



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 38 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

JAMLEC NDEKE THARAACCUSED

JUDGMENT

By the information dated 13/11/2011, **Jamleck Ndeke Thara** was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 23/6/2011 at Kanyakine village, Kebuboni Location in Tharaka, with others not in court, they murdered **Julius Mugambi Nkuno**.

He denied the offence and the case proceeded to full trial with the prosecution calling a total of 6 witnesses. The accused was called upon to defend himself and he testified on oath and did not call any witness. Mr. Mulochi prosecuted the case on behalf of the State while Mr. Kiogora appeared for Accused.

PW1 **Chrisopher Mutembei Julius**, testified that on 22/6/2011, about 1.00 p.m. he was at Ikuu Market when he received information that Mugambi, his brother, had stolen Njeri's beans. About 7.00 p.m. Mugambi was at Ikuu Market when accused, came there in company of Boniface Mutwiri, Njeru and beat up Mugambi and Mugambi ran away; that on 23rd morning about 6.00 a.m., when leaving for the market, while at his gate, he found Njeru, Ndeke, Mutwiri and Gitonga armed with sticks and they asked for Mugambi. He told them to go and check at his home and they left for his mother's house and soon after, he saw them come with Mugambi with both hands handcuffed. He did not go with them as he believed they were taking him to Chief's office. They took another direction where Mugambi had allegedly sold the beans. Later, while at Ikuu, a police officer told him to go look for Mugambi and they went together to Itumbi in the compound of Ikuu Girls in the farm where they found that Mugambi was injured on the head and all over the body. They did not get anybody at the place where Mugambi's body was and he could not talk. By the time they took him to hospital, Mugambi had died. They took the body to the mortuary. PW1 denied seeing any of the 4 who took away Mugambi injure him. PW1 said that he sees Boniface Mutwiri and Njeru at home but that Gitonga ran away from home and died wherever he had gone.

PW2 Christine Wanja Julius told the court that on 22/6/2011, she was at the market and arrived home about 7.00 p.m. when she was informed by her mother-in-law that a boy had come there with beans for sale but he left with them; that next morning about 7.00 a.m., she heard noises outside and on coming out

found 5 people; Ndeke (accused), Gitonga alias Chief, Njeru, Mutwiri and somebody else whose hands were tied (Mugambi); that Accused asked Mugambi where he sold beans and he replied that he cleaned the beans at PW2's home but sold them elsewhere and the people left with Mugambi. That about 10.00 a.m., Accused, and AP called Njeru and Assistant Chief, Gitonga and Rosemary Njeri, whose beans were stolen went to his home and the AP asked her to show where the beans were sold. They picked the beans that had spilled on the ground where Mugambi had cleaned them and she accompanied them to Chief's Camp; that the AP left to go and look for Mugambi and on returning, said he was badly beaten. Later, another group of people, the Chief, Sub Area went to PW2's home and informed her that Mugambi had died. She went back to Chief's Camp where she found Jamleck (accused) who had been arrested. She said she did not know the Accused before that day. She also said that when the group went to her home with Mugambi, he was handcuffed and had been beaten. She said she knew the names of those who came to her home when they were mentioned at Chief's Camp.

PW3 Taratiso Gitonga Irigu a village elder, told the court that on 23/6/2011 while at his home, he saw Jamleck (Accused), with Rosemary Njeri (PW4) who reported that Julius Mugambi had stolen her beans. He advised them to report at the Chief's office. They went together and reported to APC Njeru. Together, they went to Wanja's (PW2) home who denied buying beans from Mugambi. PW3 said that he was told that Mugambi had ran away and he never saw him till he later heard that he had been injured. He took Jamleck to the AP's office and he was locked up. PW3 said that Rosemary Njeri is Accused's sister (PW4).

PW4 Rosemary Njeri told the court that she was at home on 22/6/2011 with other people including Mugambi's mother when they saw a big group of people with Accused following behind; that Accused called her and informed her that her beans had been recovered at Wanja's house (PW2); that the beans belonged to her mother; she went to PW4's house (Gitonga) and with AP Njeru went to Wanja's home, found some beans on a tray and was informed that Mugambi had tried to clean the beans there. She did not see Mugambi. The Sub Area carried some of the beans to Chief's office. Later, she heard that Mugambi had been found dead. PW4 said Accused is a neighbor and she did not know who killed deceased.

