



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR NO. 33 OF 2015
(FORMERLY MERU HCCR NO. 47 OF 2014)

REPUBLIC.....RESPONDENT

VERSUS

MOSES MUTEGI RWANDA.....ACCUSED

J U D G M E N T

1. **MOSES MUTEGI RWANDA**, the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented to court is that the Accused herein on 30th April, 2014 at Ithambaderi village Kanyoro Location, Gatune Division in Tharaka Nithi County jointly with others not before court murdered **MURIUKI MAKEMBO** (hereinafter to be referred to as the deceased).

2. The Accused denied committing the offence and the case went for trial where the prosecution called a total of six witnesses to establish and prove their case. When placed on his defence the accused tendered sworn evidence and called two witnesses in his defence. I shall consider the prosecution's case before considering the defence.

3. According to John Muriuki Muriungo (PW1), he was at his home on 30th April, 2014 (material date) when at around 1.00 a.m he heard the dogs barking and upon hearing that, he went outside to check where he saw a person standing outside the deceased's house. The witness told this court that the person directed a flashlight in his direction where he was standing between 50 feet away. He further told the court that he heard people speaking in Kiswahili but could not recognize them and that before he could ask who they were he heard a gunshot emanating from the house the deceased was and this forced him to run for cover in a thicket nearby and that leaving his wife and children behind.

4. The witness (PW1) further recalled that on that material day, there was a funeral involving one John Mugambi who was a brother to the Accused. He further added that he had had an altercation with the said John Mugambi on matters related to a land dispute between the Accused family and his. He added that because of the altercation, he had criminal case at Marimanti Law Courts which ended in his acquittal. The witness testified that from the thicket he decided to rush to the village elder who called the area Sub-Chief on phone. He then went back home in the company of the elder and found that the deceased had been shot dead on the chest. He told this court that it was around 5 a.m and that they followed some footsteps from the scene of crime which led them to the Accused house. He added that the accused had prior to that date, had shot the deceased with an arrow and had sworn to kill him due to the aforesaid land dispute. He told this that he was with village elder/Sub-Area (PW3) and Assistant Chief one Musa Kaibei when they followed the footsteps that led them from the deceased's home to the house of the Accused

person herein. He further added that the Accused person is their nearest neighbour and was also a relative.

5. Ann Kariithi (PW2) wife to PW1 and daughter in law to the deceased testified that on the material date at around 1.00 am, she also heard dogs barking and woke up with a flashlight on, she saw the Accused standing outside the door of the deceased's house. She stated that she directed the flashlight on the Accused face and properly recognised him as he was the immediate neighbour. She described what the Accused's person was then wearing as a black trouser, a dark suit with decorations on the shoulder. She further testified that she heard people conversing inside the deceased's house though she could not tell what the conversation was all about adding the deceased's house was directly opposite her house. She also stated that she stood at the door of her house for about 5 minutes and then she heard a gunshot from the deceased's house and a child crying. She added that she went back inside her house but could not sleep as she was shocked. She then went back outside and into the deceased house where she saw one Nyaga Rwanda, the accused person and one other person she could not recognize despite the light from a torch which she reportedly had. She added that Nyaga Rwanda went and checked on the house of her husband (PW1) and on finding that there was none, he left the scene together with the accused and the other person she could not recognize. She further testified that when she went inside the home of the deceased, she found him having been shot dead on the chest. She took her child and left. She recalled that the person who she did not recognize carried a gun and that the police later came and recovered bullet cartridges.

6. It was also Ann Karithi's testimony that the Accused had shot the deceased with an arrow in 2010 alleging that the deceased was a witch. She confirmed that a long stand dispute existed overland existed between the deceased's family and that of the Accused. She further added that besides that the Accused had at one time threatened both the deceased and her husband (PW1) that he would kill one or both of them.

7. Geoffrey Kamwana (PW3) the 3rd prosecution witness told this court that he was the village elder (Sub-Area in charge) and that on the material date at around 1.00a.m PW1 (John Muriungi Muriungo) went to his house naked asking for help as he reported that his father (deceased) was dead and wanted assistance. The witness stated that he called both the Area Chief and Sub-Chief on phone and was told to go and verify before calling the police.

