



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE NO. 25 OF 2019**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**DANIEL MITHIKA JOSHUA.....1ST ACCUSED**

**SELESIO NTONJA TURENCE.....2ND ACCUSED**

**JUDGMENT**

1. Accused persons and three others who were acquitted were jointly 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<sup>rd</sup> March, 2019 at Kirama Village, Nkanda sub-location, Antuambui Location, in Igembe Sub-County within Meru County, jointly with others not before the court murdered GERALD MICHUBU**

**Prosecution case**

2. **PW1 KM**, a 15 years old stated that on 23<sup>rd</sup> March, 2019 at around midnight, his mother sent him to the canteen to call his cousin Muthuri and on the way, he met Accused persons and others. It was his evidence that the 2<sup>nd</sup> Accused was armed with a panga and he heard the 1<sup>st</sup> Accused tell the **GERALD MICHUBU** who was kneeling to say his last prayers because he was going to die. That he approached the scene and the 1<sup>st</sup> Accused chased him away that at a later day when he received information that Michubu had died, he reported the matter to Kennedy the village elder. He stated he identified Accused persons by their voices and with moonlight.

3. **PW3 Douglas Kobia** testified that on the material date, Michubu bought cigarettes from his shop at about 11pm or midnight and that 45 minutes later, one Martin Bariu informed him that someone was lying dead outside. That he went to the scene and found Michubu lying dead. He disputed that a child such as PW1 could have been walking that road in the middle of the night.

4. **PW4 George Kinoti**, accused 2's brother stated that at about 01.00 am on the material night, he heard screams and went out. He confirmed that Accused 2 was at home that night. He stated that he found Michubu lying dead in a bush about 50 metres away and reported the matter to a village elder the following day. He stated that the moonlight was not bright and that it was unlikely for a child to walk that road in the middle of the night.

5. **PW5 Kennedy Michubo Martin** also found Michubu lying dead in a bush on the material night. It was his evidence that Accused persons and others that did visit the scene of crime on the following morning were suspected to have killed Michubu and the crowd set out to look for them. That Accused 2 was arrested on 25<sup>th</sup> March, 2019. That in company of **PW6 Gerald Kaberia** senior assistant of Nkende sub location and others, they proceeded to the house of Accused 1 where they recovered 2 trousers, a jumper and a jacket that were bloodstained and they took them to Laare Police Station. **PW7 Joshua Thurania**, Accused 1's father stated that Accused stood at a distance from where deceased was killed. He stated that he was present when a blood stained jacket and trouser was recovered from Accused 1's house. He like **PW5 Kennedy Michubo Martin** stated that Accused 1 was only suspected for killing Michubu because he didn't visit the scene deceased was killed. Accused 1 was arrested from the house of **PW8 Solomon Kinyua** on 24<sup>th</sup> March, 2019 from and a day later, a panga was recovered from under the bed.

6. **PW9 Dr. Githu Wachira Sammy** on 09<sup>th</sup> April, 2019 conducted an autopsy on the body of **Gerald Michubu** Nyambene Sub-County Hospital. The body had two deep cuts on the head, one was on the mandibular region 31 cm extending from lower jaw to back of head. The 2<sup>nd</sup> was on back of head measuring 15 cm long cutting through the neck and cervical vertebrae. There were 2 cuts on left forearm measuring 5cm and 2cm, mandibular and maxillary bones were broken, spinal column and cord were cut at C1, C2, C4 and C5, vessels were cut on the left side of neck. The doctor formed the opinion that Michubu died of cardiovascular arrest due to severe hypovolemic shock due to excessive hemorrhage due to deep neck cut wounds caused by a sharp object as shown on the postmortem report **PEXH1**.

7. **PW10 PC David Ngang'a** by an exhibit memo form **PEXH. 6** escorted blood sample of Gerald Michubu, a grey trouser, green jacket, and dark blue jacket to government chemists and received a report **PEXH. 7** that the DNA profiles from grey trouser, green jacket, and sword machines the DNA profile generated from the blood sample of Gerald Michubu. Accused persons were subsequently charged.

#### **DEFENCE CASE**

8. Accused 1 in his sworn statement denied the offence. He stated he spent the night at his home on 23<sup>rd</sup> March, 2019 and that he spent the night of 24<sup>th</sup> March, 2019 at the home of **PW8 Solomon Kinyua**. He stated that in custody when some clothes allegedly recovered from his house in his absence were taken to the station.

