



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCR NO. 12 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SMK.....ACCUSED**

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

1. **SMK** alias 'T', 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 presented in this court are that on 19<sup>th</sup> June 2018 at [particulars withheld] village, Muiru Location within Tharaka Nithi County murdered **PMN** (the deceased herein.) The accused denied committing the said offence and the prosecution lined up nine witnesses whom they presented to prove their case against the accused.

2. Morris Mwiti (PW1), a neighbour to the deceased told this court that on 19<sup>th</sup> June 2018 at around 2 pm he heard screams emanating from the neighbourhood and before long a son to the deceased called him asking him to go to their home where he found the deceased lying down injured. He stated that he tried to hold him up but he could not stand nor even talk. He added that when he checked he noted that the deceased had an injury at the back of his head where blood was oozing out. He also stated that he saw a stick besides where the deceased lay. He added that he made arrangement and took the deceased to Consolata Hospital in Chuka for treatment and went back home where he was later informed that the deceased had passed on. He further stated that he later led the police to the house of the accused and that they found him at his house where he resisted arrest and tried to flee in vain as he was apprehended and taken to custody.

3. GMM (PW2) a 15 year old son to the deceased testified and told this court that the accused and deceased were cousins. He recalled that on the material day (19<sup>th</sup> June 2018) at around 1.30 pm he was from school and had gone home for lunch where he found his father (deceased) sleeping in his house alone. He reported that the father (deceased) had closed the front door and he had to gain access to the house through the back door before opening the front door. He stated that his father used to work at night at Chira Catholic and that may explain why he was sleeping at that time in his house. He added that he had seen the accused standing outside their compound leaning on a tree when we arrived home and that when he opened the front door the accused asked him where his father (deceased) was and when he told him that his father was asleep, the accused person asked him to wake him up as he stood outside. The son (PW2) went and woke him (deceased) up. He stated that the deceased woke up and when he got outside, the accused had gone to pick some miraa from his father's farm without permission and that when the deceased asked him why he was doing so and he (accused) reportedly responded telling the deceased to go and tell his wife to stop backbiting him. The child (PW2) told this court that because time was running out he decided to go back to school despite the fact that he had not taken lunch and that as he was getting out he saw the accused lift a huge stick (which he identified in court) and ran towards his father (deceased) who was then facing the opposite direction towards his house and had not seen the accused. He told this court that he shouted to alert his father of the impending danger but before his father could react, the accused had reached him and hit him at the back of his head. He saw his father turn and was hit on the forehead upon which he fell down. He stated that he screamed as the accused kept on hitting his father on the ground and that his screams attracted one Priscilla and Makena who came and started screaming as well which made the accused to stop hitting the deceased. The child (PW2) further stated that he ran towards his father and tried lifting him up but he was too heavy for him. He reported that Mwiti (PW1), Karani and Kariuki later came and assisted in taking the deceased to hospital as he tried to reach his mother using Makena's mobile phone. He added that as his father (deceased) was taken to Hospital he got into a boda boda and followed him to Consolata Hospital, then to Chuka and finally to Chogoria Hospital where they left him undergoing treatment. He later learned that his father had passed on when he saw an ambulance at Chuka Police Station where his mother had been called to write a statement.

4. CE (PW3) a cousin to both the accused and deceased told this court that she was at her home near her gate after lunch when she heard M (PW2) calling her; "**Priscilla!, Priscilla! why are you going away when my father is being killed by Mbaka**". She told this court that due to the anxiety exhibited by the boy, she followed him and found the deceased lying down and shortly saw the accused coming round the house with a huge stick towards them and they both ran away screaming loudly. She told this court that though she did not manage to see the deceased well, she noted that his face was covered with blood. She emotionally identified the stick in court used by the accused and recalled that the accused pursued them as they ran towards the road screaming where they met Mwiti (PW1) and 2 others who proceeded and picked the deceased before taking him to Hospital. She reported that the following day she heard that the deceased had succumbed to the injuries

inflicted on him by accused. She recalled that when she ran towards the deceased house, she found no one else apart from the accused with a huge stick.

5. DMC (PW4) on his part recalled that on the material date at around 2 pm while at his home, he heard intense screams emanating from the deceased's home which was around 300 metres away. He added that both the deceased and the accused person were his cousins. He told this court that he ran to P's (deceased) house where he found him/deceased/lying down bleeding from the back of the head and also at the forehead. He told this court that he found no one at the scene as the people who were screaming had ran away fearing the accused person who according to him was a violent person. He added that when his son saw him, he went to where he was and he told him to go and ask Mwiti (PW1) to get his motorcycle to ferry the deceased to Hospital for treatment. He added that they took the deceased to Consolata Hospital while unconscious and that the following day he received the bad news that he had passed on.

