



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 25 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MUGAMBI GATOBU.....ACCUSED

J U D G E M E N T

1. **STEPHEN MUGAMBI GATOBU**, 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 per the information provided are that on 5th May 2018 at Kirigi village Iruma Location, Maara within Tharaka Nithi County, the accused murdered one **ELIAS GITONGA MUTHAMA**.

2. The accused person denied committing the offence and the trial kicked off where the prosecution lined up a total of seven witnesses. The prosecution's case against the accused is based on direct evidence.

3. **SELINA NCUGUNI MUTHAMIA** (PW1), the mother to the deceased told this court that his deceased son lived next to her and that on the material date at around 2pm she saw the accused person with a machete headed towards a neighbour's house. She added that the deceased followed him and shortly thereafter she saw the accused turned on his son (deceased) and cut him on the head with a machete. She told this court she rushed to the rescue but it was too late. She added that the deceased wanted to kill Gitonga (deceased) so that he could have the land that belonged to Gitonga's father. The accused person is a grandson to PW1. She told this court that she was a son of her daughter. She added that she saw the accused go to a neighbour's house and as Gitonga (deceased) followed him, he laid in wait and attacked him. She stated that Gitonga tried running away but the accused caught up with him and cut him several times on the head. She added that the accused had previously threatened that he was going to kill Gitonga (deceased) adding that on the morning preceding the material afternoon, the accused had cut Gitonga's napier grass without permission and put up a fence also without permission.

4. **SASINTA GAKII GITONGA** (PW3) the wife to Gitonga (the deceased) told this court that the accused used to stay with her grandmother (PW1) but slept in the house of the deceased. She told this court that Gitonga (deceased) had a brother named Mugendi who died in April 2018 and that when the funeral arrangements were being made, the elders and the neighbours proposed that Mugendi's mother (PW1) as the next of kin would be the one to sign at the mortuary or in her absence, Mr. Gitonga being her brother. She told this court that when the proposals were made, the accused shot up and opposed the proposal stating that if her grandmother (PW1) signs, she would take Mugendi's land and if Gitonga was to sign he would also take the land. She told this court that the late Mugendi was not married and had no children adding that his death was mysterious. The witness added that the accused stating that if her grandmother (PW1) signs, she would take Mugendi's land and if Gitonga was to sign he would also take the land. She told this court that the late Mugendi was not married and had no children adding that his death was mysterious. The witness added that the accused threatened that if anyone other than him signs, he would kill three people without elaborating and began screaming. She added that the accused then said he was going to kill Selina (PW1) and Gitonga (deceased) and cut a plastic chair in the vicinity using a panga and broke it to pieces. The witness added that the elders who were present fled and that Gitonga also fled to safety adding that Gitonga did not sleep home that night because of fear. She added that the accused had a machete and kept threatening that he was going to kill Gitonga.

5. The witness (PW2) further testified that the following day the accused person who had earlier been appointed treasurer of the funeral committee and had collected money blackmailed them that unless he was allowed to go and sign for the body of Mugendi at the mortuary he was not going to pay mortuary charges despite having the money that had been raised by friends, relatives and neighbours. She told this court that because of the standoff, the accused was allowed to go and sign at the mortuary and he paid the mortuary fees and the funeral went on smoothly.

6. The witness added that after the funeral, the accused shifted from her son's house to the house of her nephew named Kinyua. She added that on 5th May 2018 while at Nkumbo PCEA Church, at around 2pm, she was called on phone by her son that her husband (Gitonga) had been cut by the accused and had been referred to Chuka Hospital from Magutuni Hospital.

7. She told this court that she rushed to Chuka County Hospital and found her husband (deceased) in critical condition bleeding from the head, shoulder and fingers. She added that the deceased was not talking and though the fingers had been bandaged he was still bleeding. She added that she left the deceased being treated and went back home but that at 11pm her son called her and informed her that Gitonga

(deceased) had been referred to Embu Level 5 Hospital because the condition had deteriorated.

8. The witness added that the following day at around 6 am, her son known as Mwenda informed her that the ICU facilities at Embu were full and that as a result the deceased had been referred to Kiirua St Theresa Hospital. The witness stated that she went to St. Theresa Hospital where the deceased was admitted and taken to theatre and then taken to ICU where he remained for a month before being taken to the general ward. The witness added that her husband remained in the Hospital for 5 months and 3 weeks and that he succumbed to the injuries sustained on 8th October 2018.