8. The witness added that he volunteered some clothing to PW1 and called one Musa Kaibei to accompany them and on reaching the scene at around 5 am, they confirmed that indeed the deceased had been shot dead and that they noted some footsteps that were heading towards a hill nearby. In his view, the footsteps indicated that three people headed onwards the hill known as Gikingo and that the footsteps disappeared 100 metres before the forest. He confirmed that the accused and the deceased had a land dispute.

9. The investigating officer (Corporal Moses Nyota PW4) testified that on the material date at around 9.00 am an AP Inspector known as Muriuki reported that somebody had been shot dead at Igamba Ngombe and that on booking the report they went to the scene and interrogated witnesses they found at the scene. He later recorded the statements from the witnesses who in his view identified the Accused as one of the persons seen at the scene. He recovered a bullet and a cartridge and collected the body and took it to the mortuary.

10. The witness further testified that he attended post mortem examination of the deceased where he observed a bullet wound on the chest that exited through the back of the deceased.

11. Dr. Simon Mwangi Musyoki testified and produced the postmortem report on the body of the deceased as P.Exh. 1 which indicated that the deceased died as a result of severe internal hemorrhage caused by a gunshot.

12. When placed on his defence, the Accused testified on oath and denied committing the offence. He raised an alibi stating that on the material date he was in a place known as Mukothima at his father's house and contended that the place was different from Ithamba Nderi the scene of crime. He testified that

he had gone to his father's place because they were burying his late brother known as John Mugambi whose funeral was reportedly on 29th April, 2014. He added that after the funeral he stayed behind and slept on his young brother's home. He further added that he went back to Ithamba Nderi on 30th April, 2014 and arrived there between 9 and 10 a.m to hear reports that the deceased, whom he knew as a neighbour had been murdered. He stated that when he reached his home, his wife told him that the enemy had been killed.

13. The Accused person denied having any issue with the deceased though he confirmed that he had an altercation with deceased son (PW1) whom he added cut him on the head and showed this court a visible scar on his head. He further conceded that they had a long standing land dispute with the deceased and his family.

14. Nicholas Kirambia (DW2) a brother to the Accused testified and supported the Accused person that there was a funeral on 29th April, 2014 involving their late brother John Mugambi. According to DW2 the Accused spent the night in his house on 29th April, 2014, because they had a family meeting the following day- 30th April, 2014.

15. Another defence called Johana Mugambi (DW3) similarly gave evidence in support of the two defence witness on the funeral held on 29th April, 2016 and a family meeting held the following day 30th April, 2014. He testified that after the meeting on 30th April, 2014 everyone left to their respective houses including the Accused herein. He also confirmed that there was a land dispute between the deceased and the family of the Accused person.

16. At the close of the defence case both counsels in this case chose to rely on the evidence tendered and therefore made no submissions. This court has carefully evaluated the evidence tendered by both the prosecution in this case. There is no doubt that there was (and probably still) bad blood between the deceased and his family on one hand and the Accused person and his family on the other because of a land dispute. The evidence of the bad blood is seen from altercations involving both the Accused person and the deceased and his son John Muriuki Muriungo. The question in this trial is whether there was a connection between the previous altercation over land dispute and the death of the deceased in this case and whether the prosecution established the motive in the murder of the deceased herein.

17. The main witnesses whose evidence the prosecution's case rested in my view were three. There were two eye witnesses (PW1 & PW2) and the investigating officer (PW4). The cause of death of the deceased in my view is not disputed. Though the prosecution failed to avail an expert witness to prove that the bullet recovered and the spent cartridge recovered were from same gun, that evidence was secondary to the overall prosecution's case and the direction this judgment takes in this case.