6. CKM (PW5) a daughter to the deceased told this court that on the material date, she was called by her sister named D about the incident and informed that his father (deceased) had been rushed to Consolata Hospital in Chuka. She told this court that she rushed there and found his father bandaged on the head. She added that they were advised to take the deceased to Chuka General Hospital which they did using an ambulance. She also stated that they went with Diana to Chuka Police Station to report about the incident. She told this court that after reporting they went to Chuka General Hospital to find his father in serious state because blood was oozing from his mouth and ears. She added that the deceased was put on oxygen but the condition of his father deteriorated and were advised to take him to Chogoria Hospital for a head scan. She reported that they took him to Chogoria Hospital from where he died while undergoing treatment. She told this court that they went to Chuka Police Station to report and that the police went with them to the house of the accused where he was apprehended after resisting arrest by hitting a police officer with an axe before trying to flee but was apprehended.

7. Dr. Justus Kitili (PW6) the doctor who performed post mortem examination on the body of the deceased. He told this court that he performed post mortem examination on the boy of the deceased on 27<sup>th</sup> June 2018 and made the following findings;

**External observations**

- (i) Deep cut on the forehead 4cm long
- (ii) Bruises on the left side of the head (parietal skull)

**b) Internal examination**

- (iii) Fracture of frontal skull bone.
- (iv) Blood clot on the frontal part of the brain.

8. The doctor based on his findings above formed the opinion that the deceased died as a result of severe head injury due to trauma to the head. He tendered the post mortem report as P. Exhibit 2 to back up his findings and opinion.

9. Inspector Abdi Duble (PW8) an officer attached to Chuka Police Station told this court that upon receiving the report regarding the incident, he was accompanied by two other police officers and relatives visited the scene of crime and the house of the accused. He told this court that on reaching his house, they knocked at the door and identified themselves but that the accused refused to open the door and that when they threatened to break the door, the accused came out with an axe and lashed out hitting a police officer before he was subdued and apprehended. The officer tendered the axe as P. Exhibit 3.

10. P.C Joseph Ole Napaso (PW9) told this court that he took over the investigations of this case from PW8 and that he recorded the statements from witnesses after visiting the scene. He told this court that he was shown by PW2 the place where the deceased was attacked and noted some blood stains on the ground. He also recovered a piece of wood or a tree branch which had been used to by the accused to hit the deceased. He produced the piece of wood which measured around a metre and 2 feet in length and 3 inches in diameter as P. Exhibit 1. He told this court that he drew a sketch of the scene and tendered the sketch plan as P. Exhibit 4. He told this court that he later escorted the accused for mental assessment where he was found sick and put on treatment. Later he said that he escorted him to Embu Level 5 Hospital where he was found fit to stand trial upon which he presented him to court to answer the murder charge. He added that he gathered information from PW2 that the accused had accused the wife of deceased for badmouthing him and that when the deceased asked him why he was picking his miraa he picked a quarrel on that subject and attacked the deceased.

11. When placed on his defence the accused person called Eric Bundi, a clinical psychiatrist working at Chuka General Hospital who had initially examined him and found him unfit to stand trial. He told this court that he examined the accused on 26<sup>th</sup> June 2018 and found him to have what he termed as drug- induced psychosis and made a report which he tendered as D. Exhibit 1. He told this court that the mood swings he noted could have been as a result of drug abuse and suspected that the accused could have been a bhanga smoker. He however admitted that he could be wrong because he made conclusions without talking to the relatives of the accused.

12. The accused (DW2) on his part denied on oath that he committed the offence. He denied hitting the deceased with the stick that was produced in court as the murder weapon. He told this court that on 19<sup>th</sup> June 2018, the deceased went to his house in the morning and requested him to go and cut nappier grass for the cows which he did. He further stated that the deceased then went to his house and came back with a paper bag and requested him to go and pick miraa from his farm saying that he wanted them picked so that they are no stolen. He added that as he was picking the miraa, the deceased came out with a sling and aimed a stone at him which made him come down the miraa tree and that a struggle ensued where he wrestled the deceased to the ground as he pleaded with him to spare him as he did not want war. He added that he left him lying down and went about his business. He added that he had no issues or differences with the deceased though he had differences with Mwiti (PW1) and DM (PW4) as the latter used to go to his home drunk.

