



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCR NO. 11 OF 2017**

REPUBLIC.....PROSECUTOR

VERSUS

JUSTIN NGAI KIBURIO.....ACCUSED

**J U D G E M E N T**

1. **JUSTIN NGAI KIBURIO**, the accused herein is charged with offence of murder contrary **Section 203** as read with **Section 204** of the **Penal Code**. The Particulars of the charge as per the information presented are that on 13<sup>th</sup> October 2017 (hereinafter to be referred to as the material date) at Gitumbi village Karamani, Mukuuni Location within Tharaka Nithi, the accused murdered one Nyamu Kiburio.

2. The accused denied committing the said offence and the prosecution presented a total of six witnesses. The prosecution's case is hinged on direct evidence.

3. Fridah Karimi Murimi (PW1) the first prosecution's witness testified and told this court that on the material date the deceased who was her father in law asked her to return a panga that appeared to have been borrowed from him and that when the deceased was given the panga, he found the panga to have rusted and not sharp. The witness stated that the deceased asked her to give him 50/- to sharpen the panga. The witness instead stated that she took the panga herself and went to a neighbour named Esther Karimi who assisted her with sharpening and cleaning material to sharpen the panga. She added that when the panga was sharpened the neighbour gave her 50/- which she took and handed it over with the sharpened panga to the deceased.

4. The witness further testified that the deceased took the panga and Kshs.50/- and started quarrelling her asking her where his goat was. She stated that the goat was at her house and so upon being shown, he took it away to his house before returning to ask for wooden frames which were equally given to them. She added that he returned again and asked for a roller used for making chapati's which was handed over to him. She further testified that the deceased came back and asked for another old panga he had previously given the witness and was given. The witness stated that after taking his properties, the deceased went back to her the fifth time and asked for a padlock which the witness did not have any idea about and so she asked him (deceased) to wait for her husband (or his son) to return. The witness told this court that she thought that the husband might have been given the padlock without her knowledge and that is why she asked the deceased to wait for him and that is when, he told her that the padlock was the one she was using in her shop. She added that she asked him to give her time to go and get the padlock from the shop but he told her not to bother. The witness told this court that the deceased then went to his

house and took out some maize grain and gave it to the chicken in the compound as a bait before snatching one of her chicken and severed the head of using his bare hands and she inquired why he was doing such a thing, she stated that the deceased entered his house and came out with a panga and walked towards her and sensing danger she dashed to her house and tried to lock the door. She added that she could not close the door quickly enough as there were beans near the door which impeded her and because of the imminent danger she stated that she ran to her bedroom for safety but the deceased pursued her there and started beating her as she began screaming for help. As she shouted for help, she saw the accused rushing in holding the deceased by the neck and holding the panga he had on one hand. In the ensuing struggle the witness stated that the deceased was thrown onto the bed she was lying on and that she struggled in the melee and managed to free herself and dashed for the exit at the door where she found Esther Karimi (PW2) screaming for help as well. The witness stated that she took her child and ran away and that as she was running for dear life, she heard the accused asking Esther to snatch the panga from the deceased. The witness further testified that she kept on running and met Mugendi Mati who was running to the opposite direction towards her home after being attracted by screams. After running for about one kilometre the witness stated that she stopped and looked back and saw the accused come out of her house bare handed. The witness stated that she decided to go back and see what had happened and that when she reached her house she found the deceased outside her house and that he had been cut 3 times on the head and he reportedly told her to let him die so that they could live in peace. She added that she took out a leso and handed it to Mugendi Mati (PW3) and Kenneth Gitonga to tie around the head of the deceased to try and stop the bleeding before a boda boda was fetched which took the deceased to hospital. She added that she was later informed that the deceased had succumbed to the injuries and died.

5. She (PW1) further told this court under cross-examination that the deceased and the accused person were brothers and never got along well and that there was a previous incident of an assault on the deceased which resulted on the deceased being hospitalize at Chuka County Hospital for a month. She added that she had no issues with the deceased but that on that material date, the deceased was simply in foul mood for unknown reason. She told this court that she ran to her bedroom to help her in sharpening a panga because she had a sharpening stone and that after sharpening the panga well she gave her 50/- which she had borrowed her previously. She added that after Fridah (PW1) left, she heard screams after a shortwhile from her homestead and she rushed over there to find out what was happening. She told this court that on reaching there, she found out that there was a fight inside Fridah's house to escape his wrath and did not fathom that the deceased could pursue her to her bedroom since it was against Meru customs for a father in law to enter a bedroom of his daughter in law. She added that she was shocked when the deceased started raining blows on her as she lay on her bed.

6. Esther Karimi (PW2), a neighbour to PW1 testified and confirmed that PW1 on the material date went to her house and requested her to sharpen a panga

because she had a sharpening stone and that after sharpening the panga well she gave her 50/- which she had borrowed her previously. She added that after Fridah (PW1) left, she heard screams from her homestead and that she rushed over there to find out what was happening. She told this court that on reaching there, she found out that there was a fight inside Fridah's house and peeped inside the house and saw the deceased, the accused and Fridah struggling and she started screaming for help. She added that she saw both the accused and deceased each having a panga wrestling as Fridah (PW1) lay on her bed.

