



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL CASE NO. 39 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH MUNYOKI KOVO.....ACCUSED**

**JUDGEMENT**

1. The accused person Joseph Munyoki Kovo stands charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 10<sup>th</sup> August 2010 at Muuna village, Mziitu sub-location Tseikuru location in Tseikuru District within Kitui County murdered Hellen Lena Munyoki.

2. He has denied the offence and the prosecution called seven (7) witnesses in support of their case.

3. PW1 was A M a 12 year old girl who testified before Honourable Justice Mutuku. She did not tender evidence on oath because the Judge was of the opinion that she did not understand the nature of an oath.

4. It was her evidence that on 9<sup>th</sup> October, 2010 she was at home with her mother and father and the other siblings. They went to sleep, and in the morning she told her brother to open the door for her but discovered that the house had been locked from outside. They found their mother seated on the floor in the bedroom where she had slept with the father but when they tried to call her, she did not respond. The brother then called an aunt by the name Mueni. She did not know where the father was but she later saw him at Garissa. She was not cross-examined.

5. PW2 was Stephen Mutinga Syengo, a pastor from Tseikutu town who gave evidence on affirmation. It was his evidence that on 10<sup>th</sup> August, 2010 at 6.00 am he left his home to his retail shop and at 9.00 am when Timothy Syengo one of his congregation and a neighbour asked him to accompany him to mama Sophia's home. After crossing a river, they met A PW1, and then Stephen Syengo asked A where her father was to which the girl said her father had left and her mother had died. They proceeded to the scene where they found the house padlocked. They then proceeded to the open window and though they called Mama Sophia, she did not respond. They observed that Mama Sophia was sitting on the floor and appeared to support herself with one hand. She had an injury on the face and hand. They thus decided to report the matter to the police who came, broke the padlock, entered and removed the body. He knew the deceased for one year and also knew her husband but did not know where he was at that time, and only saw him in court.

6. In cross examination, he said that he knew Mama Sophia from school days and was their neighbour for only 1½ years. He said that Mama Sophia and her husband stopped attending his church sometimes ago. He did not know if there was any existing domestic dispute. He maintained that it was Timothy (PW3) who came to his shop and that he did not see T the accused's son. He said that he did not know if the accused had businesses outside Tseikuru. He stated that he did not go into Mama Sophia's house. He also did not see a weapon in the house but saw a machete being removed from a toilet by the police the same day. According to him, it was removed from a pit latrine which was not very deep. He could not recall if police Constable Magenyia who removed the machete used gloves but said the police used gloves when removing the body.

7. PW3 was Timothy Musimi Syengo a businessman at Tseikuru. It was his evidence that on 10<sup>th</sup> August 2010 he was with Mutinga Syengo (PW2) when accused's son T came and asked them whether they had seen his father. Shortly thereafter a niece came and told him about the mother and also stated that the father was not around. According to him the niece was older than T who was only 3 years old and thus he told his friend (PW2) to accompany him to the place. They found the house locked from outside with a padlock but there was an open window. When they looked through the window, they saw the woman seated and supporting herself with one hand while the head was bent. There were visible injuries on the thigh and another injury on the head. They reported the incident to the police but the father of the children was not seen. According to him, the business of the father of the children was located about 50 to 60 metres from his home. Though he saw the father of the children at the business the previous day, the business was not open that day. The police came, cut the padlock open and took the body to the mortuary. He identified the accused person as the father of the children and said he had not seen him from that time until in

court.

8. In cross examination, he stated that T spoke to him when the pastor was present. He agreed that the deceased was his sister. He said that the deceased and the accused had lived in Tseikuru for a long time in peace, and the accused sold bread and operated a shop and a hotel. He agreed that sometimes the accused used to be away from home. He did not know what caused the injuries on his sister or the motive behind the injuries. On first sight he was convinced that the deceased was not breathing though he did not touch her to confirm whether she was dead. He stated that the machete was recovered by Corporal Mugenya with another police officer from the pit latrine. He could not remember whether they wore gloves.

9. PW4 was Dr. Alan Balongo, currently doing Post Graduate studies at the University of Nairobi. He was holder of Bachelor of Medicine and Surgery Degree from St. Petersburg Medical School in Russia 2006 and had done a number of post mortem examinations.

10. On 18<sup>th</sup> August, 2010 he received instructions from the police to conduct post mortem examination on Lena Munyoki at Mwingi District Hospital Mortuary. The body was identified by two witnesses Timothy and John and he conducted the postmortem examination. Body was not clothed and was of a female African in her 20s and well reserved. There was a deep cut wound in the muscles dislocating the left thumb. There were two deep cut wounds on the head right side. There was a cut wound on the left side of the head from the lower jaw area. No internal abnormality in the respiratory and digestive system was noted. Nervous system - there was swelling between the skull and brain as the cut wound had extended deep into the brain.

11. He filled the post mortem form and signed it. The cause of death was the injuries described. He produced the postmortem report as an exhibit. In cross examination he stated that the deceased had three cuts, and even if he was not given the medical history he would still give the kind of object used and the cause of death because of the nature of the injury noted.