PW5 PC Richard Ombwoye, recalled that on 23/6/2011 about 10.00 a.m., OCS Chuka instructed him to proceed to a scene of crime at Ikuu. The murder had been reported by Chief Wellington Nyamue. At Chief's Camp, he learned that the person had died and proceeded to the scene with APC Njeru, in a farm belonging to Ikuu Girls' School. The person was dead and at the scene there was evidence of a struggle, blood stains and the body had injuries all over the body. He recovered a jacket next to the body which was said to belong to Gitonga Ndeke, who died before he was arrested. He found Accused at APs Camp having been detained by the Chief. It was said that Accused with others who were at large arrested deceased on that day for alleged theft of beans. PW5 produced a portion of the beans that had allegedly been stolen and left at PW2's home by the deceased.

PW6 Dr. Justus Kitili performed the post mortem on the deceased on 1/7/2011. He observed that the deceased had a deep cut on the forehead, shoulder had multiple bruises, wound on elbow, 2 deep cuts on the legs and fracture of the frontal lobe of the brain. He formed the opinion that the cause of death was cardiopulmonary arrest due to severe head injury.

In his defence, Accused said that on 23/6/2011, a person who allegedly stole beans was killed by the mob; that he met the owner of the beans, Rosemary Njeri with the Sub Area and she informed them that it is Julius Mugambi who stole her beans, she asked to be escorted to Chief's Camp and he did, where they met APC Njeru who informed them that the thief had already been beaten by the mob and was in critical condition; that a GK vehicle came and he was arrested and was not told the reason but later was told he killed the thief. He denied killing the deceased and did not know who did it. He denied having any grudge with PW1, 3 or 4 before this incident.

After close of the defence case, Mr. Kiogora, Counsel for Accused submitted that the prosecution failed to prove the case against Accused because AP Njeru was not called as a witness and his evidence must have been adverse to the prosecution; that the others who were allegedly with Accused have never been

arrested after 4 years.

Mr. Mulochi, Counsel for the State in reply, urged that there is overwhelming evidence adduced by the prosecution to found a conviction because PW1 saw Accused and others take away the deceased; they blamed deceased for stealing beans; PW2 also saw accused and others with deceased at her home and they left together with the deceased.

I have considered the evidence and submissions on record. This case relies entirely on circumstantial evidence. The law is well settled as to when the court can rely on circumstantial evidence. In the case of **Abang'a alias Onyango v Rep CRA 32/1990**, the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i). the circumstances from which an inference of guilt is sought to be drawn, must be cogently and fully established;

(ii). These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances taken cumulatively should form a complete chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

At the end, this court will consider whether the evidence on record meets the above criteria.

For an offence of murder to be committed, the prosecution has to prove the following:

- (1) that the accused committed the act that caused the death – (*actus reus*);
- (2) that the accused had the intention to cause grievous harm or cause death (*mens rea*).

Intention to cause death is also known as malice aforethought and **Section 206 of Penal Code** defines malice aforethought as an intention to do grievous harm or cause death.

After careful consideration of the evidence on record, I am satisfied there is sufficient evidence on record that Accused was in the group of people who arrested Mugambi, the deceased, for allegedly stealing Njeri's (PW4) beans. PW1 said he saw Accused and 3 others attack the deceased on the evening of 22/6/2011 for allegedly stealing beans but the deceased ran away; that on 23/6/2011 the Accused and 3 others went to his home early at 6.00 a.m. looking for the deceased. PW1 explained that they tied up deceased's hands and led him away to go and show where he allegedly sold the beans. PW2 corroborated PW1's evidence that about 7.00 a.m., Accused and other people went to her home in company of deceased who was handcuffed and asked if he sold beans to her. PW2 said Accused and group left with the deceased who was handcuffed and was injured. It is the last that the deceased was seen alive. When Accused left PW1's home, the deceased had not been injured.

According to PW3, Accused and PW4 went to report to him about loss of the beans at about 9.00 a.m. on the same 23/6/2011 and they alleged that deceased had run away. PW4 in turn said that Accused went to inform him about recovery of the beans at PW2's house. It means that Accused was aware beans were at PW2's house and that corroborates PW2's evidence that Accused had been to her house earlier that day with deceased. PW4 went to PW2's house with the Sub Area. Indeed PW2 told the court that about 10.00 a.m. another group of people who included Accused, APC Njeru, Assistant Chief, Gitonga and the owner of the beans went to her house but they were without Mugambi – deceased. PW2 said they picked some of the spilled beans and left. PW2's evidence was further corroborated by PW3 and 4's evidence as regards their visit to her house. When Accused visited PW2's house about 10.00 a.m., he did not disclose

that he had been there earlier with the deceased.