7. The witness further testified that when she saw what was happening, she ran back to her house and got a mobile phone to call her husband one Kennedy Murithi who quickly came and headed to the scene at Fridah's house and that by that time Fridah (PW1) had broken free and fled away from danger. She stated that she learned later that the deceased had passed on.

8. Mati Mugendi (PW3) on his part testified that both the deceased and accused were his uncles or brothers to his father. He told this court that he was on his farm on the material date and that at around 11 a.m he heard screams Nyamu's house and that he rushed and notified his father about the same and headed there as the screams grew intense. On reaching the scene, he told this court that he met Fridah (PW1) running out of her compound and on inquiring what was going, Fridah reportedly informed him that the accused and the deceased were fighting. He told this court that he then proceeded with his father

to deceased's compound and found the accused and deceased outside with the accused sitting on the deceased while at the same time holding him by the throat. He told this court that he further noted that the deceased had been cut on the head and that he caught hold of the accused person herein and snatch the panga he was holding before separating them. He further testified that he realized that the deceased was bleeding seriously and looked for a boda boda to take him to hospital which they did after trying him around the head using a *Leso* (a piece of cloth normally used by women to tie around their waist) with a view to control the bleeding. He added that the deceased had been cut 3 times on the head and that they took him to Chuka County Hospital where he died thereafter.

9. Dr. Justus Kitili (PW4) the doctor who performed autopsy on the body of the deceased testified and told this court that he carried out post mortem examination on 27<sup>th</sup> October 2017 and noted the following injuries externally;

- i. Two deep cuts on the frontal scalp- 3 cm long
- ii. A deep cut on the back of the head- 4 cm long

Internally the doctor found the following injuries;

- i. Fracture of the frontal skull bone
- ii. Fracture of oxypital skull bone
- iii. Subdureal haematoma on the frontal lobe of the brain.

The doctor on the basis of the above findings formed the opinion that the deceased died due to severe head injury caused by a sharp object. He tendered postmortem report as P Exhibit 1.

10. Corporal Christanders Ondieki (PW5) told this court that he was on duty on 15<sup>th</sup> October 2017 at Chuka police station when he received information from the OCS that a murder suspect at an area called Magonga was in the hands of a mob and there was danger that he could be lynched. He told this court that he boarded a police vehicle together with other police officers and rushed to the scene where they found a group of people holding a suspect near a river bank. The officer arrested the suspect and brought him to Chuka Police Station. He also said that before leaving the scene a witness handed him blood stained clothes belonging to the deceased and a blood stained panga suspected to be the murder weapon. The officer stated that he handed over the suspect and the exhibits recovered at the scene to the investigating officer.

11. Sgt Kenneth Naivasha (PW6) the investigating officer in the case informed this court that he was called on 16<sup>th</sup> October 2017 by OCS Chuka Police Station and informed about the incident. He told this court that he got the information after the accused herein had been arrested and that he called for the witnesses and recorded their statements. He also stated that he interrogated the accused who reportedly told him that he had gone to rescue PW1 when the deceased turned on him with a panga trying to cut him before he snatched the panga and cut him and that when he referred the accused to the OCS to record what he thought was a confession the accused person retracted the statements.

12. The investigating officer stated that he received some exhibits comprising namely; a trouser, T- shirt and a masai lesa and also a panga. He stated that he forwarded the exhibits to the government chemist for further forensic analysis in order to confirm if the visible blood stains on the exhibits matched those of the deceased. He further testified that he revisited the scene where the deceased was attacked which he confirmed to be the house belonging to PW1 and got details of the events of the incident from PW1. He informed this court that he was given the exhibits by Corporal Ondieki (PW4) and he sent them to Government chemists who was yet to return the exhibits together with a report. He further testified that he went to Chuka Hospital mortuary and saw the body of the deceased with cuts injuries on the head.

13. When placed on his defence, the accused gave sworn statement and deemed committing the offence.

He raised alibi as his defence stating that on the material date he was away at his farm at Kathagara which is about 10 km away and that he only came back at 5 pm and told that the deceased had been taken to Hospital after a fight. He however did not say who the combatants in the fight were He added that he had no differences with the deceased and that he had not differed with any of the prosecution witnesses.

14. This court has considered the evidence tendered by the prosecution and the defence offered by the accused person. What is evident in this case is that the accused and the deceased were brothers who appeared to have differed in the past prior to the material date. In a case of murder such as this case, the prosecution are required by law to establish the following ingredients in order to sustain a conviction.

- i. The fact of death
- ii. The cause of death
- iii. That the act of commission or omission by the accused person cause the death of the deceased.
- iv. Mens rea or malice aforethought.

(i) **The facts of death**

15. There is doubt that Nyamu Kiburio (deceased) is now deceased. The evidence all the prosecution's witnesses and the doctor (PW4) in particular who conducted post mortem examination on the deceased's body established beyond doubt that the deceased herein is dead.