12. PW5 was police Constable Omar Mahamud attached to Tseikuru police station. On 10<sup>th</sup> August 2010 at 8.30 in the morning he was asked by Cpl. Mike Mugenya to accompany him to a scene of murder with the deceased's brother, about 6 km from the police station. On arrival, they found the house locked and one window open. The District Officer and members of the public were a distance away. They peeped through the window and noticed the deceased in a sitting position with deep cuts on the head. She was sitting on the floor near the bed and blood was scattered all over. They searched for a weapon and found a machete in a shallow latrine which they took. The pit latrine was less than 30 metres from the house and according to him the machete was blood stained.

13. On 18<sup>th</sup> October, 2010 he was instructed by his Incharge to accompany two relatives of the deceased to identify the body for postmortem. He witnessed the post mortem examination. He escorted the machete and a container with a blood sample of the deceased to the Government Chemist for analysis after preparing an Exhibit Memo Form. He produced the Exhibit Memo Form and stated that he received the report of the Government Analyst on 31<sup>st</sup> August 2010. He also identified the machete in court.

14. In cross examination, he said that though there were no eye witnesses, the deceased was chopped by her husband to death. He said that they found many people outside the perimeter fence of the home, and that the deceased was alone in the house. He maintained that he was one of the people who recovered the machete. He stated that Cpl. Mugenya was the Investigating Officer. He said they wore gloves when handling the machete, but did not dust it for finger prints. He said that he did not record in the Exhibit Memo Form that he collected a piece of flesh and if the same appeared on the form it must have been written by somebody else.

15. He was not present when the accused was arrested, and could not say where Cpl. Mugenya got information on the accused. He was aware that the accused was arrested and taken to Nyali police station and he was instructed to collect him from there which he did. He could not know if the accused was in Mombasa at the time of the incident. He could not know if the deceased fought with somebody though there appeared to be signs of a fight. He said there were three windows in the house but the window that was open was that of the deceased's room. No finger prints were taken from the wooden windows, and though photographs were taken, the scenes of crime personal did not avail them.

16. In re-examination, he stated that he accompanied his superior, the Investigating Officer to the scene and saw the body of the deceased. He also maintained that he took the exhibits to the Government Analyst and prepared the exhibit memo but did not make an entry therein about a piece of flesh. He said that he received a signal that the accused was at Nyali police station.

17. PW6 was Cpl. Mike Mugenya of Maai Mahiu police station. It was his evidence that between 2009 and 2011 he was stationed at Tseikuru police station. On 10<sup>th</sup> August 2010, at 8.30 am while at Tseikuru police station, he was informed by the report office that a report of murder had been received. He called Police Constable Omar Mahamud together with whom, accompanied the reportee, proceeded to the scene where they found the house locked from outside. The reportee said that the homestead was the home of his sister who lived with her husband the accused. They were informed by the reportee that an elder daughter of the deceased had sent a young brother by the name T to inform him about the incident. The report was that the accused had told his children that his wife had been attacked by unknown people and that he was going out to buy painkillers for the deceased but did not come back. They cut the padlock of the front door and entered and found the deceased with serious cuts. They made searches for the murder weapon and found a machete in the family's shallow pit latrine. It was very dry in August and it was thus easy to find the weapon which they retrieved with the assistance of members of the public and according to him, it had dry blood stains. He filed an inquest request form and drew sketch plans. He also took photographs.

18. The next day he proceeded for training at Kiganjo and left Police Constable Mahamud to continue with investigations. He said the pit latrine was 5 feet deep and they saw the machete with the assistance of a torch. The item recovered was taken to the Government Chemist for DNA comparison with deceased's blood sample. He identified the machete and produced it in court as an exhibit.

19. He stated that the accused was arrested in 2012, because he had gone underground and was hiding in Mombasa. He knew the accused before as a person who operated a hotel and a butchery with the deceased at Tseikuru market. He identified him in court.

20. In cross examination, he said that he was the initial investigating officer. He maintained that the accused disappeared for more than 2 years after lying that he had gone to buy pain killers and also locked the children inside the house and never came home for the funeral. According to him this amounted to guilt conscience. He also stated that before he left for Kiganjo Police College they had set a manhunt for the accused but did not get him. He denied that the children were couched. He was not present when the accused was arrested. He maintained that the accused run a business with his wife because he used to find both at the business. He did not know that the accused operated business elsewhere. He stated that he did not dust the door for finger prints and that the nearest neighbour to the homestead was 50 to 100 metres away but no screams were heard. He maintained that the investigations were not shallow and insisted that the accused had a guilty mind. He maintained that the accused was involved in the killing.

21. In re-examination, he stated that Pw6 Police Constable Omar Mahamud attended the post mortem and took blood and other samples to the Government Chemist.

22. After several adjournments, the Government Chemist was not availed by the prosecution to testify. The prosecuting counsel then closed the prosecution case.