13. This court has considered the evidence tendered by both the prosecution and the defence. This is a case of murder and for the prosecution to be successful in prosecution of such a case the following ingredients or elements must be established and proved.

a) **The fact of death**

b) **The cause of death**

c) **Proof that the deceased met his death as a result of unlawful act or omission on the part of accused. (*Actus reus*)**

d) ***Mens rea* (that the act causing death) was committed with malice aforethought.**

**(a) The fact of death**

14. It is not contested that PMN (deceased) is dead.

The evidence of PW7 who attended post mortem examination of the body of the deceased and PW6 the doctor who performed post mortem of the deceased and in my view is sufficient proof of the fact of death of the deceased herein.

**(b) The cause of death**

15. According to Dr. Kitili (PW6) the cause of death of the deceased herein was a severe head injury due to trauma to his head. He told this court that a blunt object was probably used and that a blunt object when used with force can cause a cut like he noted in the forehead of the deceased. The deceased therefore was definitely hit on the forehead and the side of his head as seen from the post mortem report (P. Exhibit 2). That caused his death without a doubt,

**16. (c) Actus Reus**

In this case the only eye witness to the incident was GMM (PW2) a 15 year old son of the deceased. He saw the accused hit his father (deceased) twice on the head when his father asked him (accused) why he had not left the habit of picking his miraa from his farm without permission. He narrated vividly how the incident occurred and his narrative is clearly corroborated by the doctor (PW6). The boy saw the accused pick up a tree branch (P. Exhibit 1) and run after his father who was facing the opposite direction walking towards his house unaware of what was happening behind him. The son (PW2) screamed to alert him but it was too late because as he turned he was hit on the side of the head before he was hit again on the forehead with a force that fell him down. The doctor found that the frontal skull was broken and that is what caused blood clot in the frontal part of his brain and eventually killed him. In his defence the accused stated that he only wrestled the deceased to the ground and though he intended to hit him, he did not after the deceased pleaded for mercy. I am however not persuaded by his defence because the kind of injuries the deceased suffered obviously could not have been as a result of wrestling. It was obviously much more than wrestling. Besides that, the first witness to arrive at the scene after PW2 had screamed found the accused with a huge stick which she identified as P. Exhibit 1. It is also evident from the witness accounts that the accused was known to be violent which explains why PW3 kept distance when she arrived at the scene. She told this court that she was chased by the accused and that is why she retreated before other people arrived. Based on the above evidence I am satisfied that the prosecution's case established and proved sufficiently that the accused person committed the unlawful act that caused the death of the deceased.

**Mens rea (malice aforethought)**

17. From the evidence tendered by the prosecution and the accused person himself, it is apparent that the accused's action was reckless and really cared less of the consequences of his action. From his own account, he wrestled the accused to the ground and left him lying on the ground and went on his own business. The provisions of **Section 206 of Penal Code** presumes such an action to be malicious even if I was to believe the accused person's narrative which I do not. He violently hit the deceased on the head because the deceased demanded answers on why he had not stopped the habit of stealing his miraa.

18. The accused person through his advocate tried to suggest that perhaps he may not have been in his right frame of mind but he did not advance the defence of insanity whether temporary or permanent sufficiently for me to consider if it was a factor that led him to commit the heinous act. This court finds that on the basis of his actions as narrated by PW2 the provisions of **Section 206 of the Penal Code** does apply in imputing ill motive on his part. I find that the element of *mens rea* has been proved by the prosecution.

In the end this court finds that the accused person based on the evidence tendered by the prosecution and his own defence he is guilty as charged and he is hereby convicted accordingly.

**Dated, signed and delivered at Chuka this 27<sup>th</sup> day of January 2020.**

**R.K. LIMO**

**JUDGE**

**SENTENCE**

This court has considered the mitigation by accused and the victim's family. There is no doubt that the deceased met his death in a most gruesome manner and due to the defendant's illegal action a life was lost and leaving behind a widow and 5 children who now have to fend

themselves without a father in their lives.I have also considered the fact that the accused person is evidently a violent man who is said to have threatened the life of the deceased.He deserves a deterrent sentence commensurate with the offence committed.I note that the law provide for death penalty for any person found guilty of murder but I am inclined to consider the principal set by Supreme Court in **Francis Muruatetu** that hands of this court (discretion) are not tied.Taking everything into consideration, the accused is hereby sentenced to serve 30 years in jail with a view to giving him a chance to reform and at the same time keep him away for the interest of security of victim's family and justice.

14 days right of appeal.

**R.K. LIMO**

**JUDGE**

**27/1/2020**