



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 47 OF 2013

REPUBLICPROSECUTOR

VERSUS

MESHACK NGOVI MUTAVIACCUSED

JUDGMENT

Meshack Ngovi Mutavi (hereinafter “the Accused), was charged with murder contrary to section 203 as read with Section 204 of the Penal Code. According to the information filed in Court on 4th October 2013 by the Director of Public Prosecutions, it is alleged that on the night of 19th September 2013 at Kavukani village, Utaati Sub-location, Ukia Location in Makueni District within Makueni County, the Accused murdered Job Maveke (hereinafter “the deceased”). The Accused pleaded not guilty to the offence.

The hearing of the trial commenced before Hon. Mutende J. on 27th February 2014, and the learned Judge heard all the six prosecution witnesses. I completed the Defence hearing on 7th December 2015 in accordance with the provisions of section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya), when the Accused person gave sworn testimony. Of the prosecution witnesses, Paul Kituku Mbovi (PW1); the Accused’s grandfather, David Wambua Kituku (PW3) the Accused’s uncle; Mary Ndanu Mutavi (PW4) the Accused’s mother; and Peter Mwasya Kituku (PW5) another of the Accused’s uncle, all testified as to the events of the night of 19th September 2013, the night when the deceased died.

The remaining prosecution witnesses were Dr. Maungu Solomon (PW2) who performed a post-mortem on the deceased and gave testimony as to the cause of the deceased death, and Cpl. Edgar Kibet (PW6) who was the investigating officer in this case and testified as to the report of the deceased’s death, and visit to the scene of the crime and subsequent arrest of the Accused. The Accused in his testimony gave a detailed account of a land dispute between his family and his uncles, and the events of 19th September 2013 when the deceased died.

The learned counsel for the Accused, O.N Makau & Mulei Advocates filed final written submissions dated 24th February 2016, while Ms. Rita Rono, the learned Prosecution Counsel, filed her written closing submissions on 18th January 2016 wherein the testimony by the various witnesses was summarized, and legal arguments made thereon.

As I commence my analysis of the evidence led during trial and legal arguments by the counsel for the Accused and Prosecution, I am mindful that section 203 of the Penal Code defines the offence of murder as follows

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Therefore in order to establish and to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Evidence of the fact and cause of the death of the deceased.
- b. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
- c. Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- ii. 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.
- iii. Intent to commit a felony.
- iv. 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.

In the present case, as to the first ingredient of proof, the prosecution case was that on 21st March 2010, the deceased was found dead near his home. PW1 testified that on 19th September 2013 he arrived at his home at Mukuyuni, Kavukoni at around 7.00pm whereupon the deceased came to his house and they started talking. Further, that the accused, his mother and younger brother then knocked on the door and forcefully came in, hitting PW1 on the leg, and the Accused started hitting the deceased. PW1 further testified that on hearing their arguments, PW3, PW3's wife and a daughter-in-law came to his house, and they separated the Accused and the deceased, and the deceased was told to go home. All the people present in PW1's house then went to their respective houses.

After a short while PW1 heard screams, and as he went to the direction of the screams he met the Accused running from the said direction together with his mother and brother, and that they ran into bushes when they saw him. He then found the deceased on the ground bleeding from a cut near the ear. PW1 testified that it was about 7pm and he was able to see the Accused and deceased as it was still light and there was moonlight. The Chief was called, and they then took the deceased to Makueni Mortuary as he was already dead.

PW1'S account of the events of that night was corroborated by PW3 and to a certain extent by PW4. PW4 testified that the Accused had gone to sleep in his grandfather's (PW1'S) house when she heard raised voices, and upon going to PW1's house she found the Accused and the deceased holding each other's shirts in a fight. She helped PW1 separate the Accused and deceased, and returned with the Accused to her house. According to PW4, she then heard people running and saying they would burn her house, and when she went out she saw PW3 and the deceased and that is when the Accused ran out in fear.

PW4 stated that she also ran with her son Muli to the bushes where they spent the night, and she came to know that the deceased had died the next day when she went to report the matter at Wote Police Station and met PW5 and the Accused on the way. PW5 testimony was largely on the land dispute in the family, and he stated that he was not present during the events of the night of 19th September 2013 and did not know who killed the deceased.

The Accused on his part testified that as he ran away to safety on the night of 19th September 2013 after he heard the deceased and his uncle (PW3) say that they would burn his home, he was intercepted by someone in the dark who attempted to hit him with a piece of wood, which wood the accused took and threw at the person. He did not know who the said person was, nor that the deceased had succumbed to his injuries until the next day when he reported to the police station.

On the cause of death of the deceased, PW2 produced a post mortem report, that showed that the cause of death was massive intraconial haemorrhage and skull fracture as a result of a blunt trauma to the head. He testified as to the wounds and injuries he noted on the deceased's frontal orbital area and temporal and frontal regions of the head.

