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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 14 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PETER KITHURE MURIUNGI alias TOM KYALO MANAGA.....ACCUSED

JUDGEMENT

1. **Peter Kithure Muriungi alias Tom Kyalo Managa** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused person on the 6th day of August 2011 at about 19:15 hrs at Gatoroni Sub location in Kathungu location of Muroroni Sub County within Kitui county murdered Nyaga Kimu.

2. The accused pleaded not guilty and the matter proceeded to full trial

The prosecution called five (5) witnesses while the accused chose to remain silent in his defence.

3. In brief the prosecution's case is that the accused person killed the deceased who was a neighbour and a clan's man on the on the 6th day of August 2011 at around 9 p.m. for unknown reason and disappeared for 3 years only to be arrested in a Matatu upon a tip off in 2014 carrying another person's photocopy of an I/D card in disguise.

4. **PW1 Daniel Mwandikwa** testified that he was at home on 6th of August 2011 when PW3 came and informed him that his father had been killed. PW3 informed him that he had seen the accused hit the deceased with a stick. On receiving the information and in the company of PW3 they proceeded to the scene which was near the market where they found the deceased lying on the ground with injuries on the head and with a lot of blood. The Police were informed, they arrived and carried away the body of the deceased.

5. It was his further testimony that his father had informed him of his intent to sell his land on the same day. He has known the accused person for fifteen (15) years and did not know of any dispute between his father and the accused person. That the accused left after the incident and only resurfaced three (3) years later.

6. **PW2 PC Henry Ochieng** testified that on 12th July 2014 at about 5 a.m. he was given instructions to arrest the accused person who was suspected to be travelling from Katoloni via Kasee to Mwingi. In the company of PC Mark & P.C. Mubea they were tasked to conducted a road check and stop all the passenger vehicles. In executing the instructions, they stopped a vehicle, enquired from the driver whether he had picked any passenger from Katoloni when the said driver told them to find out from the passengers. The vehicle was a Nissan 14-seater. The witness entered the vehicle and asked every passenger to produce their I/D card. The passenger immediately behind the driver had a Photocopy of an I/D card bearing the names John Mulyangi Mutara and which was not his. The other passengers also said he had boarded at Katoloni. They took the person to the station Police Station where he was positively identified by the deceased relatives as being Peter Mulyungi the person they were tasked to arrest.

7. **PW3 Albert Njagi Kariuki** testified that on 6th August 2011 at 6 P.M. he was coming from church and passed through the back door to his house, when he heard a person ten (10) meters away say "*Nimeua wamebaki wawili*" (loosely translated, *I have killed they have remained two*). He knew the voice; it was that of the accused. He checked and saw the accused. He followed him slowly and saw him enter the house of Njeru. He also heard children saying "*Kithure has come.*" He heard the accused ask for water and told someone he had stabbed the deceased and he left. He thereafter looked for the deceased child and together they went

to the scene where they found the body of the deceased lying on the ground. He then called the O.C.S. Kyuso and gave him information. It was also his testimony that the accused was carrying the tools he used to kill. He saw the accused near the scene where the deceased was lying.

8. **PW4 Toto Mwangangi Nyaga** a son to the deceased received the news of his father's death on 7th August, 2011. He learnt that the deceased had been killed by the accused. He was present at the postmortem on 18th August 2011.

9. **PW5 PC Ngao Clinton** of Kyuso Police Station produced the postmortem report as an exhibit.

10. The accused was put on his defence but chose to remain silent. Important is that his counsel appeared virtually, and sort to adjourn the matter as he was holding brief. The said Lawyer a Mr. Bore had appeared in this matter and severally, starting the 9th of July 2019, 21st November 2019, 16th December 2020 when directions were given on how the matter would proceed, 6th October 2021.

Notable is that on 2nd of November 2021 Mr. Bore informed the court that the prosecution case had been closed and it was time for defence hearing. The matter was adjourned to the next day to enable him prepare for the defence. The next day he informed the court that he had not contacted his client. The court found the excuse untenable and directed the matter to proceed in view of the age of the matter and the fact that the offence had been committed 11 years ago.

11. Section 211 was explained to the accused and he opted to keep quite.

12. At the close of the hearing both parties filed their respective submissions.

Submission of the parties

13. The prosecution submitted that all the ingredients of the offence of murder had been proved beyond reasonable doubt. The postmortem proved the fact of death coupled with the evidence of PW1 who went to the scene of crime where with the deceased child they found the body of the deceased.

Secondly the accused was placed at the scene of crime and his utterances that he had killed and had two to go is prove of his motive. Reference was made to Section 206 of the Penal Code.

Further it was submitted that the weapon used left the deceased with fatal injuries. The accused knew or ought to have known that his action was going to cause death.

As to the identity of the killer, the accused was at the locus, **PW3** saw him, though he did not see the weapon, he was attracted by a loud sound.

Further after the incident the accused disappeared and was only arrested after 3 years as he attempted to disguise himself to avoid arrest.

14. The accused person submitted that he was not granted adequate time to prepare for his defence. His counsel appeared online and asked for an adjournment which the court declined. The counsel was unable to prepare for defence hearing. Reference was made to Article 50 (2) (c) of the constitution, Section 211 & 213 of the Criminal Procedure Code

Further it was submitted that the prosecution did not also prove its case beyond reasonable since the only evidence that the prosecution sought to rely on is that of witnesses who never saw the crime being committed, never saw the accused at the crime scene, only became aware of the crime after the deed and relied entirely on hearsay evidence. He also submitted that no murder weapon was found. He relied on the cited case of **P.O.N versus Republic [2019] eKLR, Republic v John Waweru (2021) eKLR, R vs Eric Isoe Omwanza (2019) eKLR and George Ngodhe Juma & Others v Attorney General (2003) KLR.**

Analysis and determination.

15. The Court has considered the evidence of the prosecution, the submissions and authorities cited by the parties. For the prosecution to prove the offence of murder it has to prove the following ingredients; **(a) the death of the deceased occurred; (b) that the accused unlawful omission or commission caused the death of the deceased; and (c) that the accused had malice aforethought. See Republic Versus Andrew Omwenga 2009 eKLR**

16. As a preliminary issue, the accused has stated that the proceedings herein were rushed and that he was not granted enough time to prepare for his defence. The Proceedings herein were initiated on the 13th of August 2014.; 8 years ago. A close look at the proceedings indicate that the court made a Ruling on a case to answer on 28th of November 2019 at the time there was an advocate representing the accused person. In five instances between 19th February 2020 to 3rd November 2021 the defence sought to have the case adjourned for one reason or another. On the 2nd of November one Mr. Bore appeared before court and sought to adjourn as he had not adequately prepared. The case was adjourned to the following day, the 3rd of November 2021. Indeed, the accused person had close to a year to prepare his defence after the close of the prosecution case. The court clearly granted him ample time to prepare for his defence. The court in declining to adjourn the matter further took into account the fact that the incident happened in 2011, 10 years ago. The case has been on going for the last 8 years. The sword of justice cuts both ways and the court has to balance competing interests. The accused has rights so do the deceased family and the society at large. The court owes a statutory duty to conclude cases expeditiously and this case has unnecessarily dragged for a very long time the delay had to come to an end. Indeed, on 6th of October 2021, in the presence of his counsel the accused complained that the case had taken too long!

17. On the death of the accused person. **PW4** identified the body of the deceased during the postmortem. **PW5** presented the postmortem report where the opinion expressed was that the cause of death was cardiopulmonary arrest secondary to hemopericardium and severe head injury due to blunt force on the head. Death was therefore proved.

18. Whether the accused committed the unlawful act, which caused the death of the deceased" The prosecution case is solely based on circumstantial evidence. In **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

19. The accused person was positively identified as leaving the scene of the crime by **PW3**. **PW3** heard the accused state that he has killed the deceased and two are remaining. The accused is said to have escaped from the scene of the crime and from his ordinary place of residence and was arrested three years later without an identity card and when asked to identify himself he produced a copy Of an identity card which belonged to someone else. He was in fact arrested at 5 a.m. after a tip off from the area assistant chief that he had been spotted at his father’s place. The accused did not seek to rebut this averment made by the prosecution witnesses.

20. Section 111 of the Evidence Act provides as follows;

111. Burden on accused in certain cases

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

21. The accused person was seen immediately after the incident at the scene of crime and he uttered words suggestive to be an admission that he had killed the deceased. He was positively identified by PW3, who had known him since 2002. The actions of the accused person immediately after the murder of the deceased, his disappearance from home and the fact that he carried a copy of an identity card of someone else in an attempted to conceal his identify corroborate the prosecution’s evidence as to the inference of guilt.

22. On malice aforethought. The Court has considered the nature of the weapon used. In the case of **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, it was held that in determining whether malice aforethought has been proved, the following elements should be considered: -

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

23. The deceased herein was hit in the head causing severe injuries. The part of the body targeted was purposely to inflict fatal injuries. Secondly, the action of the accused person of disappearing from his home immediately thereafter clearly prove malice aforethought on his part

24. In the end, I do find that the prosecution has proved its case beyond reasonable doubt.

25. Accordingly, I find the accused guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code and do hereby convict accordingly.

DATED SIGNED AND DELIVERED IN GARISSA THIS 24th day OF MARCH 2022

ALI-ARONI

JUDGE

In the presence of

Mr. Bore Advocate for the accused

Mr. Kihara for the State

Amina/Martin Court Assistants



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