



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO 32 OF 2014

REPUBLIC.....PROSECUTION

-VERSUS-

STANLEY MUREA NTOKIRARI.....1ST ACCUSED

TITUS KIMATHI MUREA.....2ND ACCUSED

JUDGMENT

1. Stanley Murea Ntokirari (now deceased) and TITUS KIMATHI MUREA (the accused persons herein) were charged with the offence of murder contrary to **Section 203 as read with 204 of the Penal Code**. The particulars of the offence are that on 7th February 2014 at Kirindine Sub-Location, Athi Location in Igembe North District within Meru County jointly murdered **Francis Mithika Ntokirari**.

Prosecution's evidence

2. The prosecution summoned six witnesses in support of its case. **PW1 FELISTUS NTINYARI** testified that on 7/02/2014 at 10pm she heard loud screams. She went and called her mother Salome (now deceased) who was also sleeping and they both went to the place where the screams were coming from. They found Stanley Murea, Titus Kimathi, Alfred Kinyua, Paul Muirabwa holding her father (the deceased) and threatening to kill him. PW1 testified that each one of the persons so named was holding a panga. They asked what was happening but no one talked to them. She stated that at that point the father started to move away when Titus suddenly cut him (the deceased) on the head and he fell to the ground. The others above named also cut him. She testifies that at some point the deceased found some strength and tried to escape but the accused persons caught up with him at the door of one of the neighbor's home namely Charles Koome. The accused person continued to cut him with the panga. PW1 and her mother were screaming for help and neighbors started gathering at the scene. On seeing the crowd of people gather the accused persons ran away. PW1 and the mother took the deceased who was badly injured to Maua Methodist hospital. The following day she received news from her mother that her father (the deceased) had passed away. PW1 testified that she knew the accused as they are related. The first accused is the brother to the deceased and the 2nd accused is the child to the first accused and nephew to the deceased.

PW2 HENRY GATUARO a resident of Kirindine testified that on 7/02/2014 at around 10pm he was at home when he heard noises and screams and went out to the boma where the screams were and found the first accused and his sons cutting the deceased. PW2 testified that the accused persons also threatened to cut him too. The threat made him run away for his life, thus, he could not help the deceased. He testified that even though it was at night there was a bright moonlight and was able to identify the accused as the people who were cutting the deceased. He also testified that he saw PW1 at the scene together with the mother and they were screaming for help which attracted the attention of many villagers. PW2 testified that the 1st accused and the deceased are his brothers and that he has never had any grudge with the 1st accused. He also stated that he did not know what caused the incident. PW2 also testified that he saw the deceased run to the neighbor's house named Charles Koome for help but the perpetrators locked the door of Koome from outside and he could not go out to help. He testified that he saw both accused persons cut the deceased on the head.

PW3 KOOME CHARLES a neighbor and nephew to both the deceased and the first accused and a cousin to the 2nd accused testified that, on 7/02/2014 at around 10pm he was at his house sleeping when he heard the deceased running towards his house after being chased and the deceased started hitting his house saying that he should help him as he was about to be killed. He heard the people pursuing the deceased wrestling with him outside his door. PW3 testified that he tried to open the door but the door could not open as it had been shut from the outside. He testified that at this time his wife and children had started screaming and pleading with the assailants not to kill the deceased. One of the neighbors, Charles Mugambi opened the house of PW3 after the assailants had fled and when he came out he saw the deceased lying on the ground in a pool of blood. PW3 testified that he took the deceased to Maua Methodist Hospital where he was admitted and that the following day he learnt from the wife of the deceased that the deceased had passed away.

PW4 JOHN MICHUBUA a resident of Kirindine testified that on 7/2/14 he heard screaming from PW1 and the wife of the deceased. He

left his house with a torch and arrived at the home of PW3 Charles Koome where he found the deceased lying on the ground outside of the house. He saw the Stanley Murea the 1st accused and his children at the scene. He used the torch to illuminate the faces of the 1st accused and his children and was able to identify them as people he knew very well. PW4 testified that the accused persons fled the scene and he saw that the deceased had been cut on both hands and knees and also on the neck. He stated that PW3 took the deceased to hospital and that he later learnt from PW2 that the deceased had died.

PW5 NO 54000 PC JOSEPH MASANGO the Investigating Officer testified that on 8/2/14 he was assigned to investigate an assault which later turned into the murder of Francis Mithika of Kirindini sub-location. He testified that the wife of the deceased and other witnesses were present at the police station and he went out with his colleague PC Kiruyu to investigate the case. PW5 testified that the scene was the homestead of the deceased and the larger family compound of the deceased. He testified that the witnesses identified the scene and drew a sketch plan of the area produced as P EXBT 1. He further stated that the wife of the deceased (but also deceased) informed him that, at the night of 7/2/14 she heard a commotion within her homestead and she and her daughter went out and found her deceased husband surrounded by the 1st and 2nd accused person. She testified that the witness told him of how the accused persons had threatened to kill the deceased and went ahead to cut him and fled the scene when neighbours answered their cry for help. He further testified that the witness stated that the accused persons continued to assault the deceased until he was unconscious. PW5 testified that his investigations established that the deceased was taken to Maua Methodist Hospital in critical condition where he succumbed to his injuries while undergoing treatment. PW5 testified that he followed through and a post-mortem was done by Dr Njeru and a report thereto was prepared. He testified that according to the wife of the deceased 4 people were attacking the deceased and two of them were children of the 1st accused under the age of 18 years. He testified that he arrested the 1st and 2nd accused persons and charged them with murder and that they had also arrested the two named minors but released them after they could not gather enough evidence to charge them. PW5 testified that the wife to the deceased died before testifying and the 1st accused died during trial.

