



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 5 OF 2014

REPUBLIC

VERSUS

MUSYA MULWA

JUDGMENT

INTRODUCTION

1. The Accused person, Musya Mulwa, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that :-

“On the 28th day of August 2014 at about 6pm or thereabout(sic), at Mgoghoi area in Taveta within Taita Taveta County, jointly with other(sic) not before the court murdered NYAYO MUTHOKA.”

2. This matter was initially heard by Muya J when he took the evidence of Francis Wambua Waita (hereinafter referred to as “PW 1”), Ibrahim Lugho Lekairo (hereinafter referred to as “PW 2”), Musyoki Kisalu (hereinafter referred to as “PW 3”), Julius Matheka Kisangi (hereinafter referred to as “PW 4”), Muinde Kisalu (hereinafter referred to as “PW 5”) and Joseph Musembi Matheka (hereinafter referred to as “PW 6”).

3. This court took over conduct of the matter on 6th October 2015 and continued from where the said Learned Judge had reached after both the Accused person and his counsel confirmed to the court that it could proceed accordingly.

4. The Prosecution called a total of nine (9) witnesses to demonstrate the following ingredients of murder:-

a. Proof of the fact and cause of death of the deceased;

b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and

c. Proof that the said unlawful act or omission was committed with malice aforethought.

5. On 21st June 2016, this court found that a *prima facie* case had been established against the Accused person to warrant him being put on his defence. His defence case was heard on 29th June 2016. At the conclusion of his case, he filed Written Submissions dated 14th July 2016 on 19th July 2016. The State

filed its Written Submissions dated 19th July 2016 on even date.

THE PROSECUTION'S CASE

6. PW 1 was a farmer and also worked with the Accused person in the same farm (hereinafter referred to as "Charles Martin Farm."). He said that they stayed in the same mud walled house but in separate rooms that each had a door. He testified that on 28th August 2014, the Deceased came to their house riding his bicycle and found him with the Accused person. He said that he was preparing spray for tomatoes at the time. It was his evidence that the Deceased person asked the Accused person for fire to light a cigarette. He then left the Deceased person with the Accused person.

7. He came back to the house after about twenty (20) minutes but did not find both the Accused person and the Deceased person. PW 2, who worked at a neighbouring farm called Sabatian's Farm, came and asked him if he had heard screams coming from Charles Martin Farm which was about a hundred (100) metres away. There was no indication in his evidence what his response was. He merely stated that PW 2 left and that the Accused person emerged carrying a panga and entered the house.

8. He then asked the Accused person if he had caught a thief to which the latter responded in the negative. He also asked him where the Deceased person was but he told him that the Deceased person had left and said that he would be back. He said that the Accused person then took a bath and changed his clothes. He waited until 8.00 pm and when the Deceased person did not return, he took his bicycle to the Accused person's room. The following day, the Accused person put the Deceased's bicycle in his room.

9. On that day, PW 1 met PW 3, PW 4 and PW 5 and enquired from them where the Deceased person was but they had no idea of his whereabouts. On Saturday, he went to his employer's wife and asked for permission to travel to the Deceased person's home to check on him but he did not find him. On Sunday, he asked PW 3 and PW 5 to call the Deceased person's brother to enquire about the Deceased person's whereabouts but they informed him that he had not been seen.

10. It is then that they started searching for the Deceased person where the screams had been heard. They found the Accused person cultivating near that area and on checking, they found that grass had been disturbed. They followed the foot path and found the Deceased person's body with "panga" cuts. PW 1 said that they informed the Accused person what they had found but he did not say anything. It is then that they took him to the police station. His evidence was that the Accused person had initially refused to go to the police station and only agreed to go after being threatened.

11. In his Cross-examination, PW 1 stated that the Accused person had only worked in Charles Martin Farm for about a week. He added that when PW 2 asked him if he had heard screams, he told him that he did not hear the same. He was emphatic that the Accused person had emerged from the direction where the screams had come from and that the Deceased person's body was found in another farm near where the Accused person was cultivating.

12. On his part, PW 2 stated that on 28th August 2014, he heard screams from the Charles Martin Farm. He went to PW 1's and the Accused person's house where he found PW 1. He asked him if he had heard any screams to which PW 1 told him that he was away but that if there were any screams, then the Accused person was in that direction. He said that he did not go to where the screams were but PW 1 assured him that he would enquire from the Accused person about the said screams.

13. Three (3) days later, he was informed that the Deceased person had been found dead. He said that he did not know how the Deceased person met his death but that the Accused person was said to be the one who killed him.

