



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCR NO. 13 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CLIFF MUNENE MUTEMBEI.....ACCUSED**

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

1. **CLIFF MUNENE MUTEMBEI**, 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 as presented in the information provided are that on 17<sup>th</sup> July 2018 at Gatangi village, Thigaa Sub-Location, Maara Location of Mwimbi Division Maara Sub-County within Tharaka Nithi County, jointly and unlawfully murdered **JOYCE EGOJI RUIGA** (deceased herein).

2. The accused denied the offence and the prosecution has called 8 witnesses to prove their case.

3. **TITUS KABURIA (PW1)** the first witness to testify told this court that he is a neighbour to the deceased and knew her well. He recalled that on 17<sup>th</sup> July 2018 (the material date in this trial) the deceased went to his shop which was around 100 metres from where she lived and reported to him that the accused person herein who was her grandson had allegedly poured tea on her that very morning and expressed her fears that the said grandson (the accused herein) might kill her. The witness told this court that her clothes had tea stains visible on them. He added that he empathized with her and advised to go and report the incident at Police Station, a suggestion the deceased declined because she was afraid of meeting the accused on her way to the police. He also told this court that he advised the old lady to go and look for money so that he could escort her to the Police Station to make a report and that the deceased went but never came back.

4. The witness told this court that he did not see her again and at 6pm one of the sons of the deceased went rushing to his shop and informed him that the deceased had been killed allegedly by the accused. He then called the Assistant Chief who had gone to a local Secondary School to quell some riots then at that school and that the body was later collected by the police. He added that there was a previous incident where the accused herein had set ablaze a house belonging to one of the sons of the deceased and when action was taken the Area Chief released him.

5. **CATHERINE MUKWANJERU NJAGI (PW2)** the Sub-Area Manager of Gatangi the locality where the deceased resided, told this court that the deceased was married to her cousin and that on the material day at around 1pm as she was selling goods at her shop, the deceased went and expressed her discomfort because she reported to her that the accused herein, and her grandson had poured tea on her when she served him that morning. She told this court that the tea stains were visible on her clothes and that the accused had even threatened to kill her for unknown reasons. She added that there was another incident a week prior to that date when the accused had set ablaze a house belonging to one of the deceased's sons. She therefore advised the deceased to go and report the matter to the local Chief but the deceased reportedly declined expressing her fears. She then encouraged her to go home and keep her distance from the accused.

6. The witness further testified that at around 6.45 pm she got a call from one Nancy Muthoni that the deceased had been killed at her home. She told this court that she called the Area Chief Celesio Kamundi and informed her before heading to the home of the deceased where she found the deceased lying down covered with a sack. When she lifted the sack she noted the deceased was bleeding from the mouth, head ears and her face was swollen that recognizing her was hard.

6. **IRENE MATE (PW3)** a daughter of the deceased told this court that her mother, the deceased used to live with the accused and that he had dropped out of school at Form II because of indiscipline. She added that the deceased took care of him and from around 2015 he began developing bad attitude towards the deceased stating that she was not giving him enough food. She recalled an incident where the deceased was forced to put out a fire started by the accused who had intended to set it ablaze. She added that the father to the accused was also irresponsible and had separated with the mother of the accused. She further added that there was another incident where the accused also burned down her brother's house and a report was made about it but that the police failed to take action after her mother failed to get them money for fuel. She also testified that on 16<sup>th</sup> July 2018 at around 5.30 pm, her mother called her on phone in an emotional state telling her

to go home as her life was in danger. She told this court that she was unable to go home at that time because she was scheduled for medical check-up in Nairobi the following day. She added that the following day on 17<sup>th</sup> July 2018 at around 7 pm she received the bad news from her niece that her mother had been killed. She added that her mother was 81 years old and never talked to her on 17<sup>th</sup> July 2018.

7. **JANE NYAWIRA (PW4)** a neighbour to the deceased told this court that on the material date she had gone to Meru for some work and came back in the evening at around 7.30 pm. She added that when she stepped out of her house she saw someone standing outside and she asked for a lamp from the house which was brought and that he recognized that it was Munene, (the accused) standing. She asked him what he was doing and he reportedly told her that his grandmother was lying down and not talking or pickings calls. She added that she accompanied the accused to their home and found the deceased lying down with injuries on the face and was bleeding. She testified that she immediately knew that the deceased was dead and she took her children home adding that the accused had quarreled earlier in the day with deceased over food. She however did not know who killed her.

8. **DR. NICHOLAS KONGE (PW5)** a medical doctor at Chuka Hospital where he had worked for over 10 years with the late Dr. Kitili who performed post mortem examination on the body of deceased but could not testify as he was ailing at the time, told this court he had worked with Dr. Kitili for 7 years and was familiar with his handwriting. He told this court that the post mortem was conducted on 26<sup>th</sup> July 2018 and the doctor had observed blood clots on the nose and mouth. He also indicated that there were bruises on the forehead cut on the right ear, fracture of the lower and upper jaws and a fracture of the skull bone with blood clot on the front of the brain. The doctor opined that the cause of death was a severe head injury from blunt trauma to the head.

