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Case Action:	Judgment
Judge:	Hilary Kiplagat Chemitei
Citation:	Republic v Michael Musungu Wakwabubi [2020] eKLR
Advocates:	-
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Case Outcome:	-
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Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO.18 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**MICHAEL MUSUNGU WAKWABUBI.....ACCUSED**

**JUDGEMENT**

**1. The accused person has been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 14<sup>th</sup> day of September 2018 at Museng area in Saboti division within Transzoia county jointly with others not before court murdered PETER MAKOKHA MAKANDA.**

2. The accused denied the charge and the prosecution called several witnesses to established its case. Ultimately the accused was placed on his defence and he gave sworn evidence but did not call any witnesses. Before looking at the merits or otherwise of the matter it shall be necessary to summarise the facts and evidence as presented.

3. **PW1 BMM** a 16-year-old form one student testified that the deceased was her father and she knew the accused who was their neighbour. She said that on the 14/9/2018 at around 5pm she came back from school and found her father alone at home. Her mother had gone to the church.

4. She went on to state that shortly thereafter the accused came and took the deceased to a destination she did not know. When her mother arrived she told her that the deceased had gone with the accused and they waited in vain for his return the whole night. They went to the neighbours the following morning but none had seen him and they reported the matter at the chief's office.

5. On Sunday they heard that a body had been found at Museng and taken to the mortuary. She said that the accused and the deceased were friends and they used to go out together. She said that the deceased was owed some money by the accused.

6. When cross examined she said that she found the accused at home since her brother had left and that it was the accused who went to their home. The accused was however in his home on Saturday the following day when they went to inquire from him about the deceased disappearance.

7. **PW2 DR ALEX WANYONYI BARASA** on behalf of Dr. Shitote who carried out the post-mortem on the body of the deceased produced the report which indicated that the deceased body had several cuts all over and especially the head, face and the right leg had been chopped off. The cause of death was haemorrhage and head injury secondary to assault. The injuries were caused by sharp object.

8. **PW3 GEOFFREY KHISA WAFULA** testified that he knew the deceased who was his friend and the chairman of their Mengo farm. He also knew the accused who was a neighbour to the deceased. He said that on 13/9/18 he received a call in the morning from the deceased son asking whether he had seen the deceased. He went on to state

that he received information that he was being sort to be killed together with the deceased.

9. He went to see the deceased and informed him of the information regarding threats to their lives. He said that he had received information from three people namely Francis Khisa Mabatsi, Pius Wekesa Nabangi and Gilbert Mwolobi. He warned him not to stay in the house that day and that on 14<sup>th</sup> the following he spoke with him in the morning.

10. On the 15<sup>th</sup> he received a call from Cornelius his son inquiring whether he had seen the deceased and he answered in the negative. He told him that the deceased had left with the accused towards Corner Mbaya where they were to go to the home of one Nangila.

11. He went to the deceased home where he met many people including those who had warned him as well as the deceased family. The accused had left and turned off his phone. They went to the police and made a report.

12. He was called at 8pm and told that a body had been found at Saboti in a maize plantation. The same was collected and they went to the mortuary to confirm that it was the deceased. He said that the police suspected the accused and they went to his place 5 times but they did not find him.

13. When cross examined he said that the meeting that took place on 10<sup>th</sup> was at Mengo farm at the home of one Tendwa and the next meeting was at the home of Protus Khaemba on the 15<sup>th</sup>. He said that he spoke with the accused on the 15<sup>th</sup> using the deceased's sons phone. He went on to state that the deceased gave him the area list on 13<sup>th</sup> which was in an envelope.

14. He stated also that of all the people he mentioned who were in the meeting the accused was not there. He said that the accused told him that they were to go to the house of Nangila to drink alcohol.

