



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 64 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SALIM NGUTHU MULWA.....1<sup>ST</sup> ACCUSED**

**MATHEW MAKAU MUNYITHYA.....2<sup>ND</sup> ACCUSED**

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

1. **Salim Nguthu Mulwa**, the 1<sup>st</sup> Accused and **Mathew Makau Munyithya**, the 2<sup>nd</sup> Accused respectively are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the 24<sup>th</sup> day of **March, 2012** at **Kyambusya Village, Kyambusya Sub-location, Kalimani Location** in **Matinyani District** within **Kitui County**, jointly murdered **Rose Mutati** (Deceased).

2. Facts of the case are that on the **24<sup>th</sup> March, 2012** people who live around **River Kayo** were woken up at about **5.00 a.m.** by screams. People, including PW1 and PW2 ran to where the screams emanated from. They found the Deceased lying at the river bed having sustained a deep cut on her right leg. The 1<sup>st</sup> Accused had a catapult while the 2<sup>nd</sup> Accused had a wooden club. Some of the witnesses saw the Accuseds in the act of hitting the Deceased who was seeking forgiveness. All over sudden she stopped responding. Area Administrators and the Police were notified. The body was removed to the **Kitui District Hospital Mortuary** where a postmortem was conducted and the cause of death ascertained hence this case.

3. In their defence the Accuseds denied having murdered the Deceased. In their evidence it was stated that the 1<sup>st</sup> Accused had planted vegetables that were being harvested at night by thieves. On the material date they went to check on the vegetables at about **3.30 a.m.** As they approached they saw light emanating from objects they believed to be torches. They saw people harvesting vegetables, an act that prompted them to raise an alarm by screaming. The people ran into different directions as they pursued them. The Deceased was discovered lying on the ground. They denied having either assaulted the Deceased or having intended to kill her.

4. To prove its case the Prosecution called 12 witnesses. PW1 **Ambrose Ngala Mabindu** went to the river in company of his two (2) brothers. They found the Deceased lying on the ground. The 1<sup>st</sup> Accused had a wooden stick/club. The parents of the 1<sup>st</sup> Accused were already at the scene. He observed the Deceased body which had a cut wound on the knee of the left leg.

5. PW2 **Ekendu Mabindu** a brother of PW1 was woken up by their mother, **Munambu Kavata** following screams. He went to the river with his siblings where he found the 1<sup>st</sup> Accused and his parents with the 2<sup>nd</sup> Accused who had a wooden stick. He saw the 1<sup>st</sup> Accused stoning the Deceased. He saw and heard the 1<sup>st</sup> Accused's mother who was holding a panga begging him to leave the Deceased but he was adamant arguing how the Deceased had harassed him for long. The Deceased screamed asking for forgiveness but the 1<sup>st</sup> Accused hit her.

6. PW3 **Cyrus Gituai Malombe** the Chief, **Kalimani Location** found the Deceased having passed on. PW4 **Mulatya Mutunga** found the Deceased already injured. She turned out to be his sister-in-law. PW5 **Musyoka Kimanzi** found the Accused persons at the scene. The 1<sup>st</sup> Accused was in possession of a catapult while the 2<sup>nd</sup> Accused had a club. The Deceased was already injured. PW6 **Agnes Ntambi** found the Deceased having passed on. PW7, **Angelina Munanie Mutua** found the Deceased already injured. PW8 **Stella Mulwa**, a sister to the Accused persons heard noise and woke up PW6 and they went to the river. After the Chief was called she moved near the Deceased, observed the body which had cut wounds on the right leg and little finger.

7. PW9 **Damaris Mutua** received a call from PW7 her mother who informed her of what had transpired. She joined other people who were going towards the river. She saw the body of the Deceased. Her leg was bleeding. Accused 2 carried a stick in his hand. There was a panga at the scene which **Mulwa** (1<sup>st</sup> Accused) took and hid prior to the police arriving. However the police recovered it. PW10 **Muteti Mutunga** the husband of the Deceased found the body already in Mortuary. PW11 **Dr. Patrick Mutuku** produced a postmortem report following an autopsy done on the body of the Deceased by **Dr. Elizabeth Jowi**. PW12 **No. 38382 Senior Sergeant Sammy Ngeiwa** investigated the case and ultimately charged the Accused.

8. Issues to be determined are whether:

- Death occurred.
- It was caused by the Accused 1 and 2 through an unlawful act or omission.
- It was with malice aforethought.

9. Witnesses who answered the Deceased's call of distress confirmed that at the point when the police reached the scene of the incident the Deceased's lifeless body lay at the river bank. Thereafter a postmortem was conducted by **Dr. Elizabeth Ojowi**. Per the postmortem report, the Deceased sustained a deep cut over the calvarium-diagonal crossing both left and right parietal areas over midline. A deep cut over right popliteal fossa exposing muscle. The popliteal artery was severed. There were multiple small cuts over the forehead and right upper limb. On the head there was a deep cut on the scalp. As a result of the examination, the Doctor formed the opinion that the cause of death was massive haemorrhage secondary to severed popliteal artery. A Death Certificate **No. 303226** issued in that regard. The Deceased herein was the Accused person's relative. Her body was identified to the Doctor who performed the postmortem by PW10 her husband. In the premises the fact of death was proved beyond any reasonable doubt.

10. It is argued that there was no direct evidence to the death of the Deceased. None of the witnesses who testified saw the Accused persons cut the Deceased's popliteal artery that caused massive bleeding that eventually caused her death. Evidence against them is therefore circumstantial.

11. In the case of **Abanga alias Onyango vs. Republic, Criminal Appeal No. 32 of 1990** the Court of Appeal set out principles to be applied in testing the strength of circumstantial evidence. It stated thus:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

- 1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- 2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- 3. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

12. In the case of **Taper vs. Republic (1952) 2 All ER 447; (1952) A.C. 480** the court stated thus:

**“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

13. On the material night the Accused persons went to check on persons who were harvesting the 1<sup>st</sup> Accused's vegetables without his consent. According to the defence put up they saw some people and raised the alarm which made them run into different directions and subsequently disappeared. According to the Accuseds, the state of confused and noisy disturbance amidst darkness attracted the attention of neighbours who went to the scene.

14. Witnesses who went to the scene only carried spotlights. It was not alleged that some of them carried weapons. The Accused persons on the other hand had weapons. On arrival PW1 found the 1<sup>st</sup> Accused holding a catapult while the 2<sup>nd</sup> Accused had a wooden stick. PW2 saw the 1<sup>st</sup> Accused stoning the Deceased. At that point in time the 1<sup>st</sup> Accused's mother was holding a panga begging him to leave the Deceased but he justified his act of hitting her arguing that the Deceased had harassed him for long. He refused to heed the Deceased's plea to be forgiven. PW9 saw a panga at the scene which the 1<sup>st</sup> Accused hid prior to the police arriving but it was recovered. PW12 found the panga partly hidden in the ground some 15 meters away from where the body of the Deceased lay.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Accused persons went to the locus in quo because vegetables were being stolen at wee hours of the morning, when the Deceased screamed and neighbours answered her call of distress some of them found them in possession of the weapons.

16. Although the 1<sup>st</sup> and 2<sup>nd</sup> Accused denied vehemently having committed the act that caused the death of the Deceased, evidence adduced point unerringly at them as persons who did it. Evidence adduced did not point at any other neighbour/person who could have had the motive to injure the Deceased.

17. This brings us to the issue whether the act was done with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought as:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

- (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 of 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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Both the Accused went to the farm armed. They intended to catch the thieves. Further to that, considering the nature of injuries occasioned on the Deceased which were serious, the only reasonable inference to be drawn is that they intended to cause the persons concerned grievous harm or even death that ultimately occurred. In the premises they had acted of malice aforethought.

18. Having considered evidence in totality I find the Prosecution having proved the case against the 1<sup>st</sup> and 2<sup>nd</sup> Accused beyond any reasonable doubt. They are guilty and convicted of the offence of **Murder** as charged.

19. It is so ordered.

**Dated, Signed and Delivered at Kitui this 11<sup>th</sup> day of January, 2017.**

**L. N. MUTENDE**

**JUDGE**