PW6 DR SIMON MUNYOKI gave his sworn testimony where he stated that he is a medical doctor attached to Meru General Hospital. He testified that he knew Dr Njeru the medical examiner in this case for 2 years he worked with him at Meru Genral Hospital. Dr Njeru went on to pursue his masters. PW6 testified that he is familiar with the handwriting and signature of Dr Njeru and that he recognized the post-mortem report relating to the body of Francis Mithika done by Dr. Njeru on 13/2/14 at Maua Methodist Hospital. He produced the report on behalf of DR Njeru as EXBT 2. PW6 testified that as per the post mortem report the deceased had a cut on his thigh and that his mucus membrane was severely pale meaning loss of blood. He further testifies that there were multiple deep cuts on the skull- 6 in number. Further that both wrist joints were totally cut off with deep cuts fracturing the joints and the bones. That the hands had multiple fractures and that both knees had deep cuts which completely cut off the knee.

The defence

3. The 2nd accused person **DW1 TITUS KIMATHI MUREA** was put to his defence and gave a sworn statement and called one witness. He stated that on 7/2/14 his father the 1st accused person (now deceased) was fighting with the deceased over land. He stated that the two had been fighting over land since he was young and that on this material day he left home to avoid the conflict between the two. He stated that his brother Alfred kinyua told him the following day of the incident that the father had injured the deceased and that he was alone when he injured him. He states that PW1's testimony was just to implicate him and that she could just say anything because his father killed her father.

DW2 KINYUA ALFRED stated that his father the 1st accused and the deceased have been fighting over land. He stated that the deceased has allegedly wanted to eliminate his father and that the two are bitter enemies. He alleged that the deceased had cut his father in 2002. He stated that on 7/2/14 he was coming from school when he heard screams and went to establish what had happened and found that the deceased had been badly slashed by the first accused.

Submissions

4. At the close of the defence case Counsel for the accused person Mr. Otieno filed written submissions on 22nd July 2020 and the Prosecution called upon the Court to be guided by the evidence on record. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

Elements of murder

5. According to 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”

6. Arising from the above definition, the Prosecution must prove beyond reasonable doubt the following elements of the offence of murder:

- i. The fact of death
- ii. The cause of such death
- iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and
- iv. Proof the said unlawful act or omission was done with malice aforethought.

Fact and Cause of Death

7. The prosecution presented evidence that Henry Gatwaro, John Michubu identified the deceased's body to Dr. Njeru at Maua Methodist Hospital on 13/02/2014 for purposes of a post mortem examination. The post mortem report was admitted as Exhibit 2 in support of prosecution case. In the said autopsy report Dr. Njeru examined and identified the deceased injuries and formed an opinion that the deceased's death was due to cardiopulmonary arrest as a results of hypovolemic shock due to severe hemorrhage due to multiple cuts sustained as a result of the attack. Cuts were from a sharp object and intent was to kill. I find that the death and cause of death was proved beyond reasonable doubt by way of medical evidence.

Did the deceased die as a result of unlawful acts or omissions by the accused?

8. Medical evidence show that the deceased died out of the injuries inflicted by sharp objects on 7/2/14. The evidence pointing to the accused person was mainly by PW1, PW2 and PW4 who testified that the accused persons cut the deceased with pangas. These witnesses were at the scene and able to identify the accused persons the people who cut the deceased with pangas until he became unconscious. The defence argued that the testimony of the PW1 could not be relied on because they never moved close to the scene and relied on the voices that they heard, therefore confirming that they didn't know the cause of death. The defence contended that the testimony by PW2 that he was threatened by the accused could not be relied upon as no report was made and that the testimony that he saw the accused assault the deceased was unlikely because it was dark and he did not have a flashlight. Further that the evidence of PW3 was that he only heard voices and never saw the purported act. The defense contends that PW4 as a witness arrived after the incident had occurred.

9. The evidence before court by PW1, PW2 and PW4 was that they saw the accused cut the deceased with a panga. The crime happened at night as both PW1 and PW2 stated that it was around 10pm at night. The pertinent question that needs to be answered is whether the conditions of lighting at the scene were favorable to enable these two witnesses to see and positively identify by recognition the accused as the assailant.

10. The principles applicable when dealing with evidence of visual identification are now well established. In the case of Charles Maitanyi -vs- Republic [1985] 2 KAR 25 the Court of Appeal held at page 77:

“It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.”

