



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR NO. 15 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK MURITHI NJAGI.....ACCUSED

J U D G E M E N T

1. **FREDRICK MURITHI NJAGI**, 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 of the offence are that on 12th July 2018 at Kiria village, Murigi East Location within Tharaka Nithi County the accused murdered **PETERSON MBAE NDIGA**, the deceased herein.

2. The accused herein denied committing the offence and the prosecution lined up a total of seven witnesses with a view to proving its case. The prosecution's case hinged on direct evidence.

3. Fridah Igoki (PW1) testified that she operated bar business in her homestead and that on the material day (12th July 2018), she sold beers known as sweet waters to the accused person who was in the company of the deceased and that as the two settled down to take their drinks the deceased made a remark which irked the accused person. The remark made was;

“ Mende simekufa zote” (translated to mean all cockroaches were dead).

The witness explained that the accused person was mourning because his sister had passed on and was being buried that same day and that the remark appeared to have incensed him because he stood up and slapped the deceased on the cheek with such force that sent Mbae reeling to the floor. She further went on that she saw the accused picking a stick before hitting the deceased who was still lying down and that he was hit on the head from where he started bleeding. She told this court that the accused just picked up a piece of wood from a heap of her firewood and that when she saw blood oozing from the head of the deceased, she screamed and called for help. She stated that she called her husband John Gitonga (PW2) who quickly rushed to the scene. She also called one John Njeru (PW5) a brother to the deceased and Sub-Area (village elder) Jane Murugi (PW3) before they rushed to Marima Police Station with the deceased to report the incident before taking him to Chuka County Hospital where he was admitted for treatment. She told this court that the deceased passed on the following day.

4. John Gitonga (PW2), husband to PW1 on his part testified that he was at Marima Town on the material date and at around 8 am, his wife (PW1) called him and informed him that the deceased had been hit on the head. He told this court that upon receiving the news he jumped onto a boda boda and rushed home where he found the deceased lying down with his head bleeding and that his head appeared to have been hit by an object. He testified that he looked for a vehicle which took them to Marima police base before heading to Chuka County Hospital. He told this court that he assisted the deceased access treatment but the following day he was informed that the deceased had succumbed to the injury.

5. Jane Mirugi William (PW3) a Sub-Area in charge told this court that she was at her house on 12th July 2018 feeding her cows when PW1 called her on her mobile phone and informed that an incident had occurred. She told this court that she walked on foot to where the incident had occurred and found the deceased lying down bleeding from the head. She added that when she inquired she was told that he had been hit and was shown the piece of wood used to hit the deceased. She added that they got into a car and headed to Marima Police Post to report before the deceased was taken to Hospital. She identified the tree stump (piece of wood) used to hit the deceased and which was handed over to her by PW1.

6. Eunice Muthoni Njeru (PW4) told this court that the deceased was her brother in law while the accused was a neighbour. She testified that on the material day she had gone to attend a funeral of a sister to the accused and that while there John Gitonga (PW2) called her on mobile phone and notified her that the deceased had been hit on the head. She told this court that she took a boda boda and rushed to the scene where she found the deceased lying down injured and not talking. She observed the injury on the head. She further told this court that she then called her husband John Njeru Ndiga (PW5) who came before they proceeded to take the deceased to Hospital for treatment.

7. John Njeru Ndiga (PW5) a brother to the deceased told this court that on the material day he received a call from his wife (PW4) informing him that his younger brother (deceased) had been hurt at the home of John Gitonga (PW2). He told this court that he rushed to the scene and found the deceased lying down outside and bleeding from the head. He told this court that he was shown the piece of wood used to hit his brother and that he immediately embarked on getting a vehicle which he got and rushed his brother (deceased) to hospital in the company of John Gitonga (PW2) Fridah Igoki (PW1) and two other youths. He stated that he left the deceased at the hospital undergoing treatment but on 13th July 2018, the following day, he was informed that his brother (the deceased) had passed on.

8. Corporal Stephen Busienei (PW6) a police officer in charge of Marima Patrol Base told this court that on 12th July 2018 at around noon, while he was on duty at Marima Patrol Base, Njeru Ndiga (PW5) in the company of deceased and others arrived and made a report regarding assault on the deceased who was inside a motor vehicle bleeding from the head. He further told this court that a report was booked and the deceased referred to Hospital for treatment. He further added that Jane Mirugi (PW3) came with a piece of wood/tree stump reported to have been used by the accused to hit the deceased on the head. He also told this court that on 15th July, 2018 he got a report that the deceased had passed on. He stated that he visited the scene of crime with other officers and tried to find out the whereabouts of the accused but was told that he had disappeared after the incident. He added that on 20th July 2018 he attended a post mortem examination carried out at Chuka Hospital by Dr. Kitili. On 24th August 2018, the officer said that he got information that the suspect had been sighted at Cheera village and that he went there with another officer and arrested him (accused) and brought him to Marima before escorting him to Chogoria Police Station. The officer then tendered the piece of wood used to hit the accused as P. Exhibit 1 and informed the court that she recovered it from the in charge Sub-Area (village elder). He added that the accused person was formally an administration police officer but he left employment for unknown reasons.

9. Dr. Elvis Mwandiki (PW7) standing in for Dr. Justus Kitili the doctor who performed autopsy on the body of the deceased but was unavailable due to a long illness, told this court had worked with Dr. Kitili since 2014 and was quite familiar with his handwriting and signature. He went on that as per the doctor's findings the deceased had the following injuries externally;

a) Bruise on the left forehead

b) Bruises on left temporal skull and parietal sculp.