The evidence of PW1, 2, 3 and 4 is quite consistent as to what happened on the said date. After accused and group left PW2's house about 7.00 a.m. Mugambi was not seen again till he was found injured at Ikuu Girls' farm. Accused having been one of the people who arrested deceased and was one of the last persons to be seen with deceased, he had a duty placed upon him by dint of **Section 112 of the Evidence Act** to explain what happened to the deceased between 7.00 a.m. and 9.00 a.m. When Accused and group left PW1'S house deceased had not been beaten but when they arrived at PW2's house, he was still handcuffed but he had been beaten though PW2 did not see any of the people assault deceased. Who had beaten him? Accused had a duty to explain and this does not mean that the burden of proof had shifted to him. It is because the whereabouts of deceased after leaving PW2's home at 7.00 a.m. on 23/6/2011 was peculiarly within his knowledge alone. He did not offer any explanation but steered clear of it.

PW1 and 4 are people who were known to Accused. He accepted that they had never disagreed with him before and there was no reason why they would lie against him.

The defence took issue with failure to call APC Njeru as a witness. PW1 told the court that it is APC Njeru who informed him of the deceased having been injured at Ikuu Girls' and they went together to the scene. This was about 10.00 a.m. APC Njeru was not with Accused when they went to pick the deceased from his home or when they went to PW2's home at 7.00 a.m. It is after PW3 and 4 went to report at the Chief's Camp that they found APC Njeru, they reported to him about the allegation of theft of beans and he went with Accused and PW4 in the search of beans at PW2's home. By that time, the deceased was already missing. PW3 said they were told the deceased had run away and APC Njeru went to look for deceased. Though it may be true that the said APC Njeru took active part in investigating the alleged theft of beans and went to the scene where the deceased had been injured, yet there is no evidence to demonstrate that he ever saw the assailants or that he knew of the allegation of theft of beans before PW3 and 4 reported to him. It would have been good if he was called but failure to call him does not prejudice the defence in any way. At least none has been alluded to. PW1, 3 and 4 have stated the role played by APC Njeru. PW5 visited the same scene later that day.

PW1 and 2 told the court that Accused was with other people when they picked deceased, one being Gitonga Ndeke, Njeru and Mutwiri. It was alleged that the others went into hiding but that Gitonga Ndeke died while in hiding. PW1 and even the Investigation Officer (PW5) said so. No evidence of his death was availed to court. Ideally evidence should have been produced to that effect. PW5 also said that he has never been able to arrest the other suspects. PW1 said that two of the suspects are at home. PW5 said that he did not know the people and relied on the witnesses to identify them and nobody has ever done so. It seems that by the time they came to court, PW5 had not made much effort to trace the suspects. PW1 is deceased's brother and if he was seeing the suspects, he should have informed the police so that they could arrest them. In any case, that can still happen even now.

Accused had taken away deceased from PW1's home at 6.00 a.m., and left PW2's home about 7.00 a.m. still in company of deceased and others. At 9.00 a.m., Accused was not with deceased and Accused claimed that he ran away. Deceased was found injured all over the body as per evidence of PW1 and 5 who saw the body. The Doctor found that deceased had sustained several deep cuts on the legs, forehead and that he died of cardio pulmonary arrest due to severe head injury. The report received by police is that deceased was a victim of mob justice. Accused was one of those who arrested deceased. By 7.00 a.m., when in company of Accused, deceased was already beaten but was still alive, but soon thereafter, before 10.00 a.m. he was dead with even more serious injuries. I believe that wherever the accused and his group took deceased is where they injured him further for allegedly stealing beans. Whether or not the deceased stole, Accused's duty was to arrest and hand over him to the police and not take the law into his own hands. In my view, the circumstantial evidence adduced herein forms such an unbroken chain and unerringly points at Accused as the murderer either alone or with others not in court. I find that Accused with others murdered the deceased. The injuries found on the deceased do go to show that whoever inflicted them meant to seriously injure the deceased and cause him grievous harm or death and that is evidence of malice aforethought.

The defence was a mere denial and unbelievable and I dismiss it as such. The circumstantial evidence unerringly points at Accused and group as the murderers. I will find him guilty as charged and will convict him accordingly under **Section 322 of CPC**.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF NOVEMBER, 2015.

R. P. V. WENDOH

JUDGE

6/11/2015

PRESENT

Mr. Mungai for the State

Mr. Igweta Holding Brief for Mr. Kiogora for Accused

Ibrahim/Peninah, Court Assistants

Accused, Present