11. PW1 and PW2, both knew the accused as they were neighbors and relatives. They stated that there was bright moonlight under which they saw and identified the two accused persons. They witnessed the two cutting the deceased with pangas. The evidence available show that there was good lighting from moonlight at the time of this incident and that they could see clearly. In any event, PW4 confirms that when he left his house to go the scene he used a touch to illuminate the faces of the assailants who he identified as the accused persons. These are people well known to these witnesses and nothing shows that they were under any illusion as to their identity. Their evidence on identification is assuring.

12. With this finding and evidence, the arguments by the defence that it was dark and identification was impossible fall by the way side. Similarly, the evidence herein picks a bone with two pieces of evidence by DW1; (1) that at the material time he was coming from school when he heard screams; and (2) that his father killed the deceased due to a protracted land dispute; to be really disingenuous, for; (1) schools are known to be on during the day and not at 10pm in the night; and (2) he was trying to lay sole blame on his father because "dead people do not tell tales". I reject his claims that he was not at the scene. The evidence places him squarely at the scene at the material time.

13. Medical evidence shows that the deceased sustained multiple injuries inflicted by sharp object. The evidence adduced by PW1, PW2, PW3 and PW4 was that the accused were cutting him with pangas. PW3 also saw the injuries sustained at the time of the assault. This is consistent with the medical evidence adduced.

14. From the totality of the evidence of PW1 and PW2, I find that they were able to identify the accused as the assailant who cut the deceased, thereby, causing injuries which caused his death. PW1 and PW2's evidence was further corroborated by PW4 who stated that when they went to the scene of crime, they found the accused assaulting the deceased using a panga. I find that the accused was the assailant who cut the deceased and was positively identified and by PW1, PW2 and PW4.

15. Two things remain constant:

i. The accused hit the deceased with a panga multiple times.

ii. The injuries sustained by the deceased and which led to his demise, according to the doctor who performed a post mortem on the body of the deceased, arose as a result of the multiple deep cut injuries.

16. Accordingly, the deceased met his death through unlawful acts or omissions by the accused persons. See cause of death was hemorrhage due to internal injuries caused by the actions of the accused person.

Malice aforethought

17. The next issue is whether the accused committing the offence while driven by the malice aforethought. *Section 206 of the Penal Code* provides that:-

“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)

(d)

18. The formulation of the law in **Rex Versus Tubere S/O Ochen 1945 12EACA 63** is apt guideline when the court held that:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

19. In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA.**, while considering what constitutes malice aforethought observed as follows:

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

20. In this case, **PW1** testified that on 7/02/2014 at 10pm she heard loud screams. She went and called her mother Salome (now deceased) who was also sleeping and they both went to where the screams were coming from where they found Stanley Murea, Titus Kimathi, Alfred Kinyua, Paul Muirabwa holding her father (the deceased) and threatening to kill him. **PW1** testified that each one of the persons so named was holding a panga. They asked what was happening but no one talked to them. She stated that at that point the father started to move away when Titus suddenly cut him (the deceased) on the head and he fell to the ground. The others above named also cut him. She testifies that at some point the deceased found some strength and tried to escape but the accused persons caught up with him at the door of one of the neighbors’ home namely Charles Koome and continued to cut him with the panga until he was unconscious. The evidence is corroborated by **PW2 and PW4** who are the eye witnesses in this case and who placed the accused person at the scene of crime and identified them as the people who had assaulted the deceased. The evidence adduced show that the accused chased after the deceased who tried to escape but the assailants continuously slashed him. The evidence shows that the injuries he sustained in the assault herein led to his death. The contention by the defence that the murder weapon was not recovered and that there were inconsistencies with the prosecution witness as to who had the murder weapon was completely unraveled by the evidence by the evidence by the prosecution.

21. The weapons used to inflict injury was said to be a sharp object. In this case, it was a panga. The accused cut him multiple times causing multiple deep cuts and as result the deceased suffered severe hemorrhage and as result he died. I note that the doctor **PW6** formed the opinion that the intent of the assault was to kill. Even though the defence argues that there was no murder weapon produced in court, there were no inconsistencies that the object used in this case was a panga. Infact **DW1** admits that **DW2** had informed him that the 1st accused killed the deceased by way of slashing. Doubtless, the accused person knew that the multiple injuries caused by the deep cuts to the head, knee and wrist would kill the deceased. Further, the accused person set upon the deceased and cut him with a panga several times, he must have known that the act of cutting the deceased persons on the head with a sharp object would cause death or grievous harm to the victim.

22. By taking all the circumstances into account there is a clear manifestation of malice aforethought to kill the deceased. It is therefore this Court’s finding that the prosecution proved malice aforethought in this matter.

Verdict

23. The prosecution having proved all the ingredients of the information on murder against the accused person, I find the 2nd accused person **Titus Kimathi** guilty of the murder of **Francis Mithika** contrary to section 203 as read with section 204 of the Penal Code. he is accordingly convicted.

Dated and signed at Narok this 14th day of December, 2020

F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day of December 2020

T. W. CHERERE

JUDGE