14. PW 3 was a farmer. He stated that he used to stay with the Deceased person in the same house. He said that the Deceased left their house at about 6.00 pm but did not return home. On 31st August 2014, which was on a Sunday, PW 1 came and told them that he had heard screams near his "shamba." They

then proceeded to the site accompanied by PW 4 and PW 5 and found the Accused person cultivating. They saw some marks on the grass indicative of something having been pulled over the grass and then saw the Deceased's body.

15. In his Cross-examination, PW 3 said that PW 1 took them to the place where he heard the screams. He did not, however, tell them what he did when he heard the said screams or why he did not take any action. He said that the Deceased's body was in the bushes about fifty (50) metres from where the Accused person was cultivating and that one could smell the stench of the body from where the Accused person was cultivating.

16. PW 4 was also a farmer. He testified that the Deceased went missing on 28th August 2014 at about 6.00 pm. He called the Deceased's brother seeking to know where the Deceased was but he told him he had not seen him. He said that on 1st September 2014, PW 1 went and told them that the Deceased person had left a bicycle at their place but did not return. He told them that he had heard screams coming from near his "shamba". They proceeded to the place where PW 1 heard the screams and found the Accused person cultivating there. They found the Deceased's body ten (10) metres from where the Accused person was cultivating.

17. In his Cross-examination, PW 4 said that it was PW 1 who went to tell them that he had heard screams but he did not tell them if he had done any investigations. He said that he did not know why PW 1 gave them the said information. His evidence was that they asked the Accused person that they should report about a missing person and did not forcefully take him to the police station contrary to what PW 1 had told this court. In fact, the Accused person's evidence corroborated that of PW 4 as he said that he accompanied them when they said that they were going to make a report of a missing person.

18. PW 5 was also a farmer and testified that on 31st August 2014, PW 1 went and asked them if they had seen the Deceased. They answered in the negative and asked PW 6, the Deceased's brother, whether he knew the whereabouts of the Deceased but he did not know. He said that PW 1 told them that on 28th August 2014 he had heard screams at a corner of the "shamba" he was cultivating. They went to the corner of the said "shamba" and found the Deceased dead. He said that they did not engage the Accused person in the search.

19. It was his evidence that PW 1 did not tell them what action he took when he heard the screams but he did not go to check on the same. He said that it was PW 1 who told them that the Accused person was the last person with the Deceased. He said that no one saw the Accused person killing the Deceased but that it was PW 1 who led them to arrest the Accused person.

20. PW 6, a farmer and was the Deceased person's brother. He confirmed that he was present during the postmortem examination on the Deceased. Number 99019363 Corporal Suleiman Bakari (hereinafter referred to as "PW 7") testified how on 31st August 2014, PW 1 who was in the company of about five (5) to six (6) other people, brought the Accused person at Mboghoni Police Post where he worked. He testified that PW 1, who was the leader of the group, told him that on 28th August 2014, a person, whose name he could not remember, visited and he left him with the Accused person herein as he went to spray tomatoes. This person left his bicycle.

21. Another person, whose name he could also not remember came and asked PW 1 whether he had heard some noises whereafter the said person left. He said that the Accused person came running and when PW 1 asked him if he had heard the noises and where the other person had gone to, the Accused person answered that he neither heard the screams nor knew where the other person went to. He said that he arrested the Accused person on 31st August 2014 based on what PW 1 told him.

22. In his Cross-examination, he said that he did not know if PW 1 and the Accused person stayed in the same house. He stated that he visited the scene of crime on that date at about 3.00 pm and that the Accused person did not have anything on him to show that he was involved in the killing of the man.

23. Number 35917 Corporal James Ndereba (hereinafter referred to as “PW 8”) was the Investigating Officer and was attached to the CID Taveta Police Station. He found the Accused person already arrested at Mboghoni Police Post. He confirmed having visited the scene of crime and collecting the Deceased’s body but he did not see any weapon.

24. He said that PW 1 told him that he had heard the screams and that the Accused person was the last person who was seen with the Deceased person. He enquired and was informed that the Accused person was cultivating tomatoes near the where the Deceased’s body was found and that he was in fact preparing food under a tree where there were many flies. However, he said that he was told that the Accused person was not involved in the search of the deceased.

25. He said that they visited the Accused person’s house but did not find any blood stained clothes. He stated that there were no other structures in the area apart from that of PW 1 and PW 2 but that there were several other farms. In his Cross-examination, he said that PW 2 told him that he went to PW 1’s house to ask if he had heard any screams and when he told him he had not, he borrowed fire and left.

