



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 4 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MWANGI GACHIRI.....ACCUSED

JUDGMENT

1. On 25th December 2013 at about 14:55 hours, Joseph Kamande Gachiri (hereafter *the deceased*) made a report of assault at Kigumo Police Station. He was bleeding from the head. He told the police that he was attacked by three people including the accused. He died the same day at Murang'a Hospital.
2. The Republic brought information to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
3. The particulars are that on the material day at Kangondu village, Kigumo Location within Murang'a County, jointly with others not before the court, he murdered the deceased.
4. He pleaded not guilty. The prosecution's case is predicated upon the deceased's dying declaration and some secondary evidence.
5. The accused is a nephew of the deceased and was in Form 3 at the time of the incident. Eight witnesses took to the stand. PW1 was Phillip Gachiri. He was away in Nairobi when he learnt of the death of his brother. On 30th December 2014, he identified the remains at Murang'a Hospital for postmortem purposes.
6. The autopsy was carried out by Dr. Raphael Gachiri (PW5). He testified that the cause of death was *head injury from a blunt object*. He produced his report as exhibit 1.
7. The deceased's mother (PW2) testified that on 25th December 2014 she was at home with the accused. The deceased went out to fetch cattle feed. When he returned, he fought with her. She took off to the coffee plantation and spent the night there. She said the deceased used to drink and would beat up family members. He had been employed as a police officer but was dismissed.
8. There is then the evidence of Peter Kagwi (PW3), another brother of the deceased. He claimed that on the night of 25th December 2013, he heard someone groaning by the roadside. He called Peter Kamande for assistance. They placed the person in a vehicle. It is only then that he recognized that it was the deceased. He made a report of the incident to the area chief the following day.
9. According to Police Constable Ochieng (PW6), on 25th December 2013 at about 14:55 hours, the deceased found him at the Report Desk at Kigumo Police Station. He was bleeding from the head. He told him he had been assaulted by three people including the accused. PW6 advised the deceased to seek treatment. PW6 later learnt that the deceased died at Murang'a Hospital.
10. According to the area chief (PW7) a report was made on 26th December 2013 by Peter Kagwi (PW3) and Kamande Kariuki that the deceased was injured in a road traffic accident. However, the investigating officer (PW8) said that whereas there was a trail of blood running from the middle of the road, there were no skid marks or evidence of an impact with a vehicle.
11. When the accused was placed on his defence, he raised an *alibi*. He claimed that at the time of the incident, he was at John Kamwana's house. The latter never took to the stand. He insisted that the deceased was found a kilometer away from his home, and that he had no contact with him on the day he was injured or died. He also said that the deceased used to beat his mother, (PW2). The quarrels were over money for alcohol.
12. The accused testified that Kageni informed him that the deceased died on the road at a place called Kang'odu. He said that on

6th January 2014, he had gone to the police station to enquire why his grandmother (PW2) was arrested. He was instead arrested. PW2 was later released by the police.

13. Learned counsel for the accused filed written submissions dated 7th May 2021 with authorities annexed.

14. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

15. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

16. There is no doubt about the death of the deceased. Doubt is completely erased by the post mortem report (Exhibit 1). In the opinion of the pathologist, death resulted from head injury caused by a blunt object.

17. From that evidence, I find that the death was unlawful. The next question then is whether the Republic has proved beyond reasonable doubt that the accused, *of malice aforethought*, killed the deceased.

19. There was no eye witness. The prosecution's case is built on *circumstantial* evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused "*incapable of explanation upon any other reasonable hypothesis than that of his guilt*". **R v Kipkering arap Koske & another** 16 EACA 135 (1949). See also **Sawe v Republic** [2003] KLR 364, **Mutua v Republic**, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, **Republic v Richard Itweka Wahiti**, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.

18. I find that there are a number of *incriminating* pieces of evidence: The first and most important are the words by the deceased uttered to Police Constable Ochieng (PW6). It was on 25th December 2013 at about 14:55 hours at the Report Desk at Kigumo Police Station. He was bleeding from the head. He told him he had been assaulted by three people *including* the accused. He advised him to go to hospital first. The deceased died the same night.

19. I readily find that those words by the deceased to amount to a *dying declaration*. Dying declarations should be treated with *caution*; and, there is need for *corroboration*. The statement by the deceased and his injuries was *corroborated* by the pathologist and partly by PW3 who found him groaning in pain later that night and took him to hospital.

20. I reached the conclusion that PW3 tried to cover up the conduct of the accused by stagemanaging the road traffic accident. I believe the investigating officer (PW8) that whereas there was a trail of blood running from the middle of the road, there were no skid marks or evidence of any impact with a vehicle.

20. There is also some motive. The accused is a nephew of the deceased. He was living and depending upon his grandmother (PW2). The deceased was dismissed from the police force and unmarried. He would occasionally beat up PW2. The latter confirmed that on the material night she was beaten up and chased away by the deceased and spent the night in a coffee farm. The accused confirmed that the deceased made life very difficult and that he would run away to avoid conflict.

21. I have juxtaposed that evidence with his defence. His testimony is unbelievable and a sham. He was expressly mentioned by the deceased as one of three people who assaulted him on the material day. The deceased died from those injuries. He claimed that he had no contact with the deceased that day. The *alibi* was being set up well after the close of the prosecution's case. But it did *not* shift the burden of proof to the accused. See **Republic v Johnson** [1961] 3 ALL E.R. 969, **Saidi Mwakawanga v Republic** [1963] E.A. 6.

22. I am alive that the legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. I have *weighed* the *alibi* against other evidence and the dying declaration. The accused did not call Kamwana to lend any further weight to his claim. I also closely studied his demeanour which betrayed him as untruthful and one who was concealing vital information. In the end, I find the *alibi* is a red herring.

23. I find that there is *strong* circumstantial evidence that points *strongly* to the involvement of the accused; and, which I find completely incompatible with his innocence. **R v Kipkering arap Koske & another** [supra]. There is a strong chain of events which I find *complete*; and, which demonstrates that the homicide was *premeditated*.

24. The upshot is that the accused, of malice aforethought caused the death of the deceased by an unlawful act. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF JULY 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. S. Mutinda for the Republic.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.