



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 86 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SILAS M'MWIKA NTONGARUNI Alias MUJUMBE.....ACCUSED

J U D G M E N T

1. **Silas M'Mwika Ntongaruni Alias Mujumbe ("the accused")** was charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code*. It was alleged that on 1/11/2014 at Ngukuine Village, Kabachi Location in Igembe North Sub-County within Meru County jointly with others not before Court, the accused murdered **Silas Kilanguchia ("deceased")**.
2. The accused denied the charge and the prosecution paraded five witnesses to prove its case.
3. The prosecution evidence was that, on the material day at about 5 pm, the deceased was in the company of **Eric Mugambi (PW1)** and **Peter Kiramana (PW2)** They were from harvesting miraa in the deceased's farm. They were headed to Kabachia Market to sell the same when they met the accused with three others. The accused and the three others were armed with a panga, a stone and a knife.
4. The accused challenged the deceased to put down the miraa he was carrying but the deceased resisted. One of those with the accused hit the deceased with a stone and the deceased fell down. The accused then attacked the deceased with a panga and cut him. **PW1** and **PW2** escaped and left the deceased behind. They were to return back later only to find the deceased badly injured.
5. They notified **Charles Gichunge (PW3)** of the incident who rushed to the scene. He found the deceased in bad shape and rushed to look for transport. On returning, he found the deceased had passed on. The matter was reported at Kamwarine Police Station. Since it was late at night, they were advised to go guard the body until the following day when the police came and removed it to the mortuary.
6. **CIP Bashir Ali Mohamed** was then the Deputy OCS Mutwati Police Station. He recalled having been instructed by the then OCS of the Station on the morning of 2/11/2014 to investigate the murder which had been reported the previous night. He visited the scene with his colleagues and found the relatives of the deceased at the scene. He found the body lying at the scene with multiple head cuts. He did not recover any weapon at the scene. He drew a sketch plan of the scene and removed the body to the mortuary.
7. He later recorded statements from witnesses. In his investigations, he established that the witnesses were with the deceased from the latter's farm harvesting miraa. They were waylaid and attacked by a group of four individuals who included the accused. In the attack, the deceased was fatally injured. On 14/11/2014, the accused was arrested by **PW3** at the local market and brought to the station where CIP Ali Mohammed re-arrested him and charged him with the offence before Court.
8. **PW5 Dr. Kisilu James** produced the Post Mortem report dated 13/11/2014 which revealed that the body had three deep cuts on the skull with brain lacerations. The cause of death was opined to be traumatic brain injury secondary to assault with a sharp object.
9. When placed on his defence, the accused told the Court that on the material day, he was herding cows far away in a place called **Murothie**. That he was arrested on 14/11/2014, fourteen days after the alleged murder. That he had gone to Mutwati market to sell his miraa when he was arrested on the allegation that he had murdered the deceased. That his home is at **Kiegoi** which is 5 km from **Rukune**, the home of the deceased. Before his arrest, he had not heard that the police were looking for him.
10. The Counsel for the accused filed his submissions which this Court has duly considered together with the evidence on record. The prosecution relied on the evidence of its witnesses. The accused faces a charge of murder. The definition of murder under *section 203 of the Penal Code* establishes four ingredients which the prosecution must prove beyond any reasonable doubt. These are; *the fact of death of the deceased, the cause of death of the deceased, the fact that the death of the deceased was caused by an unlawful act or omission on the part of the accused and that the accused had malice aforethought*.

11. On the first and second issue, **PW1 and PW2** testified that on the material day at about 5 pm, they were accosted on the way from the deceased's farm by a group of four people. They escaped the moment they saw the deceased had been attacked and cut with a panga. They later returned and found him seriously injured. He later on died.

12. **PW5** produced a Post Mortem report that was filled by **Dr. Guantai** on 13/11/2014. It showed that the body had multiple head injuries. It was opined that the cause of death was severe traumatic head injuries secondary to assault with a sharp object. Accordingly, I am satisfied that the prosecution did prove beyond reasonable doubt, the fact and cause of death of the deceased.

13. On the 3rd issue, it was the evidence of **PW1 and PW2** that on the material day at about 6 pm, they were with the deceased carrying miraa that they had harvested. They met four people on the road who were armed. They recognized them as, **Mujumbe (accused), Kirimi, Patrick and Nkunja**. They identified the accused as the one who had a panga while the others had a stone and a knife.

14. One of the attackers hit the deceased with a stone and he fell down. It is then that the accused attacked the deceased and cut him with a panga. **PW1 and PW2** escaped but when they returned later they found the deceased with serious injuries from which he succumbed.

15. In **Kariuki Njiru & 7 Others Cr. Appeal No. 116 of 2005**, the Court held:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error”.

16. In **Donald Atemia Sipendi v. Republic [2019] eKLR**, Mativo J held:-

“To determine whether identification is truthful, that is, not deliberately false, the Court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not a honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before”.

17. Finally, in **Toroke v. Republic [1987] KLR, 204**, the Court of Appeal held:-

“It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification”.

18. The time of the offence was 6 pm. The conditions for identification were therefore favourable as the witnesses were using natural light. **PW1 and PW2** said they knew the attackers as they hail from the same area and they used to see them around. There was no element of surprise as **PW1 and PW2** stated that they saw the attackers while they were about 40 metres away. This must have given them enough time to recognize and identify them.

19. The accused's defence was an alibi. He testified that he was at a place called **Murothie** hearing cows. That he neither knew the witnesses who testified against him nor the deceased in this case. The Court however noted that the accused knew the village where the deceased hailed from. He named it as **Ngukuine** yet none of the witnesses who testified had named it. This shows that he lied when he told the Court that he did not know who the deceased was.

20. Further, the alibi was but an afterthought. It could not displace the strong evidence of the prosecution against him. During their cross-examination, it was not suggested that the witnesses were framing the accused. Indeed even in his defence, he never alluded to the fact that the prosecution witnesses had any reason to frame him. I reject the defence.

21. Accordingly, I am satisfied that the prosecution proved beyond any reasonable doubt that, the death of the deceased was caused by the unlawful act of the accused.

22. The last issue is whether the accused had any malice aforethought. Malice aforethought is defined under **206 of the Penal Code**. In **John Mutuma Gatobu Republic [2015] eKLR**, it was held:-

“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code ...

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought”.

23. In this regard, an inference of malice aforethought can be established by considering the nature of the weapon applied, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused generally.

24. The accused is said to have used a panga to attack the deceased. He cut the deceased on the head severally. From the Post Mortem report

produced, the body had multiple cuts on the skull with brain lacerations. When the accused set upon the deceased with a panga, which is a dangerous weapon and targeted the head, a very sensitive and dangerous part of a human being, he may have intended or he knew that it will cause the deceased grievous harm.

25. Accordingly, I am satisfied that the prosecution had proved beyond reasonable doubt that, with malice aforethought, the accused unlawfully caused the death of the deceased.

26. In this regard, I find the accused guilty of the murder of **Silas Kilanguchia** contrary to *section 203 as read with section 204 of the Penal Code* and convict him accordingly.

DATED and DELIVERED at Meru this 21st day of October, 2020.

A. MABEYA

JUDGE