23. In his defence, the accused gave unsown testimony in Kiswahili. He said that he was a small businessman selling items such as clothes. It was his evidence that on 10<sup>th</sup> August, 2010, he woke up early and travelled on business after he informed his wife, with whom he did business that he would travel secretly because their main business had collapsed. According to him, on an earlier morning, his wife had informed him that she saw a piece of paper in their compound which stated that – “if you do not pay me, I will follow my money.” The wife did not know the author but he was aware that they had debts in their business. That is why he left home secretly to find ways of repaying the debts.

24. He also stated that he had experienced mental problems from his secondary school days which had recurred while he was in business.

25. He stated further that one week did not end and he got the information that his wife had died. According to him, the person who arrested him did not tell him the reason for arrest but merely handed him over to the police and he was put in the cells and charged in court. He also stated that he had experienced mental problems even when in custody.

26. That was the close of the defence case, as the accused elected not to call any witness.

27. This is a murder case, and the prosecution is required to prove all the elements of the offence beyond any reasonable doubt. The accused does not have a burden to prove his innocence. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.

28. The elements of the offence of murder to be proved by the prosecution are firstly, whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused caused the death of the deceased. Fourthly, whether if the accused caused the death of the deceased, it was with malice aforethought.

29. Did the deceased die? The evidence of all the prosecution witnesses is that on that morning of 10<sup>th</sup> August 2010, the deceased was seen seemingly seated on the floor in her bedroom with serious injuries on the body especially the head. She was breathless. When the door padlock was opened, she was found to be lifeless. She was taken to Mwingi District Hospital mortuary and postmortem examination conducted by Dr. Balongo. The cause of death was established and a post mortem form was filled and produced in court. In my view, the prosecution proved beyond any reasonable doubt that the deceased died of the injuries suffered.

30. Was the death unlawful? From the facts and circumstances of this case and the nature of injuries suffered by the deceased leading to her death, I find that the death of the deceased was unlawful as there is no evidence or suggestion from the prosecution or defence that there was any justifiable legal reason to cause the death of the deceased the way it occurred.

31. Was the accused the person who killed the deceased? This is a case based on circumstantial evidence as no one saw the accused killing the deceased. The prosecution has to prove that all the facts and circumstances point to the guilt of the accused. Of relevance is section 111 of the Evidence Act (Cap. 80). The evidence that connects the accused to the incident was that of PW1, a minor who testified but not on oath and was not cross examined. She said that the accused was in that house with her mother the previous night and left, his whereabouts were not known, only for the mother to be found having been killed in the bedroom which they shared with the accused that night. The defence of the accused was that the accused had left for a business trip to Mombasa because he had debts and he wanted to find money to pay back.

32. In the case of **Ahmad Abdfathi Mohamed & Another vs Republic [2018] eKLR** the Court of Appeal considered the law on guilt in cases based on circumstantial evidence. There are three tests. First whether the inference of guilt is firmly established. Secondly, the circumstances should definite and tending unerringly to point at the guilt of the accused. Thirdly, the circumstances taken cumulatively should form a complete chain showing no escape from the human probability that the crime was committed by the accused, and no-one else. In addition, there should be no other co-existing circumstances which would weaken or destroy the inference of guilt.

33. All the evidence for the prosecution and the defence put the accused at the scene on the night when the incident occurred. He stated that he left that morning of 10<sup>th</sup> October 2010, the same morning when the deceased was found dead in her bedroom which he had shared with her. From his defence statement, he said that in a week's time he learnt that his wife had died. However, it is curious that he did not come home to find out what had happened to his wife instead he remained away for about 2 years until he was arrested by the police in Mombasa. The accused has also tried to raise an issue of mental disturbance but without explaining further what effect it has on his mental capacity.

34. In my view, all the facts, evidence and circumstances of this case, point to only one conclusion or hypothesis that it was the accused person who cut the deceased and killed her. The fact that the Government Chemist did not come to confirm if the machete had blood stains from the deceased is neither here nor there as the facts speak for themselves. It could only be the accused who had the opportunity to have killed the deceased that night even if the weapon was not the machete which was recovered from pit latrine.

35. I find that the prosecution proved beyond any reasonable doubt that the accused killed the deceased person.

36. Was the death of the deceased caused with malice aforethought? Malice aforethought has a statutory definition under Section 206 of the Penal Code. In summary, it is an intention to cause death or to do grievous bodily harm. The vicious nature of the injuries inflicted on the deceased can lead to no other conclusion than that the attacker intended to cause death or do grievous bodily harm to the deceased. I thus find that the death of the deceased was caused with malice aforethought. The veiled attempt to paint the accused as insane has not satisfied the threshold for a defence of insanity.

37. From the foregoing therefore, it is the finding of this court that the prosecution proved the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code beyond reasonable doubt, and I convict the accused for murder accordingly.

**Dated and delivered at Garissa this 10<sup>th</sup> day of December, 2018.**

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**George Dulu**

**JUDGE**