



**REPUBLIC OF KENYA**

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

**CRIMINAL MURDER CASE NO. 5 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS KIBAYA NGARE.....APPELLANT**

**JUDGMENT**

1. The accused person Francis Kibaya Ngare is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 29<sup>th</sup> and 30<sup>th</sup> -6-2012 at Kamweti village of Thumaita within Kirinyaga County jointly with others not before the court, murdered Paul Maria Ngari who is his brother.

The accused person denied the charge.

2. The brief facts of the case are that on 29/6/2012 the deceased who is a brother to the accused, assaulted the accused's wife inflicting an injury on the head. The accused went and asked his father Ngari Mwendwa (PW-1-) as to what he should do now that the deceased had assaulted his wife. Ngari Mwendwa (PW-1-) told the accused to report the matter to the Chief. The accused and PW-1- proceeded to the Chief's Camp where upon the Chief told them that it was a police case and they should report the matter to the police.

3. The accused and his wife went to Kianyaga Police Station accompanied by PW-1-. The deceased had ran away after cutting the wife of accused with a panga. Later at 11.30 Pm the accused called his brother Fredrick Muthike Ngari (PW-3-) and told him that he had arrived home and found a mob of people. PW-3- called the Area Chief Isaac Kabengi and informed him that his brother had been killed by a mob. The Chief Isaac Kabengi (PW-7-) called the accused and enquired. The accused informed the Chief that the deceased had been killed by a mob.

4. PW-7- then called the Area Block Leader and enquired. The Block Leader informed him that there was no mob. PW-7- called the Deputy OCS and reported to him. The Deputy OCS and the Chief proceeded to the scene. They went to the house of the accused and he led them to the scene where the body was. The Chief and the Deputy OCS found the body of the deceased at the scene. There were no footmarks to indicate there was a mob. The OCS and the Chief made enquiries but those asked including PW-1- said he know nothing and did not hear any commotion. The accused was arrested and charged on the basis that he is the one who called his brother (PW-3-) to inform him of the deceased's death and the deceased had injured his wife earlier in the day before he met his death.

5. The accused in his defence stated that on the incident date, his father called him to help him cutting grass. They heard screams by a woman who was picking tea and ongoing to the scene found his wife had been cut on the head by the deceased. They went to the Chief and then to the police station where they were issued with P3 form and took his wife to hospital. On coming back, he told his wife to go where the other women were picking tea while he went to sell tea.

6. When his wife went the deceased was hiding in the tea bushes and he cut her several times and inflicted serious injury. He heard screams and rushed with his father where they found his wife on the ground unconscious. The deceased escaped and the people assisted him to go to the police station and then to Kianyaga police station with his wife. The Doctors gave them ambulance to take her to Kerugoya hospital where she was admitted. He waited at the hospital since his wife was unconscious and later he received a call that the deceased was killed in his shamba. He went home and found the police whereby he was arrested.

7. I have considered all the evidence adduced, the statement of accused in his defence and the submissions. The issue for determination is whether it is the accused who caused the death of the deceased with malice aforethought.

8. The summary of the evidence by the prosecution is as follows:-

**PW-1- Ngari Mwendwa**, the father of both the deceased and the accused. On 29/06/2012 he got to know the deceased had assaulted the accused's wife on the head. They reported the matter to the Karumande Chief's camp and then to Kianyaga Police Station. Later he heard noise and went to deceased's home and saw deceased running away while carrying a panga. At his home he

found accused's wife had a cut wound on the head, they reported to the police then she was taken to the hospital. At 2 am the following day the police went to his home and informed him the deceased had passed away and his body was burned.

**PW-2- Pauline Njeri Kimotho**, a sister in law to both the deceased and the accused. On 29/06/2012, while at the shamba he saw deceased pick two pieces of wood and hit accused's wife and when she fell he started cutting her on the head. At 2 Am she was woken up and informed the deceased was killed.

**PW-3- Fredrick Muthike Ngari** the brother of both the deceased and the accused. He testified that on 29/06/2012 he was called by his sister who told him that the deceased had cut the accused's wife. Later at around 11.30 P.m he was called by the accused who told him he had found a mob of people. He called the Chief Isaac Kabengi and told him there was a problem at home. The following day he was informed that the deceased passed away.

**PW-4- Josphat Njeru Mwendia** testified that he identified the body of the deceased to the Doctor who performed postmortem.

**PW-5- Joseph Murigi Ndwiga** testified that he is a Block Leader. He was called by the Chief Isaak Kabenya on 29/6/2012 at 11.00 Pm and told to go to Karia where an incident had occurred, that someone had been killed. He was told to go there and ensure that the scene was not disturbed. He went there at 6.00 Am and stopped people from going into the homestead.

**PW-6- Dr. Karomo Ndirangu**, he conducted the post mortem report. The body had second degree deep burns and several deep lacerations. He was of the opinion that cause of death was severe head injury inflicted by sharp object and second degree burn.