(ii) **The cause of death**

16. The evidence of Dr. Justus Kitili (PW4) corroborates the evidence of PW2 and other prosecution's witnesses. From the post mortem report (P. Exhibit 1) the deceased died as a result of severe head injury caused by a sharp object. The prosecution failed to tender the panga weapon (Panga that caused the injuries suffered by the deceased but that notwithstanding I find that the evidence adduced has established and proved beyond doubt that the cause of death of the deceased person in this case was severe head injury (sub dural haemotoma) cause by a sharp object and the big question is who cause those fatal injuries.

(iii) **Actus Reus**

17. Going by the evidence of PW1, PW2 and PW3, the accused person is responsible for the cuts the deceased suffered on the head. PW1 clearly gave a narrative of what took place on the material date. She told this court that the deceased was really in a bad mood that material day and that after asking for several items which were given he severed the head of her chicken with his bare hands and when she inquired what was wrong, the deceased pursued her in a fit of rage that shocked and filled her with fear. After unsuccessfully trying to lock herself in her house, she escaped to her bedroom which she thought could impede the deceased owing to customary practices but she was mistaken because the deceased overlooked all that and pursued her before beginning to rain blows on her. The screams from PW1 attracted the accused and others but it is the accused who arrived first and struggled to rescue the lady (PW1). It is clear from her evidence that the engagement of the deceased by the accused kind of freed her and she managed to ran away to safety. Mugendi Mati (PW3) who also rushed to scene attracted by the incessant screams, he found the accused person having pinned the deceased down and holding him by his throat. He found the deceased with cuts on his head. PW2 saw the struggle between the accused and the deceased with both of them with a panga inside the house of PW1. It is therefore evident that the cuts the deceased suffered inside the house of PW1 was caused by the accused person as he tried to subdue him. That fact is confirmed by PW3 who found the accused sitting on the deceased with one hand tightly holding the deceased by the throat and the other hand holding a panga. PW3 snatched the said panga before separating the deceased and accused persons. That in my view proves beyond doubt that the cuts suffered on the head were inflicted by the accused herein.

18. The accused has raised a defence of alibi and that he was not present at the scene of crime but the evidence of eye prosecution witnesses (PW1, PW2 and PW3) shows the contrary. The accused stated in his defence that he had no issues the said witnesses and that the said witnesses have no problems with him. There is nothing therefore to show that they may have been ill motivated to lie that they saw the accused at the scene of crime on the material time and place. If that was not true. This court finds that the element of *actus reus* has been sufficiently established and successful connected to the accused. He definitely cut the deceased person and the only question is whether acts were actuated by malice.

(iv) ***Mens Rea***

19. As I have observed above, the evidence tendered in this case shows that the deceased for some reason was in a foul mood on that material day. He kept pestering PW1 with one demand after another and when PW1 thought he was done, he snatched a chicken and in one swift movement, he severed the head of the chicken which was not only bizarre but shocking as well. But perhaps what was more shocking and which showed he was really seething with anger was when he pursued PW1, her daughter in law, to her bedroom. That action is a taboo not only in among the Ameru but in most African communities and this court takes judicial notice of that fact. It is in that context that the action of the accused in rushing for the rescue should be seen. He rushed to the rescue of PW1 who was screaming for help. It is evident that had PW1 not screamed for help the accused certainly could not have rushed to that house and the fight or struggle that ensued between the deceased and accused could not have ensued.

20. There was evidence that the deceased and the accused never got well and this apparently also affected the father to PW3. While that could have been true including the fact that the accused and the deceased may have fought in the past there was no nexus between those differences with what took place at the material date. The author of the commotion on the material date in my view was the deceased himself. Infact had the accused not intervened the safety of PW1 was in obvious danger and though the accused may have gone overboard in his reaction, I find that the element of *mens rea* is missing from his actions. He went to rescue his daughter in law PW1 which was apparent from the circumstances obtaining. His actions to respond to the cries of help from PW1 was not premeditated. It was spontaneous and free from malice of course he went over board when he cut the deceased 3 times on the head before pinning him down holding him by the throat.

In the foregoing this court finds that the prosecution's case has not established and proved the offence and murder. It has however established and proved that an offence of manslaughter was committed and the accused is guilty of the offence contrary to **Section 200** of the **Penal Code**.

He is accordingly convicted of that offence.

**Dated, signed and delivered at Chuka this 28<sup>th</sup> day of January 2020.**

**R. K. LIMO**

**JUDGE**

**28/1/2020**

Judgment dated, signed and delivered in the open court in presence of Ngari holding brief for Mugo for accused and Maari for State.

**R.K. LIMO**

**JUDGE**

**28/1/2020**

**Court:**

This court has considered the accused mitigating circumstances and the fact that the accused is a first offender. He overreacted and caused the death of his brother but it is clear that his initial intention was to rescue a person who was in distress. In the premises, I find that he needs some time in a correctional facility to reform. he is sentenced to serve 4 years imprisonment. Right of Appeal 14 days.

**R.K. LIMO**

**JUDGE**

**28/1/2020**