



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 30 OF 2012

REPUBLIC PROSECUTOR

VERSUS

JULIUS MUTEMI KAMOTHO

GIDEON MUTIE MASILA

MUTINDA KIMOTHOACCUSED

J U D G M E N T

The three accused persons Julius Mutemi Kamotho, Gideon Mutie Musila and Mutinda Kimotho stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 29th of June 2004 at Munyumbuni market, Mwingi District within Kitui County jointly murdered Patrick Muneeni Makasa.

To prove their case the prosecution has called several witnesses. The case commenced before Justice Stella Mutuku and I later took over and completed the conduct of the proceedings.

PW1 was Elijah Mwanzi Mulandi, a security guard of shops and a bar called “**Utethyo wa Nyumbani**”. It was his evidence that on 29th June 2004 at 7.00 p.m. he reported at work and found two guests whose names he did not know, as they were new in the area coming from Machakos. It was his evidence that the two were guests of Musunza Mwinzi his employer, and that both the Musunza Mwinzi and his wife were present.

The guests came in a vehicle driven by Musyoka Muendo. Mutunga entered the bar and Muneeni Mulama went to the shop and asked for 3 bottles of beer. Mutemi Kamotho, the first accused then arrived, but before entering the bar, Mwendwa Musunza and Sammy Musunzi and Chege an Administration Police Officer Muneeni arrived. Then Mutemi and Muneeni entered the bar making a total of eleven people in the bar.

It was his evidence that those outside the bar left by 8 pm, but that first accused, Muneeni Mulonza, Mutie Musila and two guests and Munya Musila were left in the bar till 9 p.m. Before 10 p.m. Mutinda, the third accused came alone. According to him, Mutie then left for home first. Then Mutemi and Muneeni left after about 20 minutes. Then Mutinda third accused bought cigarettes and left.

On the next day 30th June 2004 at around 7.00 am, he met Mutemi Mukasa and Nguli Mukasa in a hotel in town who told him that Muneeni was dead. They then went to the scene and saw the deceased lying on the ground about 1½ kilometers away from the bar, with a sieve and a jug which was for karubu

(traditional liquor) nearby, but which was empty. He did not see visible injuries on the body. It was his evidence that the place was enroute to the deceased's home. According to him, Mutinda's home was further away from the deceased's home – about 2½ kilometer from the bar.

In cross examination, he said that he knew all three accused well and that the first accused brewed traditional liquor. He did not notice any signs of commotion at the scene. He confirmed that an inquest had been held. He stated that he knew nothing about 2nd and 3rd accused, relating to the alleged offence.

PW2 was Ngoki Mukasa a married woman from Waita Nzimbani, with children and mother of the deceased.

It was her evidence that on 29th June 2004 together with the deceased Patrick Muneeni Mukasa she went to Kamuwongo to sell goats. They parted ways at 4 pm and she went home and met the wife of the deceased.

The deceased did not however come home. She testified that he used to take beer and karubu, but he did not have a habit of sleeping out.

In the morning, as she was milking livestock, a grandchild informed her that he found the deceased lying on the road. She then rushed to the wife of the deceased and informed her of the news, and they went together to the scene, though the wife of the deceased arrived before her, and fainted.

She testified that they saw the deceased lying with a jug and sieve near the legs. The sieve was in the jug. According to her, footprints could be seen up to Mutemi's house. She knocked at Mutemi's house but no one opened the door. According to her, the first accused had said that she was proud because her sons were soldiers and that she would find them sleeping. This to her, referred to Muneeni (the deceased), and Martin, because the deceased was an Administration Police Officer, and Martin a game warden. She said that the threat was made less than two months before the death of the deceased. She warned the deceased not to take alcohol with first accused, but he did not heed her advice.

She stated that at the scene, she observed injuries on the neck of the deceased and that the chest was swollen.

In cross examination, she maintained that first accused was responsible for the death of the deceased. She stated that there existed a grudge between first accused and the deceased. She stated that she showed the police the shoe prints at the scene but did not know why police did not photograph the same. She initially saw the body lying face downwards, but later found that it was turned upwards in her absence.

PW3 was Mutemi Mukasa a farmer from Munyumbuni. It was his evidence that on 12th July 14 in the morning he went to the mortuary and witnessed the post mortem examination of his younger brother Patrick Muneeni. According to him, the body had injuries on the neck.

In cross examination, he stated that he knew Naomi the deceased's widow and that though he testified in an inquest at Mwingi, Naomi did not testify, which surprised him.