9. **PIUS MWENDA GITONGA (PW3)** a son to the deceased told this court that on 5th May 2018 at around 8 am, a village elder named Alexander M’Ntoiti went to their home looking for his father (Gitonga- the deceased) and that he told him that his father was away. He added that when he inquired what he (unit Manager) wanted, he told him that he wanted to warn Mr. Gitonga (deceased) regarding a threat the accused had made against him and told him to inform his father not to step in her grandmother’s house because of the threats from the accused herein.

10. The witness told this court that when his father returned, he informed him what the Area Manager had said and that his father stated that he was going to find out from his mother himself and that though he advised him against going his father went all the same.

11. The witness added that he saw his father go towards the grandmother’s house and talked to her from the fence and that after a few minutes, he saw the accused armed with a machete and appeared very hostile and asked him,

“Gitonga yuko wapi?”

The witness told this court that, he then inquired from him (accused) what he wanted from his father and that because he noted that the accused was seething in anger he decided to direct him to the wrong direction from the direction his father had taken. The witness told this court that when his father (Gitonga) went back, he informed him that the accused was armed with a machete and was furious because he was incensed that Gitonga had gone to see his mother. He added that he advised his father to go and report to the Area Manager because it was a Saturday and the Chief’s office was closed. The witness then went to inform her grandmother (PW1) about what had transpired and advised her to go and report to the Area Manager as well. He added that the grandmother followed Gitonga as they headed to the home of the Area Manager.

12. The witness told this court that the Area Manager called him shortly thereafter around 10.30 am and informed him that his father (deceased) had been attacked and informed him to stay away because the accused was armed with a machete. The witness stated that he headed to the home of the Area Manager and met his grandmother (PW1) on the way and that the grandmother led him to the compound of the unit Manager where he found his father seated with cut injuries on the hand and fingers. He also added that he noticed that he had been cut on the right side of the shoulders. The witness told this court that he then decided to take his father to Hospital because he was bleeding. He took him to Magutuni Hospital before being referred to Chuka. He added that he called his mother (PW2) and that the father’s condition deteriorated at night forcing the doctor to refer him to Embu Level 5 Hospital but that on reaching Embu Hospital, the ICU beds were full. He added that after consultation his father was referred to Kiirua Hospital where he was eventually taken using an ambulance. He added that his father was admitted for a long time in ICU but his conditions got worse and on 8th October 2018 he passed on.

13. **ALEXANDER M’NTOITI (PW4)** told this court that he was the Unit Manager (village elder) of Kirigi village where the deceased was domiciled. He told this court that on 5th August, he was called by his wife (deceased) that Gitonga (deceased) had been attacked with a panga outside his home. He recalled that on 4th May 2017 the accused person had reported to him and told him to warn Gitonga never to step on Mugendi’s land. He told this court that on 5th May 2018 in the morning, he went to caution Gitonga but did not find him but found his son (Mwenda PW3) and gave him the information. He added that Gitonga was later attacked and taken for treatment and died four months later while undergoing treatment.

14. **CPL JOSEPH GITAU (PW5)** the arresting officer told this court that he was called by the Iruma Area Chief on 24th August 2018 and informed that the suspect who had assaulted the deceased had been sighted and that he went in the company of a colleague and arrested the accused and booked him at Magutuni Police Post. He added that the assault had been reported way back in May. He added that though the accused was initially charged with assault the charges were later escalated to murder when the deceased succumbed to the injuries inflicted on him.

15. **P.C DANIEL SINTI (PW6)** on his part testified that he was based at Magutuni Police Station and was the one who booked the assault report on 5th May 2018 in relation to the assault on the deceased by the accused herein. He added that the report he received was that the deceased had been seriously injured and had been taken for treatment Kiirua Mission Hospital in Meru. He told this court that he visited the deceased in Hospital on 23rd July 2018 and found him in critical condition and could not obtain any statement from him. He however stated that he was able to get statements from other witnesses including the statement of one Florence Karigo Ntoiti who later died. He tendered her statement as P. Exhibit 2 and the death certificate as P. Exhibit 1. The late Florence Karigo Ntoiti from her statement witnessed the accused person attacking the deceased with a machete outside her gate. She was in the company of Selina (PW1) and that she tried in vain to stop Mugambi (accused) from assaulting the deceased.

16. **DR. JAMES KIHUMBA (PW7)** the doctor who conducted post mortem examination on the body of Gitonga (deceased) told this court that the body had wounds indicative of lying on one side for long in Hospital undergoing treatment. He opined that the cause of death was brain abscesses caused by a blunt injury to the head.

