



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 53 OF 2013

REPUBLIC PROSECUTOR

-VS-

FRANCIS KINYUA ABDI Alias RASTA 1ST ACCUSED

JULIUS MWENDA HENRY 2ND ACCUSED

J U D G M E N T

1. **Francis Kinyua Abdi Alias Rasta** and **Julius Mwenda Henry** (“the accused”) are charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya*. The particulars of the offence are that on 5th February, 2013 at Antuanduru sub-location in Tigania East District within Meru County, the accused murdered **Ebula Ncebere Muketha** (“the deceased”). The accused denied the charge with the prosecution calling 4 witnesses.

2. **PW1 Lydia Nkatha** testified that on the material day she, the deceased and **David Muthui (PW2)** spend the whole day in the farm and came back home at about 5pm. On arriving home, she gave her husband water to bath inside the house while she and **PW2** sat outside on a wooden bench. She was peeling potatoes for dinner. Shortly afterwards, the accused came. The 1st accused was armed with a panga while the 2nd accused had a *jembe* handle.

3. The two asked for the deceased and she informed them that he was inside the house taking a shower. After finishing showering, the deceased came out whereby, the 1st accused accosted him and asked him whether he had ever been cut. That before the deceased could answer, the 1st accused attacked him with the panga. He hit the deceased with the panga three times. On two occasions, the deceased blocked the panga thereby sustaining deep cuts on his hand. One of the blows hit the deceased on the back side of the neck below the head which fell him.

4. All this time, the 2nd accused was guarding **PW1 and PW2** while threatening them with the *jembe* handle so that they could not help the deceased. **PW1** screamed and run out of the compound when she saw her husband fall down. She met two neighbours to whom she narrated what had transpired. The accused run away after the incident before the neighbours came. **PW1** came back with the neighbours. They took the deceased to hospital after reporting the incident at Muthara police station. The deceased died on arrival. **PW1** had known the accused for 5 years before the incident.

5. **PW2 David Muthui** testified that on the material day, he had visited the deceased with a view to discuss about his wife who was the deceased’s daughter. The deceased and **PW1** asked him to join them in the farm and discuss the matter later. He joined the two in the farm where they worked until 5pm. They came home and **PW1** gave the deceased water to bath inside the house. He and **PW1** remained outside where they were shortly joined by the accused who were armed. The accused asked for the deceased and were told that he was inside showering. The accused sat with **PW1** and **PW2** outside waiting for the deceased to finish showering.

6. When the deceased immersed from the house, the 1st accused asked him if he has ever been cut. The 1st accused then attacked the deceased and hit him with a panga three times. The deceased was injured on both hands while trying to block the blows. He was however, hit on the neck and fell down whereby his wife, **PW1**, started to scream for help. All this while, the 2nd accused kept threatening him and **PW1** with a *jembe* handle not to dare assist the deceased.

7. After the attack, the accused run away whereby the neighbours came and helped in administering first aid on the deceased. He accompanied **PW1** and others in taking the deceased to hospital after reporting the incident at Muthara Police Station. The deceased died on arriving hospital. The witness stated that he knew the accused as they were village mates.

8. **PW 3** was **Doctor Njeru Charles**, a doctor at Meru Referral Hospital. He produced a postmortem report in respect of the body of the deceased conducted by Dr. Guantai. According to the report, externally there were 3 deep cut wounds estimated to be 6 centimeters in length over the occipital region (back of the head) and on the left and right index fingers. Internally, there were deep cuts on the skull bones at the back of the head and there was both extra cranial and epidural haematoma. The cervical bone was fractured and the doctor formed the opinion that the cause of death was severe head injury secondary to a penetrating wound in the skull bone.

9. **PW 4 PC Andrew Akolo** testified that he took over the case from **PC Duncan Maina** who had been transferred. It was his evidence that on 5th February 2013, the deceased reported having been assaulted by the accused. That he was attacked by the 1st accused while the 2nd accused prevented those who were with him from assisting him. The accused were later arrested and charged with the offence.

10. The accused gave sworn testimonies in their defence. The 1st accused stated that on the material day, he was in his farm preparing firewood. He then met the deceased who was drunk and who started blocking his way telling him that he would deal with him. That, the deceased then cut him on the left palm wrist and left thigh. He screamed and fell down. That he managed to wrestle the panga from the deceased. That people gathered and wanted to lynch him but they were prevented by his cousin, the 2nd accused who took him home while the deceased was taken to hospital. He went to Meru General Hospital the following day for treatment. Since the children of the deceased were looking for him, he ran away from the village and went to stay with his aunt until he was arrested in July, 2013. According to him, he fought with the deceased and did not intend to kill him.

11. On the other hand, the 2nd accused testified that on the material day at about 5.30pm, he was coming from work when he heard screams and rushed to the scene. On arrival, he found people beating the 1st accused who had injuries on his leg and hand while the deceased had been cut on the head. The people he found at the scene were alleging that the 1st accused had fought with the deceased. He stopped them from lynching the 1st accused and he took him home. He was arrested on 31st July, 2013 and charged with the offence.

12. I have carefully considered the evidence on record. The accused are facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows:-

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

13. From the definition of the offence, there are four ingredients that arise and that require to be proved by the prosecution beyond reasonable doubt. These are; ***the fact of the death of the deceased, the cause of such death, proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and finally, proof that the said unlawful act or omission was committed with malice aforethought.***

14. **PW1 and PW2** told the court that on the material day at about 5pm, the accused came to the deceased's compound. They asked for the deceased who was showering inside his house. When he came out of the house, the 1st accused attacked him with a panga inflicting him injuries to both hands and the neck below the head at the back. The deceased was taken to hospital where he died on arrival.