PW4 was Francis Musya Mukasa, a retired worker from Mwingi Teachers College.

It was his evidence that on 12th July 2014 he went to Mwingi District Hospital Mortuary, and together with police took the body to City Mortuary for post mortem which was performed the next day. He noted a swelling on the neck of the deceased. He was not cross examined.

PW5 was Munyao Mwangela a farmer – previously employed at Utethyo bar in Munyumbuni.

It was his evidence that on 29th June 2004 he was on duty at 6 p.m. selling beer. At 8.30 p.m.

customers Mwendwa Kaviri, Sammy Mwinzi and Muneeni Mukasa arrived in a vehicle belonging to Sammy Mwinzi. After a while a driver of a vehicle called Kimathi came.

He stated that he sold beer to Muneeni on credit, three bottles. The customers each had a drink. Thereafter three of them left, but Muneeni remained behind. According to him, there were other customers in the bar, such as Mutemi Kimoteo, Mutie Masila, and Mutinda Kamotho. Mutemi was first accused, Mutie was second accused and Mutinda third accused. According to him Mutemi and Muneeni left together. In the morning, he heard that a customer had died. He went to the scene and confirmed the incident.

In cross examination, he stated that he had by then worked for 3 months. He said all 3 accused were customers at the bar, but first accused was more regular. According to him, the deceased was a customer, but not a regular one. Accused two and three sat on a different table, but the deceased and first accused drank together. He knew them as friends.

PW6 was Mwendwa Musunza a herbalist at Munyumbuni village Mwingi. It was his evidence that on the 29th June 2004 at 6 p.m. he visited Kanake Bar at Karugongo market with the chief and IP Chege when the deceased Muneeni Makasa entered. According to him at he left the bar at 7 p.m. for home with Chege and Sammy Mwinzi in Sammy's vehicle, after taking Tusker beer. He was a son of the owner of the bar and found therein customers from Machakos, that is Mutemi Kamotho and Gideon Mbundi. Mutemi the first accused bought him one beer and gave Sammy one Tusker beer.

According to him, Mutemi was sitting down while the deceased and himself stood while taking drinks. Thereafter, when he came to the shopping centre the next morning, he learnt that Muneeni had died. He proceeded to the scene where he found a huge crowd, and the body which was about 500 metres from the bar on the way to the deceased's house. It lay face facing upwards and blood was oozing from the nose and mouth. There was a sieve and jug nearby.

In cross examination, he stated that he could not remember if the second and third accused were in the bar. He maintained that he left the deceased in the bar.

PW7 was John Mutunga Mwangangi a farmer from Waita in Mwingi. It was his evidence that on 29th June 2004 he visited Kanake Bar and met Sammy Mwinzi and Cpl Chege and Muneeni Masaka (the deceased). He bought cigarettes and went home. According to him, Sammy gave a lift to Cpl Chege and Mwendwa in his vehicle and he also got into the same pickup and went home. He was not cross examined.

PW8 was Caroline Naomi Muneeni an accountant at Kyuso. It was her evidence that on 29th June 2004, her husband Patrick Muneeni Makasa (the deceased) and her mother in law Ngoki Malasa left home at 11 a.m. for Kamuwongo to sell a goat. The mother in law returned home alone at about 5 p.m. She later asked her mother in law about the whereabouts of the deceased and she said that she left him at Kamuwongo market. She did not worry because the deceased had said that he would pass by his brother's home to collect new uniform.

On 30th June 2004 in the morning, Ngoki Mukasa knocked the door and informed her that the grandchildren Muimi Mutemi and Mwendwa Mutemi had told her that their uncle lay near a mango tree at a foot path towards Mutemi's home.

They rushed to the scene and she saw the deceased lying face downwards. Beside him was a jug and sieve. She called the deceased several times but he did not answer. Ngoki who had arrived slightly after also called the deceased but he did not respond.

Ngoki then left, and other people started arriving. She requested Loice that they go together to Mutemi's house to ask for help to take the deceased to hospital. They did not find anybody at the home. She then asked Loice to help her turn the deceased's head upwards, which they did.

She observed that the deceased was dressed the same way he left home the previous day, and had an injury on the forehead and dry blood stains on the nose. She realized then that the deceased was dead.

They traced footsteps and noted the tracks of the deceased's safari shoes, but could not trace footprints of the deceased from the Julius Mutemi's house.