26. Dr Amani Chai (hereinafter referred to as “PW 9”) produced the Postmortem report that had been prepared by Dr Oyoo. The cause of death was said to have been due to severe bleeding due to multiple cut wounds especially in the neck region.

THE DEFENCE CASE

27. The Accused person adduced evidence under oath. He said that he was a farmer and was also employed at Charles Martin Farm on contract basis. He said that PW 1 and three (3) other people who hailed from Tanzania worked at the said farm.

28. His evidence was that on 28th August 2014, he worked with PW 1 at Charles Martin Farm until about 12.00 noon. They stayed in the house till about 3.30 pm when PW 1 went to Matiku’s farm. Before PW 1 left, the Deceased came riding his bicycle, he found him and the Accused person sitting at the verandah. The Deceased person asked him for a matchbox to light a cigarette which the Accused person gave him.

29. The Deceased person, who also worked at Matiku’s farm, then told them that he was leaving his bicycle to go to Mboghoni Shopping Centre but he would be back. The Deceased person left his bicycle under a tree. PW 1 then left to go to Matiku’s farm to spray tomatoes. The Deceased left and he also left.

30. When he came back to the house at about 5.00 pm, PW 1 informed him that PW 2 had told him that there were screams from Mr Martin’s second farm and that it sounded as if there was a fight. He told him that they did not check on the screams. He also said that PW 1 did not ask him if they could go to check on the screams. He said that they both then went to bath.

31. The Deceased did not return by morning. However, together PW 1 and the three (3) Tanzanians, they continued working in Charles Martin Farm for three (3) days. He said that there were many people in that area and that PW 1 did not suspect him of having had anything to do with the disappearance of the deceased. At about 11.00 am on a date he did not specify, he said that PW 1 came with PW 3, PW 3 and PW 5 and told him that since the Deceased had not been found, it was best that they report his disappearance to the police. When they got to Mboghoni Police Post, he was put under arrest.

32. During his Cross-examination, he said that it was normal for him to carry a “panga” and to take baths after being in the “shamba”. He also said that the Deceased person told him and PW 1 that he was leaving his bicycle at their house to go to Mboghoni Shopping Centre. He was emphatic that he did not hear any screams and had no knowledge of where the Deceased’s body was found but that he only saw the body of a dead person when he was in the police vehicle.

LEGAL ANALYSIS

33. After carefully combing through all the evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW

5, PW 6, PW 7, PW 8 and the Accused person herein, it was apparent that PW 7 and PW 8 arrested the Accused person based on what PW 1 narrated to them. However, his evidence was inconsistent and contradictory and raised more questions than answers.

34. PW 1 seemed to have been obsessed with the screams PW 2 had heard. Indeed, the pattern that ran across the evidence of the Prosecution witnesses is that it is PW 1 who went out of his way to tell PW 3, PW 4 and PW 5 about the screams and to enquire from them whether they had seen the Deceased person. They wondered why he told them about the screams yet he had done nothing when he heard the said screams.

35. His interest in the screams when he himself told PW 2 that he never heard them was particularly telling and seemed to suggest that he knew more than what he was telling this court. Indeed, in his evidence, he told PW 2 that he never heard any screams. However, he told PW 3, PW 4, PW 5, PW6, PW 7 and PW 8 that he heard screams coming from a nearby farm. It was also strange that when PW 2 asked him if he had heard any screams, he said that if there were any screams, then the same must have come from the direction where the Accused person was.

36. The question that arose in the mind of this court was, if PW 1 left the Accused person with the Deceased person when he went to spray tomatoes, how then did he know which direction the Accused person had gone to? Additionally, how did he know that the Accused person had emerged from the direction where the screams had come from? There was no logical explanation in his evidence that made him arrive at the conclusion that the Accused person had gone and/or emerged from the direction where the screams had come from.

37. Further, if he did not hear the screams, how did he then know exactly where the Deceased person's body was? As can be seen from PW 5's testimony, PW 1 told them that he had heard screams at a corner of the "shamba" he was cultivating and true to his word, when they went to that corner of the said "shamba", they found the Deceased person, dead.

38. PW 1's evidence was suspect because the Accused person and PW 8 informed this court that there were other farms nearby. The fact that PW 1 led them to the exact spot that the Deceased person's body was found pointed to a fact that he had prior information of where the Deceased person had been killed and dumped.

39. His actions also appeared suspect. At about 8.00 pm on the day that the Deceased did not return to pick his bicycle from their compound, he took his bicycle to the Accused person's room. His enquiry from the Accused person if he had caught a thief was also a random question.