9. Accused 2 in his sworn statement similarly denied the offence.

#### **ANALYSIS AND DETERMINATION**

10. I have considered the evidence on record and I have deduced the following issues for determination is whether the Prosecution case has been proved to the required standard.

11. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that Accused persons committed the murder and that they were actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

##### **(a) The death of the deceased**

12. That **Gerald Michubu** died was confirmed by all the prosecution witnesses. Their evidence was corroborated by the evidence of the doctor contained in the postmortem form tendered as **PEXH. 1** which reveals that he died of severe hypovolemic shock due to excessive hemorrhage due to deep neck cut wounds caused by a sharp object.

13. In order to establish the accused's culpability, the prosecution relied on the evidence of among others by **PW1, PW5, PW6, PW7** and **PW8** whose evidence I shall review as hereunder.

14. The offence was committed at night and the first issue for determination is whether Accused was positively identified. Whereas **PW1** stated that there was no electric lighting at the scene, **PW2** said there was.

15. I have considered the evidence of visual recognition against the Accused as adduced by **PW1**. Evidence of visual identification

should always be approached with great care and caution (see Waitthaka Chege v R {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume & Another v R {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla bin Wendo & Another v R, {195} 20 EACA 166; Wamunga v R, {1989}).

16. In the case of Maitanyi vs Republic (1986) KLR 198, the Court of Appeal stated as follows in relation to identification at night

**“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

17. In this case, the prosecution failed in its duty to lead evidence as to the nature of the moon light that PW1 alleged to have been there especially considering especially PW4 George Kinoti stated that the moonlight was not bright thereby rendering the evidence of identification unreliable.

18. From the foregoing, I find that the evidence by PW1 cannot safely found a conviction. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

19. As we know from Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20

**“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”**

20. In Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR), the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused the circumstances taken cumulatively, should form a 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.**

21. In the case of Ernest Abanga Alias Onyango vs. R CR. NO. 32 of 1990 (UR), the Court of Appeal cited with approval the case of Rafaeri Munya Alias Rafaeri Kibuka vs. Reginam (1953) 20 EACA 226, where it was held that:

**“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”**

23. PW5 Kennedy Michubo Martin, PW6 Gerald Kaberia and PW7 Joshua Thurania, who is Accused 1’s father have evidently stated that bloodstained clothes were recovered from the house of Accused 1. A bloodstained sword was also recovered hidden in the house of PW8 where Accused 1 was arrested from.

23. The government analysts report PEXH. 7 confirmed that the DNA profiles from grey trouser, green jacket, and sword matched the DNA profile generated from the blood sample of Gerald Michubu.

24. From the foregoing analysis, I find that the summing up of the prosecution case forms a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by Accused 1 and that there is no evidence to prove that Accused 2 was involved in the murder.

25. Having come to the conclusion that the Accused 1 killed the Michubu, the final issue for determination is whether malice aforethought has been established.

26. Section 2016 of the penal Code as follows; -

**206 Malice Aforethought shall be deemed to be established by evidence proving any one or more of the Following circumstances-**

**(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) An intent to commit a felony;**

**(d) An intention by the act or omission to facilitate the flight or escape of any person who has committed or attempted to commit a felony**

27. Malice aforethought has been defined in the following cases;

**(a) NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

**- Intention to cause death**

**- Intention to cause grievous bodily harm**

**-Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.**

**(b) In the case of DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:**

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

28. The extent of the injuries visited on the deceased leaves no doubt in the mind of the court that Accused 1 intended to cause him grievous bodily harm if not death which demonstrates malice aforethought on the part of Accused.

29. From the foregoing, the defence is considered and rejected for the reason that it does not cast doubt on the well corroborated prosecution case.

30. In the end, I have come to the conclusion Accused 2 is **NOT GUILTY** of the offence of murder Contrary to **Section 203** as read with **Section 204** of the Penal Code and he is acquitted. However, Accused 1 is found **GUILTY** of the offence of murder Contrary to **Section 203** as read with **Section 204** of the Penal Code and he is accordingly convicted.

**DELIVERED AT MERU 24TH DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**Accused 1 - Present**

**Accused 2 - Present**

**For the Accused persons - Mr. Igweta Advocate**

**For the State - Ms. Mwaniki**



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