



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 107 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BAARIU JULIUS MUCHEKE.....ACCUSED

JUDGMENT

1. The accused herein has been charged with murder contrary to section 203 as read with Section 204 of the Penal Code Cap. 63 Laws of Kenya.
2. The particulars of the offence are that on 12th Day of October, 2013 at Njia location in Igembe Central District within Meru County jointly with another not before court murdered **Samuel Ntela Muccheke**
3. The Prosecution called four (4) witnesses. The defence called 1 witness. Their testimonies were recorded verbatim and are part of the record.

Elements of Murder

4. To secure a conviction for murder, the prosecution must prove beyond reasonable doubt the following:

- i. The fact death of the accused**
- ii. The cause of death;**
- iii. That the accused caused the unlawful act or omission which caused the death; and**
- iv. That the accused caused the death with malice aforethought as defined under section 206 of the Penal Code.**

The death of the Deceased and cause of death

5. These two elements may be conveniently dealt with together. **Pw4 Dr. Maria Muthoni Mwangi** testified that the deceased died as a result of acute head injury due to blunt force trauma to the head. He produced the Post mortem report which was marked as Pexh-1. Accordingly the death of the deceased and cause of death has been proved beyond any doubt.

Was the death caused by the unlawful act or omission of the accused?

- 6. PW1, John Mutembei Ntela stated** that on 12/10/2013 at around 5:00 p.m. he was at home with his father, the deceased, when he heard commotion between his father and his uncle the accused herein. That he went out and saw the accused holding a hammer which he used to hit the deceased with. That he hit his father on the head and his father fell down. That they started wrestling on the ground. While wrestling, Kimathi, the son of the accused came holding a metal rod and started to hit the deceased. Another person also came with Kimathi and he hit the deceased with a piece of wood. They all descended upon his father.

7. It was his testimony that he feared for his safety because the persons were all armed. He therefore went to the house and screamed. That **Mbaabu** came and the three fled. **Samuel Ncoro** also came. They took their father to hospital and reported the matter to **Kangeta Police Station**. Two days later they were informed that their father had died. The witness stated that he conducted an inquiry that revealed that the accused person killed the deceased so that he can take his land. That the accused was given land by his grandfather but he sold it. He

therefore wanted to take over his father's land.

8. On cross-examination he testified that he was outside and therefore saw everything that transpired.

9. His evidence was corroborated by the evidence of **Pw2 Joseph Mbaabu Kaunga**. He testified that on the material date he was at the farm when he heard screams from the house of the deceased. He arrived at the home and found the accused person holding a hammer, his son holding a metal rod and another person holding a walking stick. They were all beating the deceased. He screamed and **Samuel Kinyagi** came in response. The three assailants ran away. They reported the matter at Kangeta Police station and took the deceased to hospital.

10. On cross-examination he denied that he had a quarrel with the accused. He stated that the deceased lived on his father's land and that the accused did not have any house on the land. He denied demolishing the house of the accused and testified that the accused lived with his in-laws. He denied ever being armed with a gun, participating in robbery or assault together with the deceased herein or ever being charged with assault of the accused or commotion to kill the accused on the material day.

11. In re-examination he testified that his land and that of the accused is 800 metres apart. That he has never been partners in crime with the deceased nor arrested for any crime.

12. **Pw1** was recalled on 20th November 2018 to shed clarity on his whereabouts on the material date. He testified that he was in the house on the material date. That he does not conduct business in Nairobi nor is he aware of one **Charles Kubai**. That his work is to sell miraa, his own miraa.

13. **Pw3 Athaman Mbuya** a police officer attached to Maua Police station stated that on 18th they received a report from Kangeta about the demise of the deceased. That he went to the scene and conducted the investigation which revealed that the accused person and his accomplices assaulted the deceased. That he was also present during the post-mortem.

