



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 1 OF 2009

REPUBLIC.....PROSECUTOR

V E R S U S

LAWI MUROKI THIONOI.....1ST ACCUSED

PATRICK GICHERU M'MITHIKA..... 2ND ACCUSED

FRANCIS MUROKI KOBIA ALIA MOHAMED.....3RD ACCUSED

JUDGMENT

Lawi Muroki Thionoi, Patrick Gicheru M'Mithika and Francis Muroki Kobia alias Mohamed are jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The three are alleged to have murdered **Peter Chokera** on 19/12/2008 at Kathelwa Market, Akirangondu Location in Igembe District.

The prosecution called a total of four witnesses in support of their case. The accused testified on oath in their defence. The accused were represented by Mwenda Mwarania Advocate while Mr. Mulochi appeared for the State.

The key witness in this case is **David Meeme (PW1)** who worked as a watchman at Kathelwa Secondary School. He recalled that on 19/12/2008 about 2.00a.m. while at work at the school, he heard noises at the market, then heard people singing traditional songs along the road which was about 200 metres from the school. He walked towards the market, hid inside a maize plantation near accused 1's hotel and saw people walking back and forth and noticed that they were taking somebody round as they turned him; that they then took the person to Lawi Muroki's (accused 1) hotel, and he saw the people cut the person with *pangas* and slashers till he fell down. He said he was hiding about 15 metres from the hotel and was able to see the people using the moonlight and electric lights; that there were lights at a bar adjacent to the hotel; that about 10 people were present including Lawi Muroki; Patrick M'Mithika and Francis alias Mohamed (accused 1-3) but he was not able to identify the others; that he knew the three people very well before that date. He recognized the person being cut as Peter Chokera the deceased. He said that by the time he walked away, Chokera had been cut completely. He went back to his place of work till and stayed till 8.00 a.m. when he went to the market and saw the deceased's body lying by the roadside. He said that the body had been moved from the hotel where the deceased was assaulted to the side of the road and there was a pool of blood at the hotel door but it had been partly covered with soil. In cross examination, PW1 told the court that he never informed his workmate, one Peter Muroki what he had seen that night nor did he go to inform one Elias, the father-in-law of the deceased nor did he report the

incident at the AP Camp which was nearby.

PW2 John Mutane testified that on 18/12/2008, he was with accused 1, the deceased and one Kanathi at a bar where they were trying to reconcile Accused 1 and Kanathi who had had a fight and accused 1 was demanding to be paid Kshs.20,000/= by Kanathi as compensation. After negotiations, the deceased suggested that accused 1 be paid 5,000/= but accused 1 got very upset with deceased and poured beer on him after which they were thrown out of the bar. It was resolved that accused 1 be paid KShs.10,000/= and he was very unhappy with deceased and threatened him that he would not enjoy Christmas because he prevented him from getting his money; that from the bar, PW2 went with deceased to Laare Police Station where he recorded a report about the threats. Next day, about 6.00 a.m. he was informed that a person had been murdered at accused 1's place and on going to see, found it was deceased. He said that police entered accused 1's house and came out with a *panga* that was blood stained. He said that he was a neighbour to accused 1 and they were friends there before.

PW 3 CIP William Matu is the OCS, Laare whom this court summoned to produce the OB for Laare Police Station dated 18/12/2008. He denied that there was any report by the deceased about threats to his life made by accused 1. He only found OB No. 25 of 19/12/2008 where a murder report was made and the finding of the body near accused 1's hotel and a pool of blood that was partially covered following which the accused were arrested.

PW4 PC Daniel Kiptanui took over investigations in December, 2011 and only relied on the information found in the OB and the witness statements on what transpired. PW4 also produced the post mortem report which was conducted by Dr. Macharia. The Doctor found that the deceased suffered the following injuries: deep cut on right arm, traumatic amputation of the left forearm at the wrist, deep cut on right leg; deep cut on scalp; compound fractures on the left parietal and occipital bones; the skull was split open; deep laceration of the brain tissue. The Doctor was of the opinion that the cause of death was head injury.