**PW-7- Isaak Kabengi Ndambiri**, he is the Area Chief Thumaita. On 29/06/2012, he was informed by Muthike that the deceased had been killed by mob and it was the accused who informed him. He called the accused and he confirmed the said information. He called Block Leader who informed him there was no mob then together with OCS went to the accused's home. The accused guided them to where the body of the deceased was lying. The accused was then arrested.

**PW-8- Dr. Joseph Thuo** examined the accused and found that he was fit to stand trial.

**PW-9- Cpl Ezra Serem**, the Investigating Officer. He was called by OCS and informed of a dead body in Kamweri village and accompanied him to the scene. He started investigations and discovered the deceased had seriously injured the accused's wife. He established that it was the accused who informed his brother of the death of the deceased and on being interrogated he could not explain how he came to know of the death. He proceeded to charge him.

9. From the foregoing, it is evident that none of the prosecution witnesses gave evidence on how the deceased met his death. The prosecution relied on circumstantial evidence. For the court to rely on circumstantial evidence to convict, the evidence must be weighty and cogent and the inculpatory facts must be incompatible with the innocence of accused and must lead to only one conclusion, that of guilt of the accused.

In Republic –v- Michael Muriuki Munyuri (2014)eKLR

The Court held;

In Sawe-v- Republic (2003) KLR 364 the Court of Appeal held:-

*“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any hypothesis other than that of his guilt.*

*Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances relied on.*

*The burden of proving facts which justify the drawing into this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution.*

*This burden always remains with the prosecution and never shifts to the accused.*

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*7. Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubts”.*

In Abanga alias Onyango -V- Republic Criminal Appeal No. 32/1990 UR the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain conviction. These are:

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: -*

(i) *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.*

(ii) *Those circumstances should be of a definite tendency, unerring pointing towards guilt of the accused.*

(iii) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else”.*

10. The question is whether there is circumstantial evidence which points to the accused as the culprit. For one to be convicted for the offence of murder the prosecution must prove that he had malice aforethought. It must be proved that the accused’s by his conduct caused the death of the deceased. The prosecution must prove mensrea as provided under **Section 203 of the Penal Code.**

#### **Mens Rea**

##### **Section 203 of the Penal Code**

*“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. “*

##### **Section 204 of the Penal Code.**

*“Any person convicted of murder shall be sentenced to death”*

##### **Section 206 of the Penal Code**

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

–

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

Refer to **Dickson Mwangi Munene & Another v Republic (2014) eKLR**

The Court of Appeal Stated:

**“As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the *mens rea* of the crime of murder.**

**In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The *mens rea* of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.”**

11. In this case the deceased had attacked the wife of the accused injuring her. There was however no medical evidence tendered to prove the nature of injuries the accused’s wife sustained or that she was treated at Kianyaga and at Kerugoya. Be thus as it may there was testimony of PW-2- which confirms that the accused’s wife was assaulted by the deceased. It is expected that the accused was not happy. This shows that he had motive to attack the deceased and avenge the attack on his wife. Secondly, the injuries inflicted on the deceased clearly shows that the intention of the attacker was to cause the death of the deceased. The motive to avenge the death and the intention to cause death disclose the necessary mensrea.

12. There is circumstantial evidence which prove that the accused is the one who attacked the deceased and caused his death. The accused is the one who called his brother at 11.00 Pm informing him that there was a mob. The Chief, PW-7- testified that when Muthike (PW-3-) called him, he reported that the accused had informed him that the deceased had been killed by a mob. When PW-7- and PW-9- went to the scene, the accused led them to where the body of the deceased was. It has turned out from the testimonies of the witnesses that there was no mob. PW-1- whose homestead was near where the deceased was murdered never heard any commotion. It is police who woke him up and told him that the deceased had been murdered. Similarly, PW-2- never heard any commotion during that night. PW-5- the Block Leader testified that there was no mob at the scene. It is therefore the accused who came up with the allegation that there was a mob. This is nothing else but a cover up.

13. I have considered the submissions by the defence. I have considered the case cited GMI-V- Republic CR. Appeal No. 308/2011 C.A where the Court of Appeal found that the conviction was based on circumstantial evidence. However considering the circumstances of this case, they are cogent and sufficient to base an inference of guilt. It has been demonstrated that no other person had a motive to kill the deceased. The accused knew of the death and even led the police to where the body was. I find that the facts of this case fall squarely in the test laid down in the case of **Abanga alias Onyango –v- Republic (Supra)**.

14. The defence of the accused was a general denial. Having considered the evidence on record, I am satisfied that the prosecution has tendered sufficient circumstantial evidence which has proved beyond any reasonable doubts that the accused is the one who unlawfully caused the death of the deceased with malice aforethought. The charge of murder is proved beyond any reasonable doubts. I find the accused person guilty as charged and I convict him.

**Dated at Kerugoya this 27<sup>th</sup> day of February 2020**

**L. W. GITARI**

**JUDGE**