9. **DAVID NKONGE RINGA (PW6)** a son of the deceased told this court that her mother aged 81 years old stayed with the accused who a nephew is a son of his brother. He told this court that the deceased used to feed the accused and that on 17<sup>th</sup> July 2018 he had received a call from his mother at around 7.30 am and went to check on her and he was taking a cup of tea offered to him, the mother (deceased) called the accused and gave him tea as well but that the accused began quarreling her mother why he had given him one cup and poured the tea his mother as he watched. He told this court that he then intervened and pushed him away. He added that her mother was then screaming in pain as the tea was hot and had been poured on her chest. He stated that he advised her mother to go and report the incident before the Sub-Area as he began doing his chores until 1pm when he left by which time her mother had not returned. He added that he had left the accused alone in the compound and went to his home which was around 1 km away. He told this court that at around 6 pm as was resting his nephew named Kimathi went in crying;

**" Uncle Unalala hapa na cucu ameuawa tayari?"**

The witness told this court that he immediately rushed to his mother's home where he found her lying down dead next to the door of her house. He added that neighbours had already arrived by the time he reached there and he made frantic calls to the Sub-Area and the Chief informing them of what had taken place.

10. **NICHOLAS KIRIMI (PW7)** a grandson to the deceased told this court that on the material day he had been asked by the deceased to help her charge the phone and help her switch it on which he did and that when he did so he heard the deceased talking to Mutembei the father to the accused telling him that things were not good at home and that she would give him the details later. He further testified that later he was called by Mwenda and asked if he knew that the deceased had been killed. He rushed to the home of the deceased using a boda boda and confirmed that she was dead. He added that the accused later came and appeared shocked that the deceased had died. He added that the following day as he was cutting banana leaves to feed the cows he saw a club that was blood stained and when he observed closely he noticed that the stains were fresh. He called some elders and neighbours who took it to the Magutuni Police Station. He identified the wood stick or club in court which was around 1 metre long and 2 inches in diameter.

12. **JACKSON MUGAMBI (PW8)** a son to the deceased told this court that he lived around 100 metres away from his mother's home. He testified that on the material day at around 6.30 pm he heard screams from his mother's house and when he rushed there, he found her mother lying down near the door bleeding from her face, mouth and ears. He told this court that he was shocked because she was dead and no one was around then. He testified that he rushed to the Sub-Area who had a shop nearby and informed him and went back home. He added that after a while the accused also came and that the police later came and collected the body after interrogating some few people. He added that he did not see who killed his mother though he was the first person to arrive at the scene of crime.

13. **IP GILBERT LANGAT (PW9)** the investigating officer in the case told this court how he received the report regarding the incident and that he went to the scene of murder and found the body lying down near her house. He confirmed that the body had been covered by a sack and that there was bleeding from the mouth, face and ears. He added that he interrogated few people he found and arrested the accused within the compound where the deceased was found dead.

14. When placed on his defence the accused denied committing the offence. Giving unsworn statement of defence, he told this court that the deceased took care of him and paid his school fees. He testified that on the material date, he left his uncle with the grandmother at home as he went to chew miraa. He added that when he returned in the evening he found her grandmother lying down dead and went to a neighbour to report. He further added that he was arrested and told to go and explain at the police station. He denied committing the offence.

15. This court has considered the evidence tendered by the prosecution and the defence. The prosecution's case is hinged on circumstantial evidence as no one saw the accused commit the offence. I will come back to that issue shortly.

16. In a case of murder for the prosecution to secure a conviction it has to prove three major ingredients which are;

(i) death of the deceased

(ii) that accused committed the unlawful act which caused the death of the deceased.

(iii) that the accused had malice aforethought.

### **Fact of death**

17. There is no doubt that Joyce Egoji Ruiga aged 81 years old is dead. The body of the deceased was found by the witnesses lying at her home next to her door to her home. Her body was identified at the mortuary by PW3 one Martin Muthamia. The post mortem report tendered as P. Exhibit 1 tendered by Dr. Nicholas Konge shows that the deceased died on 17<sup>th</sup> July 2018. The 1<sup>st</sup> element was established and proved by the evidence tendered in this case.

### **Actus Reus**

18. As I have observed above, the prosecution's case on this element is hinged on circumstantial evidence and it is trite law that for a conviction to be sustained in such instance, the circumstances obtaining should be incapable of any other inference or hypothesis other than the guilt of the accused person.

19. In this case the prosecution witnesses (PW2, PW3 and PW6) who are close relatives of the accused painted not so rosy a picture in regard to the relationship between the accused and the deceased. The accused though a grandson is said to have made life a living hell for his grandmother.