In his sworn defence, Lawi Muroki (accused 1) stated that indeed, him and deceased had married to sisters and were friends; that on the night of 18/12/2008, he was at his home with his family where he carries on business of a hotel; that indeed he had a case with one Kanathi on 17th and the OCS, Laare Police Station told him to go and get a witness; that on 17th night, he asked the deceased to be his witness; that on 18th, they went together to the Police Station and at Police Station they found that Kanathi had his witness, John Mutane (PW2) and that the case was not heard because the OCS was busy; that they all proceeded to Kamukunji bar where they drunk till 6.30 p.m. and he left for work, leaving the three others, deceased, PW2 and John Kanathi drinking. On reaching home, he was too drunk to work and he slept. He was woken up next day at 8.00 a.m. by people screaming along the road; that on the opposite side of the road from his house, he found Chokera lying dead; he went to Police Station to report the incident; that indeed there was blood found near his house. Police entered and searched his house but nothing was found. He was locked up with his wife who was later released and the two other accused were brought in but a fourth person who was arrested – Christopher Kaumba was not charged. Accused 1 also said that he had disagreed with PW1 who owed him money and that when he demanded for the money, there was a fight whereby PW1 damaged his house and he reported to the Police Station; that PW1 framed them because the other 2 accused tried to help stop PW1 from damaging accused 1's property. He agreed to having disagreed with Kanathi but not the deceased and that Kanathi did pay him for hospital fees.

In his sworn testimony, accused 2 Patrick M'Mithika Gicheru recalled that on 18/12/2008, he went to get *miraa* from Rumuthu, took them to Kathelwa where he found people making noise claiming that somebody had been killed. He was arrested next day. He denied knowing who committed the murder. He talked of an incident where accused 1 demanded his money from PW1 and that PW1 then caused damage to accused 1's property; that they reported to Police Station and that PW1 threatened him. He said that on 18th, he slept at his friend's home by name David.

Accused 3 in his sworn defence said that on 18th he was at his place of work, returned home, sent his wife to buy food and she left him with a small child but did not return. Next day 19th, he went to his in-laws to

look for the wife; he left the child there, went back home and found the wife had returned. He went back to work on 20th and heard that PW1 had named him as a murder suspect and he went to report to the Chief's Camp. He also claimed to have recorded a statement with the Police in a case where accused 1 fought with PW1.

To prove an offence of murder, the prosecution has the duty to establish the following ingredients:

- 1. Proof of the fact and cause of death of the deceased;**
- 2. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence and**
- 3. Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence.**

Malice aforethought can broadly be defined as an intention to cause grievous harm or cause the death of one. **(See Section 206 of PC).**

In this case the death of the deceased was confirmed by the findings of Dr. Macharia in the post mortem produced by the Investigation Officer, PW4. The cause of death was found to be head injury. The Doctor found that the deceased had suffered many deep cuts all over the body and the skull had been split open and amputation of the left arm. It is obvious that the injuries were inflicted by somebody and the question will be whether it is the accused who caused the death.

In the instant case, the only identifying witness is PW1. The incident occurred about 2.00 a.m. and PW1 said that he watched from a maize plantation. The principles guiding the court on the standard of evidence required in a case of identification were set out in the case of **Cleophas Otieno Wamunga v Rep 1989 KLR 424** where the Court of Appeal stated as follows:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The key witness in this case is PW1. I have carefully considered his evidence in its totality and I found it to be questionable in many aspects. First of all, PW1 told the court that he was on duty at a school near the scene of crime with another watchman by the name Peter Muroki. Even after witnessing the shocking and bizarre incident, he did not go back to inform the said Peter Muroki about it. He went back on duty and kept silent. That reaction is abnormal. Further to the above, PW1 confirmed in evidence that the AP Camp was a plot away from the school, but he never bothered to go and report this incident saying that the APs should have gone to the scene if they were interested. Thirdly, PW1 confirmed that the deceased and accused 1 were married to sisters whose home was also next to the market – the home of Elias. Again, PW1 never made effort to go and inform the said in-laws. PW1 then said that he went back to the scene after he left work at about 8.00 a.m. and he did not disclose whether he told anybody about what he had seen the previous night. It is not known how Police came to know that PW1 had witnessed the incident.