The counsel for the Accused submitted on the issue of the fact and cause of death, and he contended that there was contradictory evidence on the events leading to the death of the deceased as between PW1 and PW3 on one hand, and PW4 and the Accused on the other hand. The said contradictions which were also noted by the Court, were firstly, as to the existence of a land dispute between the Accused and his family members which was not referred to by PW1 and denied by PW3, but confirmed by PW4, PW5, and the Accused.

Secondly, as to whether the Accused first went alone to PW1's house to sleep as testified by PW4 and the Accused, or whether he first went to the house with his mother and brother as testified by PW1. Lastly, whether PW3 came and found the Accused in PW1's house after hearing the disturbance as testified by PW1, or whether it is the deceased who called PW3 to come to PW1's house as testified by PW3.

However, while these contradictions may be material to the movements of the Accused on that night, they are not material with respect to the evidence that the deceased was later found dead which is not contested, and the fact and cause of death of the deceased are therefore not in dispute and were proved by the prosecution.

As to the second ingredient as to whether the Accused is the one who caused the deceased's death by an unlawful act, none of the witnesses saw the Accused cause the injuries observed on the deceased. PW6 testified that the Accused was seen by PW1 standing about 10 meters away from the place where the deceased was found dead, however PW1 in his evidence testified that he did not find anyone at the scene, and that he met the Accused running away from the scene. The Accused testified that he threw the piece of wood at someone that night and did not know who that person was, nor that it was the deceased.

Therefore, the Accused was suspected of having caused the death of the deceased by reason of the fight he had with the deceased shortly before the said death, and also by the evidence that he was seen running from the direction where the deceased was found. As this is a case founded on circumstantial evidence, this court is guided by the dictum laid down in **Kipkering Arap Koske & Another v R, [1949] EACA 135**, the Court of Appeal for Eastern Africa had laid it down:-

“That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused”

The learned counsel for the Accused contended that the prosecution evidence that the Accused had earlier had a fight with the deceased did not meet the threshold set in **Kipkering Arap Koske & Another v R (supra)** as there was no eyewitness and the prosecution merely suspected the Accused. Reliance was placed on the decision in **R vs Chelestino Kago Nguku, (2013) e KLR** and **Sawe vs Republic (2003) KLR 364** for the position that suspicion however strong, cannot infer guilt which must be proved beyond reasonable doubt.

The learned counsel for the accused also questioned the integrity of the murder weapon produced in Court as the Prosecution's Exhibit 1, as PW1 testified that the stick used was in the Accused room, while PW6 testified that the stick was taken from the murder scene.

I have analysed the evidence as to the alleged movements of the Accused when the deceased died. In addition to the contradictions in the evidence by the various witnesses as to the Accused movements noted in the foregoing, it is evident that there was active movement by various actors in the compound of PW1 on the night of 19th September 2013, who included the Accused, PW3, PW4, the Accused's brother

and the wife of PW3. It cannot therefore be said with certainty that it was only the Accused who may have had contact with the deceased, or that the person at whom the Accused threw a stick was the deceased. This is also in light of the evidence of PW3 that when he heard the screams he left his house carrying a stick, and he could very well be the person that the Accused encountered as he fled.

Doubt has also been cast by the fact that there are differing accounts as to when the deceased was with the Accused. The Accused and PW4 testified in this regard that the deceased left the house of PW1 before them, which is corroborated by the testimony by PW3 that the deceased went to PW3's house to tell him that the Accused was fighting with PW1. It cannot therefore be found as asserted by PW6 that the Accused followed the deceased from the house of PW1.

Lastly, as noted by the counsel for the accused, there are gaps as to how the alleged murder weapon which was the stick produced as the Prosecution Exhibit 1, was removed from the house of PW1 and came to be presented to PW6 the next day as the murder weapon. No witness testified to the Accused being seen with the said stick on the night in question, and PW1 and PW3 did not testify to recovering the stick at the place where the deceased was found. PW1'S evidence on the other hand was that the said stick was recovered at the scene of crime and taken to Mukuyuni police station. It was not shown by the prosecution who recovered the said stick or who took it to the police station.

The prosecution on their part submitted that the nature of the injuries inflicted on the deceased intended to cause grievous harm, and the Accused's utterances that he would kill someone showed that he had *men's rea* and malice aforethought. However, since the circumstantial evidence does not exclusively point at the Accused person as the perpetrator of the crime, and does not prove beyond reasonable doubt that the Accused is the one who killed the deceased, it will not be prudent to examine the Accused's motives and intentions at the time of the deceased's death.

Arising from the foregoing findings I enter a verdict of not guilty and acquit the Accused under section 306(2) of the Criminal Procedure Code.

It is so ordered.

DATED AT MACHAKOS THIS 6th JUNE 2016.

P. NYAMWEYA

JUDGE