multiple cuts to the head. The prosecution was able to prove beyond any reasonable doubt those two ingredients.

18. The Third issue is whether the death of the deceased was as a direct consequence of an unlawful act of the accused. **PW1** told the court that he saw fifteen people assaulting the deceased. That out of the 15, he recognized the four who assaulted the deceased as the accused, **Junto, Mwirigi** and **Njogu**. He stated that they hit him with stones and a tree branch or log.

19. There was also the evidence of **PW4**, the brother of the deceased. He stated that he witnessed the whole episode. That in the group of people who caused the death of the deceased, it was the three named by **PW1** who assaulted the deceased and not the accused. He questioned why the three who had been arrested were not in court.

20. These two were the only eye witnesses who were paraded by the prosecution. While **PW1** implicated the accused, **PW4** exonerated him. This being the case, it is left for this court to determine out of the two, whose evidence was to be believed. Of course both swore that they saw the accused at the scene. However, **PW1** was categorical that he saw the accused participate in the assault that resulted in the death of the deceased while **PW4** testified otherwise.

21. **PW1** told the court that he accompanied 5 police officers to the scene who recovered 4 stones and the tree branch. That the accused used the tree branch or log and the 4 stones that he identified in court in assaulting the deceased. However, when **PW2** testified, he stated that he and his colleagues were taken to the scene by elders from the area chief's office. That they only recovered 2 stones and not 4.

22. **PW1** had stated that, he witnessed the assault that resulted in the death of the deceased. That he left the scene after the deceased died. However, in cross-examination, he admitted that he had told the police that he only learnt the following day that the deceased had passed on.

23. In view of the contradictory evidence of **PW1**, his evidence must be taken with a lot of caution. On the other hand, **PW4** exonerated the accused from the heinous act. He wondered why the three whom he named and who had been arrested were not charged with the offence. **PW2** on his part exonerated the 3 and implicated the accused. He never told the court why he left out the 3 but clang to the accused while the

evidence of PW1 was shaky. To my mind the prosecution's case was contradictory and unsatisfactory to warrant returning a conviction against the accused.

24. On the other hand, the accused set up an alibi. He told the court that on the material day, he was in the farm of **DW2**. He worked there the whole day. His testimony was supported by **DW2**. Although they were thoroughly cross-examined, their testimony remained consistent and firm.

25. To my mind, the prosecution did not prove the third ingredient to the required standard. The doubt cast in the prosecution's case can only be resolved in favor of the accused.

26. In view of the foregoing, there is no need of examining the fourth ingredient of malice aforethought. Accordingly, I am satisfied that the prosecution was not able to prove its case beyond reasonable doubt.

27. I therefore find the accused not guilty of the murder of **Timothy Muchweri**. I acquit him of the charge under *section 215 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya*.

**SIGNED** at Meru;

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 13<sup>th</sup> day of December, 2018.**

**F. GIKONYO**

**JUDGE**