15. **PW3** a doctor from Meru Referral Hospital produced the postmortem report dated 11th February, 2013 as **PExh 1** According to that report, the body of the deceased had injuries to both the right and left index fingers. It also had a deep cut on the head. The cause of death was opined to be severe head injury secondary to a penetrating wound to the skull.

16. In view of the foregoing, I am satisfied that the first and second issue of the fact of death and cause of such death was proved by the prosecution to the required standard.

17. The next issue is whether the death was caused by an unlawful act or omission on the part of the accused. **PW1 and PW2** were eye witnesses. They told the court how on the material day at about 5pm they arrived at the home of the deceased from the farm. That the deceased went inside the house to shower as there was no bathroom in the compound. **PW1 and PW2** remained seated outside.

18. Shortly thereafter, the accused came and inquired of the whereabouts of the deceased. The 1st accused was armed with a panga while the 2nd accused was armed with a *jembe* handle. When the deceased came out of the house, the 1st accused attacked him and struck him thrice with the panga. The 2nd accused prevented **PW1 and PW2** from helping the deceased. That the deceased sustained injuries to both hands and the back of his neck just below the head. After the attack, the accused run away. The matter was reported to Muthara Police Station and the deceased died on arriving hospital.

19. These witnesses remained firm in their testimony despite intense cross-examination. They stated that they had known the accused for about 5 years before the incident. That because of the threats of the 2nd accused, who stood guarding them, they were unable to lend any help to the deceased.

20. On the other hand, both accused denied the version of **PW1 and PW2**. According to them, the 1st accused fought with the deceased on a footpath whereby the deceased was fatally injured. That the 2nd accused was being implicated **PW1 and PW2** because he was a cousin of the 1st accused and had removed the 1st accused from the scene saving him from being lynched by an irate mob.

21. I saw the witnesses testify. **PW1 and PW2** were not only consistent and credible, they were firm as to the manner and place of the attack. The attack took place at the home of the deceased. The evidence of **PW1 and PW2** was corroborative of each other. I believed them.

22. **PC Duncan Maina** who visited the scene drew a sketch plan which was produced as **PExh.2**. That sketch corroborated the testimony of

PW1 and PW2. The sketch showed where the wooden bench **PW1 and PW2** were sitting when the accused came to the compound. It also pointed the scene of the incident as being next to a house, the home of the deceased. It should be recalled that **PW1 and PW2** testified that the 1st accused attacked the deceased immediately the latter came out of the house. This sharply contradicted the accused's version that the attack happened on a footpath.

23. On the other hand, the accused were not only evasive, their testimony was contradictory and an afterthought. The 1st accused ran away from the village and stayed away for six months. I did not believe him when he alleged that he was running away from the children of the deceased. His testimony that he was injured during the alleged scuffle became a cropper when he failed to produce the alleged medical report showing that he was treated on 6th February, 2013 at the Meru Referral and Teaching Hospital.

24. Even if the 1st accused proved that he was treated at the Meru Referral Hospital on 6th February, 2013, I do not believe that he would have sustained any such injuries from any scuffle with the deceased. There was no proof that the deceased was armed at the time of the attack. Further, there is no evidence that he ever reported the matter to any police station. Accordingly, I reject the defence offered.

25. As regards the 2nd accused, he was part of the scheme of common intention. He accompanied the 1st accused to the deceased's home while armed with a *jembe* handle. He used the same to threaten and prevent **PW1 and PW2** from lending any help to the deceased. He helped the 1st accused in executing the common intention which was to fatally injure the deceased. I reject his allegation that **PW1 and PW2** were framing him for allegedly being a cousin to the 1st accused. There was no evidence, leave alone any suggestion that there was any grudge between him and the two witnesses.

26. It should also be recalled that during the cross-examination of the prosecution witnesses, the narrative by the accused was not put to those witnesses. The defence was but an afterthought devoid of any merit. Accordingly, I am satisfied that the prosecution had proved beyond any reasonable doubt that the deceased met his death as a result of an unlawful act by the accused.

27. The next issue is whether the accused had the requisite malice aforethought at the time of commission of the offence to support a charge of murder. In *Daniel Muthee v R. CA No. 218 of 2005 (UR)*, while considering what constitutes malice aforethought, the Court of Appeal 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 a 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”.

28. According to the post mortem report produced by **PW3**, the cause of death was severe head injury secondary to a penetrating wound in the skull bone. The deceased also suffered cut wounds to the index fingers of both hands. Both **PW1 and PW2** who were eye witnesses, testified how the deceased who was unarmed, was viciously attacked by the 1st accused while the 2nd accused armed with a *jembe* handle prevented them from assisting the deceased. That the deceased was struck three times with a panga thereby sustaining injuries from which he succumbed.

29. By viciously attacking the deceased with a panga, not once not twice but thrice and aimed at the most vulnerable part of the body, the head, the accused must have known or had a reasonable belief that the same would either cause grievous harm to the deceased or even kill the deceased.

30. In this regard, I am satisfied that the accused had the necessary malice aforethought at the time of the commission of the offence to support a charge of murder.

31. Accordingly, I find that the prosecution have proved beyond any reasonable doubt, that with malice aforethought, the accused caused the death of the deceased.

32. In the circumstances, I find the accused guilty of the murder of **Ebula Ncebere Muketha** and I convict them of the offence of murder under **Section 322 of the Criminal Procedure Code.**

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE