



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HIGH COURT CRIMINAL CASE NO. 14 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTETHIA NKANJA.....ACCUSED

J U D G E M E N T

1. **James Mutethia Nkanja**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars as per the information presented to this court are that on 3rd August 2018 at Chiakariga Location, **Tharaka South Sub-county** within **Tharaka-Nithi County**, the accused with another person not before court murdered Peter Murauko Kirema (hereinafter to be referred to as the deceased).

2. When the accused was first produced in court on 25th August, 2018, he pleaded not guilty to the charge but on 31st January, 2019 when the matter was slated for hearing, the accused person informed this court that he desired to change the plea and the charge was read afresh to him upon which he pleaded guilty. This court then entered a plea of guilty and fixed the case for facts on 19th February, 2019.

3. On 19th February, 2019, the state through the Office of the Director of Public Prosecution presented the facts of the case, and the accused denied the facts and consequently this court entered a plea of not guilty and fixed the case for trial.

4. The Prosecution's case was basically based on direct evidence while the defence position was that though the action was admitted it was not premeditated.

5. **Karuku Bereche (PW1)** testified in the trial and gave vivid account of what he witnessed. He testified that on 3rd August 2018 (the material date) at around 5:30 am, he was asleep when he heard someone calling saying he had been shot with an arrow. He told this court that he opened his door and saw someone running towards him for rescue crying out that he had been shot with an arrow. He recognized the person as the deceased herein and that before reaching where he stood, he fell down and that at the same time the accused and one Gitari were in hot pursuit armed with machetes and arrows. The witness saw the two stoning the deceased after he fell down. The witness further told this court that he tried to intervene asking the accused and his fellow assailant why they were killing someone in his compound but the accused person threatened him as well. He further testified that he saw the deceased lying down with an arrow protruding from his chest and that as the two continued stoning the deceased on the ground he ran away to seek for assistance but as he was running away he noticed the two were also cutting the deceased using the machetes they had.

6. PW1 proceeded that he ran to a neighbour known as Stephen Kirundi who lived about 50 metres away from the scene. He added that Stephen Kirundi (PW2) woke up and both of them got into a boda boda and rushed to another neighbour known as Pastor Mwathi. He informed Pastor Mwathi (PW3) of what had happened and Pastor Mwathi told them to go ahead of him as he sought for a car. The witness stated that they rushed back to the scene of crime and that when the accused and one Gitari saw them approach, they ran away with the weapons they had which were machetes and arrows. He testified that on reaching the scene, he noticed that the accused had left one bow and one arrow which were later collected by the police. He testified that the deceased was in bad condition but still alive. He testified shortly thereafter, the deceased passed on. He identified one arrow that was later produced by the investigating officer as the same arrow recovered at the scene. He added that one arrow was still lodged on the chest of the deceased though the stick of the said arrow had been broken as it appeared to him that the deceased had tried to dislodge the arrow but the arrow head remained stuck inside the chest.

7. The witness also testified that there were blood stains on the stones at the scene which stones were used to stone the deceased adding that the police collected some of the stones and took them as exhibits when they arrived at the scene to collect the body.

8. The witness further testified that he was aware of a land dispute involving the deceased and the father of the accused herein. According to him the dispute was resolved in favour of the deceased.

9. **Stephen Kirundu Kirema (PW2)** testified and corroborated the evidence of PW1. He confirmed that on the material date at around 6 am, PW1 rushed to his house and told him to get out quickly in order to rescue the deceased who was his brother. He testified that he got into a motorbike and together with PW1 he rushed to inform his other brother Nicholas Mwathi (PW3) whom was referred by PW1 as Pastor Mwathi.

He further testified that they all rushed to the scene and because, the scene was stoney with no road, they parked the motorbike at a distance and approached the scene on foot. When they reached the scene, the witness (PW2) testified that he saw the accused and his brother one Gitari Nkanya armed with bows and arrows and that they had also had pangas.

He saw the accused kicking the deceased on the ground as Gitari was stoning him. He added that when the accused and Gitari saw them, they ran away. He testified that they then went closer to where the deceased lay and found an arrow stuck on his chest and his face covered with blood with visible cuts on the face. He also confirmed seeing blood stained stones which he opined had been used to stone the deceased. He testified that his brother had difficulties in breathing and that he died shortly thereafter.

10. **Nicholas Mwathi Kirema (PW3)** a brother to the deceased and a pastor at a church known as Christian Gospel International, testified and majorly corroborated the evidence of PW1 and PW2. He confirmed that when PW2 called him on the material date early in the morning he got into his car and followed his brother (PW2) who was using a motorcycle and carrying Bereche (PW1). He repeated what PW1 & PW2 stated in their evidence on what they witnessed at the scene of crime. He added that there was a land dispute between the deceased and the father of the accused and according to him that was the cause of the murder because the dispute was still persisting despite the matter having been resolved by the clan members.

11. P.C. Amos Wafula Wahungu (PW4) testified and informed this court that on 6/08/2018, the area Chief went to Chiakariga Police Post with the accused person who was suspected of murder.

The officer stated that, he locked up the accused after booking him and later handed him over to DCI Marimanti Police Station.

12. Josphat Kiria Kirema (PW5) a younger brother to the deceased testified also and told this court that on 10th August, 2018 he went to Chuka Hospital where he identified the body of his brother (the deceased) before post mortem was conducted.

13. Dr. Nicholas Nkonge (PW6) a medical doctor testified on behalf of Dr. Kitili who conducted the post mortem examination of the deceased's body but has since passed on. Dr. Nkonge stated that he had worked with the late Dr. Kitili for 6 years before he passed on and was familiar with his signature and handwriting. He testified that the findings on the deceased's body were as follows: -

(i) Blood clots in the mouth.

(ii) Deep cut wound on the left ear (6 cm long).

(iii) Deep cuts above the right eye (about 2 cm in length).

Internally

a) Hemathorax secondary to a shot.

14. The doctor concluded that the deceased died out of left side haemathorax due to an arrow wound. The doctor tendered the post mortem report as **P. Ex 4**.

15. **CPL Benard Muli (PW7)**, the investigating officer in the case `also testified and recalled receiving a report on 3rd August, 2018 from Chiakariga Police Post in respect of a murder at Karini area. He testified that he went to the scene of murder accompanied by Director of Criminal Investigation Office, Chief Inspector of Police Too, and the Officer in Charge of the Station Chief Inspector of Police Njiru. He further told this court that on reaching the scene, they found a large gathering of people surrounding the body of the deceased person. He noticed visible injuries on the face of the deceased and an arrow stuck on the left side of his chest. He further testified that the deceased was bleeding and he noticed blood stained stones around where his body lay. He produced an arrow head that was recovered from the deceased body during post mortem and the 2 blood stained stones he recovered at the scene. The three exhibits were produced as **P. EX 1, 2 and 3** respectively.

16. When the accused was placed on his defence, he gave unsworn statement stating that he was sleeping in his house at around 3 am when he heard a commotion outside like someone was trying to open his cattle boma. He testified that he woke up and saw someone standing next to his cattle and that he tried calling out but received no response. He testified that he then went inside his house and armed with a bow and arrow he went outside and shot at the alleged intruder. He stated that he heard screams and that hearing that, he went to Chiakariga Police Post to report where he was informed that investigation would commence.

17. The defence then recalled CPL Benard Muli, the investigation officer to shed light on the report made on 3rd August, 2018 at Chiakariga Police Post. The officer came and presented an old OB with front pages containing the report made on the material date missing. This court noted from the OB that the front pages was missing due to either age or contact movement of the O.B.

18. This court has considered the evidence presented by the prosecution and the defence offered by the accused person. The accused person as observed above faces a charge of murder and for such a charge to be sustained, the following elements must be established and proved. The prosecution under the provision of **Section 203 of Penal Code** has the onus of proving the following ingredients beyond reasonable doubt;

(i) *The death of the deceased.*

(ii) *The cause of death and its connection to the accused.*

(iii) *Malice aforethought.*

19. (i) *The fact of death of the deceased.*

This issue was established beyond doubt by the prosecution through the evidence of PW1, PW2, PW3, PW5 and PW6. The evidence of PW1, PW2 and PW3, the witnesses who were first to arrive at the scene of crime saw the deceased badly injured and fighting for his life but succumbed to the injuries soon thereafter. PW5 the younger brother to the deceased attended the post mortem and identified his body. The doctor (PW6) testified and tendered post mortem (P Ex 4) which proved beyond doubt that the deceased died due to injuries inflicted on him.

20. *The actus reus*

The prosecution was required to prove that the death of the deceased was caused by unlawful act of commission or omission by the accused. Going by the evidence tendered, that element was also clearly proved by the evidence of PW1 who partly witnessed the accused and his brother Gitari pursuing the deceased before attacking him further when he fell down. PW1 clearly saw the deceased falling down after he had called him from his house for help. He also saw the accused and his brother armed with arrows and machetes. He recognized them well because they were neighbours and it was around 5:30am. The evidence of PW1 was well corroborated by the evidence of PW2 and PW3 who rushed to the scene and found the accused and his brother one Gitari still attacking the deceased who then was lying down. Both witnesses (PW2 and PW3) stated that they arrived at the scene of crime at 6am and clearly recognized the accused and his brother.

21. This court notes that the accused person admitted to shooting the deceased and heard him scream. This clearly proves that the element of *actus reus* has been well established and proved beyond reasonable doubt. The defence by the accused that the deceased was an intruder is dispelled by the prosecution's evidence which I find overwhelming against the accused person herein. There is sufficient evidence linking him with the cause of death because the doctor's (PW6) evidence shows that the deceased died due to arrow wound. The investigating officer (PW7) produced the arrow head that was recovered from the body of the deceased in the chest. The arrow head was tendered as exhibit 1 and from the size (3 inches long) and the shape of the arrow head (v-shaped) it was clear that it was not possible to dislodge or remove it and that is why PW1, PW2 and PW3 found the arrow striking out of the deceased chest. This court finds that the element of *actus reus* was clearly proved to the required standard of beyond doubt by the prosecution.

22. *Mens rea*

The Prosecution's case on this element hinged on the evidence of PW1 and PW3 both of whom testified about a land dispute involving the deceased and the father of the accused. This court finds that the evidence of squabbles was established by the fact that the accused and his brother, one Gitari who is still at large had motive to cause harm to the deceased perhaps with a view to making him surrender the disputed parcel of land. The accused person defended himself that he found the deceased in his cattle boma but it is clear that there was a dispute over that parcel and this was clearly stated by PW1 and PW3.

23. This court has also considered the nature of the weapon used (Arrow-P Ex. 2) and find that the accused clearly intended to cause or inflict fatal injury to the deceased. The arrow head recovered inside the chest of the deceased tendered was almost three inches long with pointed sharp ends forming v-shaped wedge at the end. The size of blood stained stones tendered as P Ex 3 also indicates that despite knowing that he had shot the deceased with an arrow which had lodged on his chest and on his account had made him scream, he continued assaulting him by cutting and stoning him despite the fact that the deceased had fallen down. That clearly proves that the accused is guilty of premeditated murder owing to the existence of a land dispute between the deceased and the father of the accused. This court is persuaded that this crucial element of *mens rea* has been proved by the prosecution in this case. The accused ought to have resorted to civil and peaceful means to resolve the land dispute rather than causing death of the deceased. This court finds that the prosecution case against the accused who had even admitted to the charge before changing his mind when facts were read out, has been proved beyond reasonable doubt. He is guilty as charged and he is hereby convicted accordingly.

DATED, SIGNED, AND DELIVERED AT CHUKA THIS 13TH DAY OF JANUARY 2022.

HON. JUSTICE R. K. LIMO

JUDGE

13/1/2022

Court:

This court has considered the mitigation by the accused but owing to the manner in which he together with his brother who is still at large carried out the act of committing murder, really showed no mercy to the deceased. He is hereby sentenced to life imprisonment. He has 14 days Right of Appeal.

HON. JUSTICE R.K. LIMO

JUDGE

13/1/2022