The incident occurred at about 2.00 a.m. PW1 told the court that he was hiding in some maize plantation

behind accused 1's hotel from where he watched as the people frogmarched the deceased before taking him to accused 1's hotel where they ultimately killed him. Before this court, PW1 said that there were electric lights at an adjacent building and the moonlight which enabled him see the assailants. However, during cross examination, the statement he recorded with the Police a day after the incident was read to him and he told Police that the moonlight was the source of light which enabled him to recognize the attackers. If indeed there were electric lights at the scene, why did PW1 not disclose that to the Police in his statement which was written when the incident was still very fresh in his mind? The inconsistency in PW1's evidence does raise doubts as to the source of light at the scene; what enabled PW1 to see, was it electricity or moonlight or both?

PW1 testified that he was only able to recognize three out of the about ten assailants, who are the three accused persons before the court. However, in cross examination by Mr. Mwenda, he was shown his statement to the Police where he named three other people as having been with the accused namely, Martin Meme, Mboi Mutua and Zakayo Kimoe. He even stated how each of them was armed. In court, he however changed and alleged that these three were only singing. If they only sang, why did he include them in the list of the assailants? PW1 did not have any plausible explanation why he chose to exclude the three from the list of those he saw at the scene on the fateful night. Having named the six people to the Police, the other question is why didn't the Police arrest, question or treat the other three as witnesses? The inconsistency between PW1's testimony and the statement to Police regarding who the assailants were puts to test PW1's credibility.

In *Kiarie v Rep (1984) KLR 739, at page 744* the Court of Appeal observed as follows;

“Where the evidence relied upon to implicate the accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

After a careful consideration of PW1's evidence, the single identifying witness, I find that his evidence is so fraught with inconsistencies that it cannot not be said to be watertight. It has raised many doubts as to PW1's credibility.

The only other evidence that could link accused 1 to the offence is that of PW2 who testified that he had been with accused 1 and the deceased at a bar where they went to settle a dispute between the deceased and one Kanathi whereby the accused 1 was infuriated by the deceased's suggestion that he be paid less than KShs.20,000/= as compensation by the said Kanathi. PW2 also said that accused 1 then threatened the deceased that the deceased would not enjoy Christmas; that when they parted with accused 1, he escorted the deceased to report at the Police Station. The OB for Laare Police Station for 18/12/2008 was produced to court and there was no such report by the deceased. Accused 1 admitted to him, PW2, deceased and Kanathi, meeting at a bar to discuss the compensation by Kanathi, but denied that he ever quarreled with the deceased, but that infact deceased was his witness. Unfortunately, the court has the word of accused 1, as against PW2. The Police never bothered to call Kanathi to tell the court what he knew of the incident of 18/12/2008. PW2's testimony raises a serious suspicion on the part of accused 1. In addition, blood was found at the entrance of accused 1's hotel while the deceased's body lay a few metres away. The blood had been partially covered with soil, meaning somebody tried to conceal it. This being right in front of accused 1's hotel, one wonders how come he never heard of any commotion outside his hotel. Neither did all his neighbours, including PW2 who said he lives nearby. The deceased was also said to have been residing with his wife behind accused 1's premises and the wife was in their house that night. This being a market place, it is quite curious that nobody else apart from PW1 heard or saw the commotion at the scene before the deceased's death?

From the manner in which this case was handled, it is evident that the investigations were shoddy; the Police took very little interest and left out key witnesses and failed to cover some key points.

This court had to go out of its way to summon the OCS Laare Police Station to produce the OB and the original Investigation Officer was not called to explain the lapses in the case. For example, PW2 testified that a blood stained *panga* was recovered from accused's 1's house. Though accused 1 denied it, there was no record of that recovery in the Police record. It is only the officer who visited the scene who could

have clarified what he did and whether he recovered the *panga* at all. As pointed out above, the only conclusion I can arrive at is that either there was Police laxity or complicity in this matter. For that reason, I find that the prosecution failed to prove their case beyond any reasonable doubt. Whereas I find that accused 1 is a key suspect, yet suspicion alone cannot be a ground for a conviction. The accused's defences were not convincing at all and were afterthoughts especially as regards the allegations leveled against PW1, but they have no duty to prove their innocence.

For the above reasons, I have no option but to acquit all the accused persons under **Section 322 of the CPC**.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

10/2/2016

PRESENT

Mr. Musyoka for State

Mr. Kibiti Holding Brief for Mr. Mwenda Mwirania for Accused

Peninah, Court Assistant

All 3 Accused, Present