14. In cross-examination he testified that whereas his name was not in the Investigation diary he participated in the investigations. That he only received the information on the land dispute. The weapons used by the accused were also never recovered.

15. **Dw1 Julius Mbaaruru Muchene** testified that he went to his home at Kangeta where he was waylaid by five persons known to him including the deceased. That the deceased came out with a stone and a whip and hit him on the face with the stone. The son of the deceased, **Mutwiri** also hit him with a stone. That he wrestled with the deceased and other people joined. That at the time he was bleeding hence could not see them properly. That he was able to release himself and ran away. The lady they were with by the name **Karimi (now deceased)** screamed and asked them why they wanted to kill him.

16. That he later reported the matter to Kangeta Police station where he also met the deceased who also sought to report the matter. That he was given a paper to go to the hospital but the hospital was closed. That he later learnt that the deceased had died.

17. He told the court that he lived in Kangeta where the incident took place but only vacated when a gun was discovered in the land in the home of the deceased. That the deceased accused him of tipping the police and had vowed to kill him.

18. He also testified that he is familiar to Pw2 and that he had found him red handed stealing a sewing machine. That he was charged and convicted for 6 months. He however could not remember the case number.

19. In cross-examination he stated that he had a p3 form of the earlier assault by the deceased but he could not trace it.

20. Doubtless, the accused person was at the scene of crime at the material time. Evidence on this was clear. Even the accused stated he was at the scene of the crime and admitted wrestling with the deceased. Pw1 testified that the accused and the deceased were involved in wrestling at the material time. Of particular concern is the defence by the accused that he was defending himself from attacks by the deceased and other persons.

21. The claim that he was attacked by the deceased was not supported by evidence. He claimed that he was injured during the scuffle and that he was treated for the injuries sustained. But he did not produce anything, medical evidence or otherwise, to support this claim. Clearly his defence thereto was an afterthought. The allegations that some of the prosecution witnesses were actuated by malice because he had tipped off the police of their illegal actions was not based on concrete evidence. He also stated that the deceased wanted to kill him because he tipped off the police that the deceased and his partners in crime had a gun. This matter was an important but no documents were produced to show report was made in that respect. See also the testimony of Pw2 that he had no quarrel with the accused prior to this case and that he was discharged from the criminal case he was facing.

22. Evidence shows and the accused testified to this, that he does not reside in the premises where the offence occurred. He did not present any justifiable reasons why he was on the premises on that particular day.

23. Eye witnesses stated that the accused and three other persons attacked and assaulted the deceased. This evidence was not controverted as I have found the defence of self defence was an afterthought. The post-mortem report shows that injuries the fatal injuries were as a result of blunt force which is consistent with the weapons used and described by the witnesses, and in particular that the accused hit the deceased on the head with a hammer. Accordingly, the accused committed the unlawful act which caused the death of the deceased. The prosecution has proved this fact beyond reasonable doubt.

Malice Aforethought

24. Instances of malice aforethought are stated in Section 206 of the penal Code as follows;

206 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) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape of any person who has committed or attempted to commit a felony.

25. Of intention in homicide cases, I am content to cite the English case of **Cunliffe v Goodman 1950 1 ALL ER 724 Asquith L.J** that:

“An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition”

26. From the evidence of Pw1 the accused hit the deceased on the head with a hammer. The evidence of Pw2 to Pw4 corroborated the evidence of Pw1. The post-mortem report states the injuries on the head were as a result of blunt force. Hitting a person on the head with a hammer was with full knowledge and intention to cause death or grievous harm to the deceased.

27. In view of the foregoing, the ingredients of malice aforethought and indeed the offence of murder have been proved beyond reasonable doubt.

28. I hereby convict the accused person of the offence of murder pursuant to section 203 of the Penal Code of Kenya. It is hereby so ordered.

Dated, signed and delivered in open court this 31st day of July 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Basilio for accused

Accused – present

Namiti for state

F. GIKONYO

JUDGE