18. Of the two eye witnesses to the incident that is PW1 and PW2, Ann Kariithi (PW2) was positive in her testimony that she identified the Accused herein standing near the house of the deceased after she came out in response of intense barking from dogs in the homestead. PW1 (John Muriuki Muriungo) stated that it was dark when he went out to check what was going on and that he went out naked and found a person standing outside the deceased's house and that the person shone or directed the flashlight on him. He heard voices at the deceased's house and could not recognize the voices. He took off to the thicket when he heard a gunshot. So having not recognised the Accused herein or any of the assailants, the only direct evidence linking the Accused herein with the offence charged is that of a single witness Ann Kariithi (PW2).

19. It is true that though the evidence of a single witness can be sufficient to found a conviction, such evidence must be treated with caution especially in circumstances where conditions for positive identification is suspect. I have noted that PW2 gave a vivid description of what the Accused was wearing when she saw him standing outside. She testified that she was able to identify him because he was an immediate neighbour and had a flashlight which helped her identify him because it was dark. However, this evidence is inconsistent to the evidence given by the investigating officer (PW4) who testified that he interrogated witnesses including PW2 who reportedly told him that she identified the Accused herein with the help of the moonlight. There was no mention of a spotlight by the investigating officer. This

inconsistency though minor when considered alongside other factors at play in this case cannot be ignored.

20. I have keenly looked at the evidence tendered by PW1. PW1 told this court that when he went back together with the village elder/Sub-Area Geoffrey Kamwara (PW3) and one Musa Kaibei, they followed footsteps which led to the house of the Accused herein. However, this evidence was inconsistent with the evidence tendered by PW3 who testified that the footsteps went and disappeared towards Gikingo hill which he stated was a forest. The prosecution for unknown reasons did not avail the said Musa Kaibei to testify and shade light on this important aspect that might have positively connected the accused with the crime herein. This is so because the court was told about a land dispute between the Accused family and that of the deceased. The probative value of evidence of feuding families are normally affected and it is not safe to base a conviction solely on such evidence. There is need for such evidence to be corroborated and when I consider the corroborating evidence tendered here on the question of identification, I find the same inconsistent and insufficient to convince me beyond doubt that identification was positive.

21. Another aspect of what I found wanting in the prosecution case in this case, is that there was no evidence tendered to show why the other suspect identified by PW2 as Nyaga Rwanda was not arrested and charged. The investigating officer did not tell this court why the suspect was not arrested and charged if he was seen at the scene of crime just like the Accused was also seen. The gunmen who supposedly shot the deceased, was not identified but the police should have done more by carrying out further and better investigations. This court for example has not been told why the crucial evidence showing that the accused had earlier attempted to kill the deceased by shooting him with an arrow was not availed to this court in order to establish and prove beyond reasonable doubt, that the Accused person had prior motive to cause harm to the deceased herein. The son to the deceased (PW1) testified that the threats by the Accused to his father (deceased) had earlier been reported to the police and besides the case where the Accused had also shot the deceased with an arrow. Though it did not come out clearly if the incidents were one or different, the least the prosecution should have done was to avail evidence especially if the Accused had been charged with attempted murder which was the proper if the accused really had attempted to shoot the deceased with an arrow on a different occasion. The omission of this important evidence in my view negated the weight of the prosecution's case against the accused. Evidence touching on threats to life was crucial for the prosecution's case but the same was not tendered in evidence.

In summary, I find that prosecution's case against the accused person is characterised by the cited inconsistencies and though I find that the defence of alibi put forward by the accused does not hold any water because the date in issue is 30th April, 2014 not 29th April 2014, I still find that the burden of proof is always on the prosecution. The positive identification of the Accused person by a single witness is not beyond doubt for the reason I have pointed above. The upshot of this is that this court finds that the evidence tendered by the prosecution is insufficient to sustain or render conviction against the Accused herein for the offence he is charged with. He is acquitted under **Section 215 of Criminal Procedure Code** and shall be set free forthwith unless he is lawfully held.

Dated and delivered at Chuka this 18th day of July, 2017.

R.K. LIMO

JUDGE

18/7/2017

Judgment signed, dated and delivered in the presence of Murango for accused and Machirah for state.

R.K. LIMO

JUDGE

18/7/2017