17. When placed on his defence, the accused denied killing the deceased. He alleged that there was a grudge against him because of a parcel of land left by the late Mugendi which he claimed was given to him by the late Mugendi in his lifetime. He testified that the family of Mugendi were not happy about the arrangement. He told this court that Gitonga’s wife (PW2) hated him and that his grandmother (PW1)

did not like him either.

18. The accused further testified that he was away in Lare at the material time. He blamed unnamed person from County Government of Tharaka Nithi claiming that he wanted to buy the land that Mugendi had given him. He added that Mr. Gitonga the deceased had on 4th May subdivided his land and claimed that his son Mwenda (PW3) was unhappy about the portion he was given.

19. This court has considered the evidence tendered by the prosecution in this case. I have also considered the defence put forward. This is a case of murder and in such a case the prosecution are required to prove three crucial elements namely;

(i) Facts of death

(ii) Cause of the death (*actus reus*)

(iii) Malice aforethought

i. Facts of Death

20. The facts that Elias Gitonga Muthama died on 8th October 2018 is uncontested. Dr. James Kihuma (PW7) told this court that he performed post mortem examination on his body on 19th October 2018 in the presence of Jacinta Gakii (PW2) and Pius Mwenda (PW3), the wife and son to the deceased respectively. Both PW2 and PW3 narrated to this court the efforts made to treat and save his life but the efforts were to later become futile when he succumbed to the injuries sustained after approximately 5 months undergoing treatment at Kiirua Mission Hospital.

(ii) Cause of death:

21. The evidence tendered before me indicates that the deceased died after a tedious process of interventions by medical personnel at Kiirua Mission Hospital to save his life. The doctor (PW7) who performed the post mortem told this court that the body of the deceased was wasted and in such a bad state due to severe bed sores on one side of the body caused reduced mobility and lying on one side for too long. The actual cause of death according to the doctor was multiple brain abscesses or pus in the brain cause by a blunt injury to the head.

22. There is no doubt that despite the challenges brought about by “*moderate decomposition changes*” as put forward by the doctor it is quite apparent that the injuries inflicted on the 5th October 2018 were a direct cause to his demise. The prosecution witnesses (PW1, and PW3) gave vivid description of those injuries and stated that from that time (5th May 2018) to the time of his demise, the deceased could not talk again which explains the seriousness of the injuries suffered.

23. Having found what the cause of death of deceased was, the next question is what or who cause those injuries.

24. The prosecution’s case against the accused on this element hinged on the evidence of four eye witnesses. Selina Ncuguni Muthama (PW1), the aged grandmother of the accused herein saw the accused cut the deceased on the head and shoulders as she screamed and tried rescuing her son in vain. She gave a vivid description of what transpired on the material date and despite the fact that she was unable to recall the actual dates to her advanced age, she was able to narrate the ordeal her son (deceased) underwent. She saw the accused run after the deceased outflanking him while armed with a panga which got PW1 alarmed because she stated that the accused had previously threatened the deceased and had on that morning cut deceased’s napier grass and put up a fence without permission.

25. **PIUS MWENDA GITONGA** (PW3) the son to the deceased also gave a clear narrative of what transpired on the material day. He tried his best to save his father and directed the accused person to the wrong direction after he sought to know where his father was. His ingenious efforts to save his father however were short lived because the accused appears to have either figured out or spotted him because he caught up with him and attacked him near the homestead of the village elder (Unit Manager). The wife of the Unit Manager known as Florence Karigo M’Ntloti (deceased) saw the accused attacking the deceased with a machete. The witness Florence Karigo M’Ntloti (deceased) died in the course of trial but had made her statement recorded by P.C Daniel Sinti (PW6). That statement (P. Exhibit 2) is admissible in evidence pursuant to provisions of **Section 33** of the **Evidence Act** because there was proof (P. Exhibit 1 – death certificate) that the maker could not be found because she was death. The son to the deceased (PW3) was alerted by the village elder (PW4) about the assault on his father and he rushed to the scene which was barely 400 meters away and found his father the deceased bleeding from the cut on his head and fingers.

26. Going by the above graphic accounts I have no doubt in my mind that the accused person attacked the deceased on the material day and caused him serious and fatal injuries from which he later died as a result. The element of *actus reus* has been proved by the overwhelming evidence tendered against him,

(iii) Malice Aforethought or Mens rea

27. The evidence tendered by the prosecution showed that the accused person had ill motives against the deceased and had previously expressed them quite clearly. Selina Ncuguni, the grandmother to the accused told this court that the accused wanted a piece of land left behind her late father and which parcel had been given to Mugendi, a deceased son of PW1 who had died in April the same year after a short illness. PW1 told this court that in the morning of 5th May 2018, the material date, the accused had cut napier grass belonging to the deceased put up a fence without permission which shows that he was upto some mischief.