Internally, there was a fracture on left temporal skull and subdural haematoma on the frontal and left temporal left of the brain. According to the doctor, the deceased died as a result of head injury due to blunt trauma to the head. He tendered post mortem report as P. Exhibit 2 and added that a death certificate No.0851687 was signed and issued by Dr. Kitili

10. When placed on his defence, the accused denied on oath seeing or coming across the deceased that material day. He told this court that he went to bury her sister Edith Karimi who had passed on that day. He further told this court that he stays at his sister's place at Cheera and had only come that day to Kiria to bury her late sister. He further went on that he was in the company of ten people and that after the burial he went back to Cheera. He stated that he later learnt after about 2 months that the deceased had passed on.

11. Wallace Micheni (DW2) testified that the accused went to his place on 12th July 2018 at around 7 am and that he had come from Cheera for his sister's funeral. He denied that they assembled at his place but he recalled going for the funeral with the accused and being with him until the end of funeral.

12. This court has considered the evidence tendered by both the prosecution and the defence in this case. The accused in this case is charged with the offence of murder and an offence of murder is established and proved by the following elements or ingredients;

a) The fact of death

b) The cause of death

c) *Actus reus* or proof that the act of commission or omission by the accused cause the death

d) *Mens rea* or malice aforethought

(a) Facts of death

13. Based on the evidence tendered particularly the post mortem report (P Exhibit 2) and the evidence of PW7, PW1, and other prosecution witnesses, this court is satisfied that the element of the fact of death of Peterson Mbae Ndiga has been proved beyond doubt.

(b) The cause of death

14. The evidence of PW1 which indicates that she saw deceased being hit with a stick or a tree stump with roots protruding (P. Exhibit 1) is corroborated by doctor's evidence (post mortem report- P Exhibit 2) which indicates that the deceased died due to severe head injury due to blunt trauma to the head. This court saw the exhibit (P. Exhibit 1) which as I have observed above is a dry tree stump with roots protruding at the end and from the look of it can be turned into a lethal weapon. I have no doubt that the kind of the weapon used could cause the injuries described by the doctor even if it was only one blow given the number of roots sticking out on its end which roots had dried and appeared like sharp bristles or nails. The evidence of PW1 the only eye witness clearly indicates that the weapon caused the nature of injuries that caused the death of the deceased herein.

(c) Actus Reus

15. The prosecution case that connects the accused with the act that cause the death of the accused hinges mainly on the evidence of the PW1 who was the only eye witness to the incident. This court has cautiously looked at the evidence tendered by that witness and looked at the evidence of the accused person and his witness. The accused person says he was attending his sister's funeral on that date. The fact that there was a funeral of a sister to the accused that day is supported by PW1 and PW4. However given the chronology of events it is possible that the accused had the opportunity of committing the act

and attending funeral at the same time. This is because the incident took place at around 8 am. According to the accused person, he had gone to the home of DW1 that morning where he claims they assembled before proceeding to the funeral. This narrative is contradicted by his witness (DW2) who stated that the accused found him alone with his wife and that they proceeded to Chogoria Hospital mortuary using public means. This is inconsistent with the narrative given by the accused who stated that they proceeded to the burial straight away from Micheni's (DW2) home. This inconsistency shows that either the accused or both of them were not telling this court the truth. The defence of alibi cannot therefore stand in such circumstances.

16. The accused person furthermore told this court that he had no differences with PW1 which means that the witness had no reason to lie against him. I have looked at the evidence of PW2, PW3 and PW4 and find that the evidence clearly corroborates the evidence given by PW1. PW1 says she saw the accused pick up a piece of wood from a heap of her firewood and hit the deceased on the head after slapping him hard on the cheek. The other witness found the deceased lying down and bleeding from the injury he had sustained. This court finds that the element of *actus reus* has been established. The accused person is responsible for the fatal injury suffered by the deceased.

(d) Mens rea/Malice aforethought

17. The evidence of PW1 is quite telling on this crucial element in this case. The witness states that the deceased provoked the accused with a remark he made which was “*Nyenje ciokua cionthe*” which is translated to mean “*Mende simekufa zote*”. Of course the remark may look harmless but given the context and the fact that the accused was mourning her sister who was being buried that same day one would see and understand why the accused person may have felt incensed though he did not admit it. Nonetheless, I find that the element of *mens rea* is deflated by the utterances attributed to the deceased. It is on that basis that this court finds that though the accused definitely committed the offence, he was provoked and in that sense he can only be guilty of a lesser offence of manslaughter.

In the premises the accused is found not guilty for murder but he is guilty of manslaughter contrary to **Section 202** of the **Penal Code**. He is hereby convicted accordingly.

Dated, signed and delivered at Chuka this 29th day of January 2020.

R. K. LIMO

JUDGE

29/1/2020

Judgment signed, dated and delivered in the presence of Mugo for the accused and Maari for the State.

R.K. LIMO

JUDGE

29/1/2020

Court

I have considered the mitigating circumstances. The convict obviously overreacted even if he was provoked and as a result he caused the death of one Peterson Mbae. He should have controlled himself but did not. He needs time in a correctional facility in order to enable him perhaps to reform. He is hereby

sentenced to serve 7 years in prison. He has 14 days Right of Appeal.

R.K. LIMO

JUDGE

29/1/2020