40. He could only have acted or asked the Accused person questions with the hindsight of a particular occurrence. Since the Deceased person's whereabouts were not known at the material time, his action pointed to a deliberate attempt to connect the Accused person to the Deceased person's disappearance and/or his death. He appeared to know more than the Accused person knew at the material time.

41. All in all, it did appear to this court that from his evidence, PW 1 put all his energies in enquiring about the Deceased's whereabouts and had more interest in finding the Deceased person than even his own relatives. A day after the Deceased person's disappearance, which was on a Friday, he reported the Deceased person's disappearance to his employer's wife. The following day, which was a Saturday, he asked for permission from his employer to go and look for the deceased at his home. The next day which was a Sunday, he asked PW 3 and PW 4 to ask the Deceased's brother if he had seen the deceased.

42. His evidence also materially differed from that of other witnesses. He testified that the Accused person was forcefully taken to the Police Station contrary to what PW 4 stated. In fact, PW 4 corroborated the Accused person's evidence he was told that they were going to the police station to report a missing person. PW 5 and PW 8 corroborated the Accused person's testimony that the latter was not involved in the search of the Deceased person. This was contrary to what PW 1 said that the Accused person was found next to the place where the Deceased person's body was found.

43. His information to PW 8 that the Accused person was cooking near the tree where the Deceased person was found was not corroborated by PW 3, PW 4 or PW 5 who went to the scene. This court was therefore not convinced that PW 1 was truthful in his evidence before the court.
44. Although the Prosecution had submitted that motive was not a necessary ingredient to prove a charge of murder, it was incumbent on it to show that the Accused person actually committed the offence. As was rightly pointed out by the Accused person's counsel, whereas motive is not an essential ingredient to prove crime as was held in the case of **Musili Tulo vs Republic [2014] eKLR**, the fact that the Accused person was the last person to have been seen with the Deceased person, which was the basis of the Prosecution's case, was not a sufficient reason to have concluded that the Accused person was the one who was responsible for the Deceased person's death.
45. Indeed, there was no evidence that was adduced before the court to connect the Accused person to the Deceased person. In fact, none of the witnesses provided any proof that the Accused person was the one who murdered the Deceased.
46. Notably, PW 8 testified that he saw the clothes the Accused person was wearing on the material date, though washed, but did not find any blood stains on them. He did not explain why he found it necessary not to investigate PW 1 regarding the said offence but merely relied on what he told them. He did not also establish that no other person other than the Accused person was in that vicinity bearing in mind that there were other farms in that area.
47. The fact that the Accused person was the last person with the deceased was not proof that he committed the offence. He continued to cultivate in the Charles Martin Farm for three (3) days and accompanied PW1, PW 3, PW 4 and PW 5 to report the disappearance of the Deceased person. This was conduct that was consistent with the mind of an innocent person.
48. This court was thus satisfied from his evidence that there were no existing co-existing circumstances that would weaken or destroy the inference that he was innocent as was held in the case of **Musoke vs Republic [1958] EA 715** citing with approval **Teper vs Republic [1952] AL 480** that was relied upon the Prosecution.
49. From the evidence that was adduced, the Prosecution appeared to have charged the wrong man. This case was not based on circumstantial evidence at all. In fact, it was based on mere suspicions. Unfortunately, mere suspicion is not sufficient to prove an offence. The Prosecution tried to shift the burden on the Accused person to establish exactly what happened on the material day. Unfortunately, his evidence withstood the test of Cross-examination.
50. Accordingly, having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the Written Submissions and the case law they relied upon, this court found that the Prosecution failed to demonstrate that the Deceased person met his death as a result of the unlawful acts or omissions on the part of the Accused person or that the alleged unlawful acts or omissions were committed by the Accused person with malice aforethought or at all.
51. In other words, the Prosecution did not prove its case beyond reasonable doubt as the evidence fell way below the standard required in a murder case. To say the least, the investigations herein were shoddy and marred by weak and incredulous evidence of PW 1 upon whose evidence, the case against the Accused person herein was hinged.

DISPOSITION

52. For the foregoing reasons, this court has no option but to find that the Accused person was not guilty of the offence that he had been charged with. This court therefore orders and directs that the Accused person be and is hereby acquitted under Section 215 of the Criminal Procedure Code and that he be set free forthwith unless he be held for any other lawful cause.

53. It is so ordered.

DATED and DELIVERED at VOI this 13TH day of SEPTEMBER 2016

J. KAMAU

JUDGE

In the presence of:-

Mwinzi..... for Accused Person

Miss Anyumba.....for Republic

Ruth Kituva– Court Clerk