On 4th May 2018, the previous day, he had warned PW4, the village elder to warn the deceased to keep off her grandmothers (PW1), parcel.

PW3 corroborated the evidence of PW4 in relation to the threats made by the accused. According to PW3 the Unit Manager (PW4) went to their home and told him that he was looking for his father (deceased) and when he was told he was not at home he told him (PW3) to warn his father not to go to her grandmother's house. Shortly thereafter, the deceased came back home and defied the warning and went to her mother (PW1) before proceeding to the Unit Manager to make a report against the threat.

28. PW3 stated that the accused person went to their home and looked incensed and menacingly inquired from PW3 where his father was. PW3 told this court that the accused was seething in anger and was armed with a machete and that is why he tried misdirecting him on the direction his father (deceased) had taken.

29. **SASINTA GAKII GITONGA** (PW2) also gave material evidence in relation to the element of *mens rea*. She told this court that as they were planning for the funeral of Mugendi, the accused was infuriated by a suggestion that either Mugendi's mother (PW1) or brother who happened to be Gitonga (deceased) would sign documents at the mortuary for the body of Mugendi. According to the witness (PW2) the accused got so infuriated that he screamed and cut a plastic chair sending all those who had gathered to plan for the funeral to scatter and run for dear lives. The accused appears to have been made to believe that whoever was to sign for the body would automatically inherit Mugendi's parcel of land. He appears to have been so passionate of that parcel that he was prepared to physically take it by force. That is what clearly drove him to commit the heinous act of taking away an innocent life whose only crime was being the only brother to the late Mugendi and hence his next of kin.

30. This court is satisfied that in view of the evidence tendered by the prosecution the element of *mens rea* has been established against the accused. I am not persuaded by the defence put forward that all the witnesses summoned by the prosecution were ill motivated against the accused person was so destructive and a bad character but had no reason to lie on what he did and looking at her advanced age, this court had no reason to doubt the veracity of her evidence.

31. This court is also not persuaded by the allegations made by the accused that a County official was interested in his parcel. In the first place he had no parcel of land because the parcel left behind by Mugendi is still subject to succession proceedings and there is no evidence that he was likely to get it because he is just a nephew of Mugendi and there is no evidence that there was a written will left behind by the late Mugendi. Secondly the accused person did not adduce any evidence to show the official who wanted to buy Mugendi's land and the connections he had with all the prosecution's witnesses.

32. The accused person may also have had conflicts with his family members but he cannot say that the late Florence Karigo M'Ntoiti also had a grudge against him to give an adverse statement against him.

33. This court is also not convinced about the defence of *alibi* put forward by the accused. He did not call any witness to back up that defence which in my considered view is an afterthought.

This court finds that on the basis of evidence tendered, the prosecution has proved beyond reasonable doubt that the accused herein murdered Elias Gitonga Muthama in cold blood and in an attempt to acquire land left behind by Mugendi. He ought not to have gone to such extremes but he did. As such this court finds him guilty of the offence of murder and he is accordingly convicted as provided by law.

Dated and signed by;

HON. JUSTICE R. K. LIMO.

SIGNED; DATED 14TH SEPTEMBER 2020

Dated, signed and delivered in the open court on 28TH day of SEPTEMBER 2020

By:

HON. LADY JUSTICE L.W. GITARI

28/9/2020

Coram:

Before Hon. Lady Justice L.W. Gitari

Prosecutor- Momanyi/Maari

C/A Muriuki

Accused – present

SENTENCE:

I have considered the fact that the accused is a 1st offender. I also note the submissions by the State. I have also considered the sentiments by the family of the deceased. The mitigation by the accused is also considered. The law provides for mandatory death sentence. Death

sentence is not outlawed. I note that this offence was pre-meditated with prior threats. The accused acted mercilessly when he committed this offence. It is on record that the accused had threatened to kill three people and this means he was in line some unexecuted murders. He therefore needs to serve a sentence which ensures that he will not go back soon to execute these murders. Though I will spare him the death penalty in view of the mitigation, I will nevertheless pass a sentence that ensures that he is punished sufficiently for his actions and is restrained from going back to do his unfinished art business. I therefore sentence the accused to forty years imprisonment. Right of appeal in 14 days.