20. **CATHERINE MUKWANJERU NJAGI (PW2)** in particular exhibited very emotive reservations and regretted why she did not accompany the deceased to go and report the incident which had taken place earlier on the material day when the accused poured hot tea on her.

21. The accused poured hot tea on his grandmother just because he was given one cup of tea and this was witnessed by PW6, one a son of the sons of the deceased. That fact was clearly corroborated by PW1 and PW2 both of who saw the tea stains on the clothes worn by the deceased indicative of the fact that she had been assaulted because the tea was reported to be hot when she served it on the grandson the accused herein.

22. I have keenly considered the evidence tendered by deceased's own daughter who told this court that her mother called her on 16<sup>th</sup> July 2018, a day prior to her murder and emotionally told her that her life was at risk due to the conduct of the accused herein. The accused herein on two previous occasions had committed two acts of arson and that in one instance the deceased managed to put off the fire but in the second instance the fire burnt down one of the houses of her son. The incident was reported but unfortunately due to laxity of the local administration and the police, no further action was taken and one can only regretfully only imagine that perhaps had action been taken earlier perhaps this trial would not have taken place.

23. There is no doubt that the accused was wayward towards his grandmother. Nicholas Kirimi (PW7) overheard her grandmother (deceased) complaining to the father of the accused regarding his wayward conduct. That the deceased had expressed fears about her life because of the conduct of the accused. The accused person was the only person who was with the deceased at the material time. On his own account, the accused stated that he had gone to chew miraa and came home early for supper. PW8 a son of the deceased who lived nearly 100 metres away heard screams at around 6.30 pm, the same time that the accused says he arrived home and when he rushed to find out what was happening he met her mother lying down dead with blood oozing from her mouth, nose and ears. The accused later went to the house of a neighbour (PW4) Jane Nyawira and was seen standing next to her house. He did not say he heard her grandmother scream but instead he told her that her grandmother was lying down and not talking posing the question why did he not scream when he found her dead?.

24. In my considered view when viewed in the context of what he had done to his grandmother earlier in the day which was pouring hot tea on her just because he was served one cup of tea instead of perhaps a full kettle, one is bound to conclude and rightfully that the accused was not only ungrateful but a rogue grandson who had exhibited high degree of violence which had put fear in the mind of her grandmother. She had expressed it clearly prior to her demise to all she thought could listen to her and address the fears for her life. That was not to be unfortunately and this court is satisfied that the only plausible inference that can be drawn from the circumstances obtaining from the evidence tendered points to one and only person the accused herein. I am satisfied that the element of *actus reus* by inference has been established;

Majanja J in **REPUBLIC V MARTHA AUMA NYANGOL [2018] EKLK** stated;

**“14. When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under section 119 of the Evidence Act which states:**

**119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

### **Mens rea**

25. It is without doubt that the person who struck the deceased on forehead with the wooden club tendered as P. Exhibit 2 intended to cause grave harm to her if not kill her. I have considered the medical evidence tendered (P. Exhibit 1) and from the evidence the deceased suffered serious injuries to her head. The witnesses who saw her body all stated that blood was oozing from her mouth, nose and ears. Under **Section 206 of the Penal Code** the law infers malice aforethought where the level of violence visited on a victim is high and causes death. In this case there is sufficient evidence that the accused person disliked her grandmother so much that he poured tea on her for no apparent reason. His past conduct alone towards her in my view was tainted with malice because the deceased had expressed fears about her life to her

children.

I am therefore inclined to find that the element of *mens rea* has been established and proved due to the level of violence used on the deceased. The club used was meant to cause maximum damage and it did.

In the end I find that the prosecution's case has been proved to the required standard. The accused herein brutally and senselessly attacked 81 year old grandmother and caused her death. He is hereby found guilty and accordingly convicted.

**Dated, signed and delivered at Chuka this 24<sup>th</sup> day of February, 2020.**

**R. K. LIMO**

**JUDGE**

24/2/2020

**Court:**

Judgment signed, dated and delivered in the open court in presence of Mutani for accused and Maari for State.

**R.K. LIMO**

**JUDGE**

24/2/2020

**Court:**

This court has considered the mitigation by the accused. It is true that the decision in Francis Muruatetu now vests counts with discretion to met out a sentence other than a sentence under **Section 204** of the **Penal Code** (death sentence). I have considered the brutality and senseless action by the convict who made the life of his grandmother a living hell before finally brutally killing her despite the fact that she was perhaps the only person who sympathized with his situation and offered him shelter and care as a loving grandmother. The accused herein is asking for mercy but quite obviously he showed no mercy at all towards his grandmother. He is hereby sentenced to serve 40 years (Forty years) in jail and he has 14 days Right of Appeal.

**R.K. LIMO**

**JUDGE**

24/2/2020