15. **PW4 ZACHARIAH WANYAMA MAKANDA** the son to the deceased testified that on 14/9/2018, the accused was to pay the deceased his debt. He said that the deceased left in the evening of 14<sup>th</sup> but did not come back. He went to the accused home on 15<sup>th</sup> to inquire as they had left together. The accused left them and went to his home. The deceased phone was still calling but nobody was answering. He identified the phone in court. He said that he suspected the accused as he was close to the deceased and it was the day he was to pay him his timber debt.

16. When cross examined he said that he was with the deceased from 2pm to 5pm and that the accused was to pay him that day. He said that they both went to the house of Nangila.

17. **PW5 CORNELIUS SIMIYU MAKANDA** the son to the deceased and a neighbour to the accused testified that he was home with the deceased on 14/9/2018 when he gave him his phone to delete many messages which had filled it. As he did so the accused called and they spoke with the deceased. He said that he appeared anxious after about 30 minutes.

18. He thereafter left for market leaving the deceased at home. His mother on the other hand had left for a church meeting. When he came back the deceased was not there but he carried on with his business. The following morning her mother came to his house and informed him that the deceased did not come back that night. They went to the home of the accused to inquire. Many other people came and the accused left immediately.

19. They went to report at the police station and on Sunday they heard that the deceased body had been found in a maize field and that the accused had left for Uganda.

20. When cross examined he said that he did not get to know what the deceased discussed with the accused on the

phone but he appeared anxious. He denied that Zachary his brother was present when the deceased discussed the issue of collecting his debt from the accused. He said that Zachary was not at home but was in the market where he met him. He said that the accused left after he had been questioned by many people including the village elder. He went on to state that the deceased died over the issues concerning the farm.

21. **PW6 MARGARET WAMALWA** the wife to the deceased testified that the accused was her neighbour. He said that on 14<sup>th</sup> September 2018 at around 7am he was with his son Cornelius Simiyu as well as Zachary his other son. The accused told the deceased not to leave the homestead till 5pm when he shall pay his debt.

22. At 5pm he came and picked him up to go to Corner Mbaya where he was to pay him. She said that he was owed ksh.3000. They left and did not come back that night. At around 10pm she called his phone but nobody was picking it though it was ringing.

23. He asked the accused who was at his home and he told him that they had parted with the deceased. He then took off and he was arrested in Uganda. She did not however see the deceased body.

24. When cross examined she said that it was the accused who came picking the deceased. She was not sure whether they went to Corner Mbaya.

25. **PW7 C I. THOMAS SIMBILI** carried out investigations, recorded witness statements and preferred the charges against the accused. He said that many people were mentioned to have been with the accused before he was killed including the deceased. The other reason for charging the accused was the fact that he fled to Uganda after the offence and that he was the last person to have been seen with the deceased.

26. When placed on his defence the accused said that he last saw the deceased on 13<sup>th</sup> September 2018 when he came and called him as he was planting beans. As they spoke PW 3 came and called the deceased and he asked for the farm books from the deceased as they had a meeting on 14<sup>th</sup> concerning Mengo farm. He said that they left each other at 10a m.

27. At 10 am the deceased son Cornelius came asking for his father and he showed him the direction he had gone. Cornelius and Zachary the deceased sons came and asked about their father and he told them he had not seen him and they called pw3 who told them that he had been killed. He called the village elder and they went to the deceased home. Meanwhile pw4 went to report at the police with the deceased family members.

28. They heard at 9pm that the deceased had died but his body had been taken by the police to the morgue. He said that pw3 had found the body. Later 13 people went to record statements at the police station.

29. He testified that he went to Uganda on 28<sup>th</sup> to weed his vegetables and he was arrested on the 30<sup>th</sup> because of being suspected as the last person with the deceased. He said that he was not with the deceased on the 13<sup>th</sup> as he was at Muroki. He said that he owed him kshs750 being the balance of the money from the timber he had purchased from the deceased.

30. He said that his wife and the deceased had gone for a church function on the 14<sup>th</sup> and that nobody saw him leave with the deceased.

31. He said that the pw3 knew about the deceased death as he took the farms books from the deceased. When further cross examined he said that the deceased was his friend as he would even come and sleep in his place. He said that he had not completed the debt as time was not yet ripe.

32. He said that he was in Kenya up to 28<sup>th</sup> September and nobody looked for him. He had not ran away.

## **ANALYSIS AND DETERMINATION**

33. The court has carefully perused the proceedings herein and although the parties' counsels were advised to file written submissions none complied. The court shall however proceed based on the evidence adduced.

34. It is clear that there was no eye witness to the gruesome murder of the deceased. The basic reason why the accused was charged was because he was said to have been the last person seen with the deceased and that after the incident he fled to Uganda where he was arrested after about one month.

35. The evidence of pw1 was that the deceased left with the accused on the material day in the evening. She said that it was the accused who came and picked him from home allegedly to pay his debt at Corner Mbaya. The issue of the debt was acknowledged by both the accused and the deceased family. The money was to be paid at Corner Mbaya or at least in the home of one Nangila. The said Nangila was not called to verify whether both the accused and the deceased arrived at his home.

36. Although pw1 said that the accused picked the deceased from home that position seemed to have been contradicted by her brothers. PW 4 and 5 did not see the deceased picked by the accused. PW 4 went to the market and pw5 deleted messages from the deceased phone and received a phone call from the accused who wanted to talk with the deceased and which he did and the latter appeared very anxious thereafter. He did not see the accused going with the deceased.

37. From the evidence of PW 4, 5 and 6 none corroborated what pw1 stated, namely that he saw the accused go with the deceased. There was no evidence that she was at home at least from her family members.

38. This brings me to the evidence of pw3 and the Mengo farm connections. It is easy to conclude from his evidence during cross examination that there were issues relating to the dispute at the said farm. He said that there were people who had held some meetings to plan the elimination of the accused and him. This is the report he gave to the accused and warned him not to spend at his place on the 13<sup>th</sup>.

39. That information was not shared with the police and the investigating officer herein was in the know. He did not bother to check on the people mentioned by pw3 namely Francis, Pius and Gilbert he indicated in his evidence above. Apparently the deceased must have been an official and he had the farm books.

40. The mere disappearance of the accused to Uganda and the suspicion it created was not enough to charge him however strong it may have been. It is also not in dispute that the accused stayed for about 10-day s after the incident before going to Uganda and he was not arrested or required to make any statement. He was not among the 13 people who went and recorded statements immediately after the incident.

41. It is therefore the view of this court that the sworn defence by the accused was credible to have created some doubts in the prosecution case. The debt owed to the deceased by the accused was not disputed. There was no evidence to suggest that the accused had refused to pay or for that matter had disagreed over it.

42. The sum total of this court's finding is that the case was poorly investigated. The investigating officer concentrated on the issue of the accused going to Uganda and failed to check on the big issue surrounding the Mengo farm dispute where the accused was holding some office. At the same time the investigating officer should have pursued the planned assassination meetings which PW3 was privy to and which he had warned the deceased.

43. The court in the premises does not find that the prosecution has met the threshold required to prove murder charge against the accused. Strong mere suspicion cannot suffice unless backed by cogent evidence. See **SAWE VERSES REPUBLIC (2003) KLR 364**.

44. The proof must be beyond any shadow of doubt. It is also noted that the key witnesses were the deceased children and his wife. Although nothing stops the court from relying on the same, at least those other persons of interest should have been interrogated as well for instance one Nangila where the deceased and the accused allegedly went to pay themselves.

45. There was no malice aforethought established against the accused. No evidence that he planned and executed the death of the deceased despite going to Uganda for almost a week.

46. The accused is hereby acquitted under the provisions of **Section 215 of the Criminal Procedure Code. He is set free unless lawfully held.** The sureties are also discharged.

**Delivered, Signed and Dated at Kitale this 11<sup>th</sup> day of December 2020.**

**H K CHEMITEI**

**JUDGE**



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