It was her evidence that when she got married to the deceased, there existed a grudge between Julius Mutemi's family and family of the deceased due to cows straying to Mutemi's land. In addition, the deceased and his brother was at one time paid lumpsum earnings by their employer and used to tease the first accused since he was a teacher who was not paid the lumpsum like APs. According to him, she was informed of the grudge by the deceased.

In cross examination, she said that the first accused was a teacher who did not have problems sending children to school. She confirmed that she did not testify at the inquest though she had recorded a statement with the police then. She said that she knew the jug well as belonging to first accused as they used to visit his house. She did not know however if first accused brewed traditional liquor. She said that she saw prints of safari boots leading to first accused's house, but not back to the scene.

She stated that she had complained about the failure of the police to record her statement, and said that their home was 300 metres from first accused's home.

In re-examination, she confirmed that she had recorded a witness statement before the inquest was held. She denied that the first accused and deceased were friends.

PW9 was Samson Mwangi Mwinzi a waiter in Mwingi town. It was his evidence that on 29th June 2004 he left home at 8.30 pm to pick Mwendwa Mwanza as he went to where he slept. He met him at the club with many people and waited for him for one hour and then went home. According to him, he left the club with Mwendwa and Musyoka, but left behind Muneeni at the bar. They left in a pick-up.

The next morning, a woman who brought them water said that she had found the deceased on the road. He went to the scene at about 11 a.m. and found the deceased covered with a blanket and by then the police had already arrived.

In cross examination, he said that the first accused and others were drinking when he went into the bar.

After recording the above proceedings, the trial Judge was transferred, and I took over the case – and the accused persons opted to proceed with the trial from where the case had reached.

PW10 was Dr. Moses Njue a retired Government Pathologist. It was his evidence that he conducted the postmortem examination of Muneeni Makasa the deceased at City Mortuary Nairobi on 13th July 2004.

The body was dressed, male African 5ft 6 inches, in good health. It was partly decomposed.

There was blood coming from both nostrils, and the eyelids on both sides were swollen, and the conjunctiva had blood. There were no other external physical injuries.

Internally, there was extensive bruising of muscles of the neck and swelling at the back of the head with collection of blood. There was no fracture of the skull.

He formed the opinion that death was due to manual strangulation, which was evidenced by squeezing of the neck and cords and the head injury. He produced the post mortem form as an exhibit.

In cross examination, he stated that he was not sure whether he carried out a toxology test, as the examination was long ago. He maintained that he was sure that the cause of death was strangulation, and

that toxicology tests would not change the cause of death.

In re-examination, he stated that even if the deceased was drunk, that would not have changed the cause of death.

When put on their defences, the three accused persons tendered sworn testimony.

DW1 was Julius Mutemi Kamotho the first accused. It was his testimony that he was a teacher and retired in 2013 after 37 years service with Teachers Service Commission. He stated that he knew PATRICK MUNEENI the deceased well from childhood. According to him the deceased's home was about 220 metres from his home.

He stated that on 29th June 2004 he went to the shopping centre in the afternoon and then to Kunda Kindu Bar arriving there at 9 p.m. He found many people including the deceased in the bar, but did not meet the co-accused herein. He stated that he shared a table with the deceased as they normally socialized. He stated that they left the bar together at 11.30 p.m., only the two of them. They proceeded to his home because the deceased had asked him for the usual traditional karubu drink. They normally shared the drink. That night, he poured the drink into a plastic jug and gave to the deceased to take home, as he was going to sleep. He also gave him a sieve.

He stated that he did not know where the sieve and jug were, as same were not produced in court.

At about 7.30 a.m. in the morning, he received news on the deceased. He denied knowing what happened to the deceased after he left his house that night.

In cross examination he stated that he knew the deceased very well as an AP officer and said that they visited each other's homes many times. He said that the deceased was a cousin and they drank together often. He stated that the deceased was about the age of his children. He maintained that he did not see the co-accused in the bar that night. He stated that GIDEON MUSILA MUSEE was an untruthful witness. He admitted that he was the last person to be seen with the deceased. He denied that the co-accused joined him in the bar. He agreed that an inquest had been conducted, but denied giving one of the co-accused a sack of maize for work done.

He said that he had employed a woman called Mbuli to take care of his grandson, as he did not have his wife. He denied that Mbuli was at his house that fateful night. He denied that the jug belonged to Mbuli. He admitted that the jug and sieve found near the deceased belonged to him.

He said that he saw the body of the deceased at 7.30 a.m. when he was going to school, and that by then many people were at the scene. He said that if one screamed from where the deceased was, he could hear the noise from his home. He stated that he slept immediately the deceased left and did not hear any screams. He denied participating in strangling the deceased. He stated that he was not aware that statements had disappeared from the police file.

He stated that the deceased's mother lied when she said that he boasted in the village. He denied knowledge of a lessa.

In re-examination, he said that he did not know where the deceased was killed. He stated that though he was questioned about a lessa, he never saw one.

The second accused GIDEON MUTIE MASILA testified as DW2 also on oath.

He stated that he was a businessman who dealt in honey and avocados and tomatoes. It was his story that on 29th June 2004 he went to Kamuwongo market and hired a vehicle to take goods to Nunguni and closed his business at 6 p.m. and proceeded to the bar at 7 p.m.

He said that he did not know the deceased, nor could he say that he saw him that night. He left the

bar at 8.30 p.m. and went home. He said that he knew the first accused only as a teacher, but not as a friend.

In cross examination, he stated that he knew JULIUS KAMOTHO as a teacher. He maintained he did not see PATRICK (the deceased) that night. He also said he did not see JULIUS. He also did not see MUTINDA in the bar.

He maintained that he walked home alone. He denied knowledge of evidence disappearing at the police station. He denied leaving the bar at 10 p.m. and stated that he was questioned at the police station.

The third accused PETER MUTINDA KIMOTHO testified as DW3, also on oath. He stated that he was a farmer. That on 29th June 2004 he went to Kunda Kindu Bar at 9 p.m. alone and took one bottle of Senate beer while standing. He was in the bar for only about 10 minutes, then bought cigarettes and went home. He did not meet either the first or second accused that day.

It was his defence that he met the deceased earlier in 1980 at Ngungu Primary School, where he also schooled.

In cross examination, he stated that he only took Senate beer at the bar. He only met a waiter called MUNYAO. He stated that, he met the deceased last in 1983, and that the distance between their homes was 7 kilometres.

He said that he was in a hurry when he went to the bar that day. He sold 10 Kgs of maize for Ksh. 100/= and that is why he went to the bar. He knew JULIUS KAMOTHO as a teacher, who was not his friend. He stated that he was given maize by his mother not by Julius.

At the close of the defence case, Mr. Onono for the defence elected to make no closing submissions. Mr. Okemwa for the DPP made closing submissions, which I have perused and considered.

This is a murder case. The three accused persons have been charged jointly with the murder of the deceased PATRICK MUNEENI MAKASA. I appreciate that this case was commenced after an inquest was held. This is why an alleged murder of 2004 was prosecuted from 2012 to this year. I also appreciate that the prosecution evidence was mainly heard by another Judge.

In a case of murder, the prosecution is required to prove specific elements according to law. They have to prove that the deceased died. They have also to prove that the accused caused the death. They have also to prove that such death was caused through malice aforethought.

In all criminal cases, the burden is always on the State to prove a case against an accused person beyond any reasonable doubt. The accused does not carry a burden to prove his innocence. The accused can only raise doubts to the prosecution case – see the English case of **WOOLMINGTON – VERSUS – DPP [1932] AC 462.**

Coming to our present case, did the deceased die? From the evidence, it is not disputed that the deceased was found dead in the morning on a footpath, after he went on a drinking spree the previous night of 29th June 2004, and failed to come home. All the witnesses, both prosecution and defence agree that the deceased was found lying motionless on a footpath near his home. The scene was also near the home of first accused. A postmortem examination was later conducted at the City Mortuary Nairobi by the pathologist Dr. Njue PW10 who confirmed that indeed the deceased died. The doctor produced the postmortem form as exhibit 1. The cause of death was found to be strangulation. In my view, prosecution proved beyond reasonable doubt that the deceased died of strangulation, and also that the body was found on a foot path that was close to his home as well as the home of the first accused.

Did the prosecution prove that the accused or any of them caused the death of the deceased?

I will start with the second and third accused. A number of witnesses said that they saw them at the Kunda Kindu bar which was visited by the deceased that night of 29th June 2004. All the three accused also agreed that they visited the bar that night. The prosecution hypothesis is that together with the first accused the second and third accused killed the deceased.

From the evidence on record, there is no conclusive testimony to show that the second and third accused sat together with the first accused in the bar on that night. There is no evidence of a common plan.

Only GIDEON MUSILA MUSEE alleged that those two were with the first accused that night. There are allegations by the prosecution of a lesso and loss or disappearance of evidence from the police station. However, no evidence was tendered to explain the hypothesis relating to the lesso and how and by whom evidence disappeared at the police station. The prosecution did not tender any evidence to connect the two to the death of the deceased, or with a plan to kill the deceased.

With regard to these two accused persons therefore, it cannot be said the prosecution tendered evidence which would connect them to the death of the deceased. Mere imagination or rumour, or street stories cannot be enough to the prosecution. The prosecution was required to tender tangible evidence to connect them to the death of the deceased or to the plan to kill the deceased. They did not. There might be suspicion in the air, but suspicion alone is not adequate to prove a criminal case – see **SAWE – VERSUS REPUBLIC (2003) KLR 364.**

With regard to the first accused, the evidence on record is that he knew the deceased well, and they were relatives. They were also neighbours at home. They had a drink together that night. They left the bar together and walked to the home of the first accused who gave him karubu a local brew, a jug and a sieve. The deceased was in the early morning found on the road nearby lying on the ground. He had died, and the doctor found the cause of death to be strangulation. The people who went to the scene found the jug empty, and the sieve placed near the legs of the deceased.

The first accused said in his defence that he gave the jug with karubu drink and sieve to the deceased, and immediately he left, he went to sleep.

Nobody witnessed the killing. The deceased actually died shortly on same night he left the house of the first accused. His body was found next morning about 200 metres away. According to the first accused, if someone screamed at the place where the body was found, the noise would be heard by him at his house but he heard no screams.

The prosecution was thus trying to prove its case against the first accused on circumstantial evidence. It is possible to found a conviction on circumstantial evidence. Courts have considered many cases grounded on circumstantial evidence. I will only cite the case of **MUNYAO – VERSUS – REPUBLIC (2002) 2KLR 504** where the Court of Appeal held inter alia, as follows:-

1.
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3.

4. It is 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.

Do the circumstances herein lead irresistibly to the inference that the first accused caused the death of the deceased, without other co-existing circumstances that would weaken or destroy the inference?

Indeed, from the evidence on record the opportunity was there. The first accused and the deceased

left the bar together to the first accused's home on foot. The body was found next morning near the first accused's home on a footpath. The prosecution had to prove that all the circumstances of the death lead to the inference that the deceased was killed by the first accused.

The hypothesis pursued by the prosecution was that a lesso was used to strangle the deceased. However, that lesso was not produced in court as an exhibit, nor an explanation given for not doing so. The prosecution also pursued a hypothesis that the strangulation was done in concert by the three accused persons herein. However, the evidence does not connect the two other accused persons herein to the killing. The prosecution has also brought up in cross examination, an allegation of loss of evidence at the police station, without saying what evidence it was, and how and through whom it got lost.

These gaps put together create a lacunae in the circumstances of the death of the deceased. Since the burden is on the prosecution to prove the circumstances that can lead the court irresistibly to the inference of guilt, if they leave open loopholes, or create loopholes, then the benefit of the doubt has to go to the accused.

If the prosecution for example was relying on strangulation using a lesso, then it was for them to show how the accused or any of them did strangle the deceased. They should have shown whether it was possible for one person or more to strangle the deceased and leave him where the body was found without any trace of struggle at the scene. The prosecution line of also alleging loss of evidence at the police station shot them in the foot. That loss of evidence, if it was true, could not have happened without police involvement.

I am aware of the evidence of Naomi that the deceased was teasing the first accused on matters to do with salary, and also the evidence of cows from the family of the deceased straying to graze on the land of the first accused. Even if these were true, the evidence on record does not show that such disagreements would cause the first accused to kill the deceased. All the witnesses who testified agreed that the 1st accused and the deceased were jovial in the bar that night, where they shared a drink and left in a friendly manner.

In my view, the prosecution failed to prove, on circumstantial evidence that the first accused killed the deceased.

I find that the prosecution has not proved beyond reasonable doubt that any of the three accused participated in killing the deceased.

Having found as above, I am of the view that it will be merely academic to delve into the element of malice aforethought. I will thus not go into determining whether the death was caused by malice aforethought.

In conclusion, I find that the prosecution has not proved the case against any of the three accused beyond reasonable doubt, for the charge of murder herein. I thus find them not guilty and acquit them accordingly.

Dated and delivered this 6th day of May 2016

GEORGE DULU

JUDGE