



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 20 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER CHACHA MOGAYA.....ACCUSED**

**JUDGMENT**

1. **Muruga Mwera Musungu**, the deceased herein, allegedly lost his life out of a longstanding controversy with the family of the accused person herein, **Peter Chacha Mogaya**, over ownership of land. The deceased died on 19/08/2014 while undergoing treatment at Kegonga District Hospital. The incident occurred at Nyamagenga village in Kuria East Sub-County of Migori County. When the matter was reported to the police, investigations were commenced which culminated with the arraignment of the accused person before Court facing the information of the murder of the deceased about 4 years later.

2. The accused person denied the charge and the case was set for hearing. Six witnesses testified in support of the information facing the accused person. The accused person and the deceased were very close family members in that the deceased was an uncle to the accused person. In other words, the Father of the accused person and the deceased were brothers. A cousin brother to the accused person one **Johanna Magoiga Mwera** testified as **PW2**. A brother to the deceased and an uncle to the accused person one **John Magare Mwera** testified as **PW3**. The Chief of Nyabasi North Location one **Joseph Saguge Maroa** testified as **PW4** whereas a neighbour to the deceased and the accused person one **Angelo Mwitwa Moses** testified as **PW1**. **Dr. Awinda Victor Omollo** testified as **PW5** whereas **No. 46482 PC Joshua Adenyi** attached at DCI Kuria East testified as **PW6** as the investigating officer. For purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was that in the morning of 19/08/2014 at around 11:00am **PW4** was on his official duties and walked towards Kegonga town from his home. While on the way he heard someone screaming from the land owned by the deceased and he stopped. The deceased emerged from the land while crying and carrying a panga and told **PW4** that he had been speared on his back by the accused person. **PW4** saw the spear on the back of the deceased as the deceased pleaded with him to remove it. **PW4** declined to remove the spear. The deceased talked to **PW4** in Kuria language in the words which **PW4** translated in Kiswahili as follows: -

***Haki nimeuliwa. Nimedungwa mshale na Chacha Mogaya ambaye ni kijana wa ndugu yangu....***

4. Immediately **PW1** arrived on a motor cycle and was requested by **PW4** to take the deceased to a hospital in Kegonga town. **PW1** assisted the deceased and rushed him to hospital where the spear was removed before **PW1** left. **PW1** also stated that as he was rushing the deceased to hospital the deceased kept on repeating that he had been pierced by one Chacha Mogaya who is the accused person and the only person with that name in Nyamagenga village. **PW1** knew the accused person quite well. The deceased underwent treatment at the Kegonga District Hospital but succumbed to the injuries later that afternoon.

5. The incident was reported to Ntitaru Police Station. The police visited the hospital and removed the body to Migori County Referral Hospital Mortuary for further action. Those who saw the body of the deceased before it was removed by the police included **PW2** and **PW3** who were close relatives of the deceased.

6. The case was investigated by **PC Mwangi** who recorded statements from potential witnesses, recovered the spear, visited the scene (in the company of **PW6**) and even had the body of the deceased photographed and the films duly processed. He also witnessed the post mortem examination of the body of the deceased on 22/08/2014 at Migori County Referral Hospital Mortuary which was conducted by **Dr. Ndege** and who prepared a Post Mortem Report. **Dr. Ndege** observed a penetrating wound on the right inferior scapular region and when he opened the body he found that the lung was also penetrated. The cause of death was opined as right haemathorax secondary to posterior penetrating lung injury. It was **PW5** who produced the report on behalf of **Dr. Ndege**.

7. At the conclusion of the investigations the accused person was at large. According to **PW2**, **PW3**, **PW4** and **PW6** the accused person fled to Tanzania where he stayed for 4 years before he returned home. In the intervening period the police, **PW4** and the family members of the deceased were closely monitoring the whereabouts of the accused person and on return **PW2** informed the police who liaised with the Anti-Stock Police Unit officers and the accused person was arrested. Since **PC Mwangi** had long been transferred **PW6** took over the conduct of

the case. PW6 interrogated the accused person who denied committing the offence and he escorted him to Migori County Referral Hospital where he was examined and certified to be fit to stand trial. The accused person then formally charged. PW6 produced the photographs, the Certificate thereof, the Mental Assessment Report and the Statement of PC Mwangi as exhibits. He could not produce the spear as the same was not found in the exhibits store.

8. At the close of the prosecution's case, the accused person was placed on his defence and he opted to give sworn testimony without calling any witness. The accused person denies committing the offence. He denies disappearing from his home and stated that he was all along riding his motor cycle between his home and Sirare town. He produced documents from Alliance One Tobacco Ltd that he was a contracted farmer and that he did not abandon his crops at any time. He contends that PW4 was out to fix him out of recovery of his family's stolen animals which some were traced to the home of PW4. The accused person denied any land dispute between the family of the deceased and his family. He prayed that he be acquitted.

9. At the close of the defense case the matter was left for judgment.

10. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

I will consider each ingredient separately.

**(a) Proof of the fact and the cause of death of the deceased: -**

11. There is no doubt that the deceased died. That was attested to PW2, PW3, PW4 and PW5. The first limb is hence answered in the affirmative.

12. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which was filled in by his colleague Dr. Ndege who conducted the autopsy. The report opined that the possible cause of the death of the deceased was right haemathorax secondary to posterior penetrating lung injury. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person: -**

13. The accused person denied killing the deceased. The evidence pointing to the accused person was mainly by PW1 and PW4 who relied on a dying declaration by the deceased. As such, the starting point is the law. **Section 33(a)** of the **Evidence Act, Chapter 80** of the Laws of Kenya provides as follows: -

**33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:**

**(a) Relating to cause of death:**

**When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.**

14. Further, Courts have had several occasions and interrogated the above provisions. In **Pius Jasunga s/o Akumu vs R (1954) 21 EACA 333** the predecessor of the present Court of Appeal had the following to say: -

**The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (**R -v- Eligu s/o Odel & Another (1943) 10 EACA 9**) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ,,,,,,. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.**

15. The Court of Appeal in a later case of **Stephen Muturia Kinganga v. Republic (2013) eKLR** reiterated the foregone.

16. It is therefore settled that a dying declaration must be corroborated. I will now intently look at the evidence of PW1 and PW4 with a view to first ascertain whether the deceased made the alleged statements and if so whether the statements amounted to dying declarations and further if there was corroboration. Having gone through the evidence hereinabove there is no doubt that the deceased made the statements to PW1 and PW4 respectively. He first told PW4 that it was the accused person who had speared him and later told PW1 that it was still the accused person who had speared him as PW1 rushed the deceased to hospital. As to whether the statements were dying declarations, I also find no difficulty in finding that the statements by the deceased amounted to dying declarations. The statements squarely related to the events that eventually led to the death of the deceased. On corroboration, the evidence of PW1 perfectly corroborated that of PW4. There was also the corroboration by way of medical evidence which confirmed that the alleged injury was the cause of the death of the deceased.

17. This Court therefore finds and hold that the deceased made holding dying declarations to PW1 and PW4 which were duly corroborated. As to whether the accused person was at the scene, I must note that the incident took place during the day and the deceased knew the accused person quite well. He repeatedly mentioned the name of his assailant as Chacha Mogaya which PW1 confirmed that there was only one Chacha Mogaya in their Nyamagenga village who was the accused person, a fact which was never contested.

18. There is also the alleged aspect of the disappearance of the accused person for 4 years immediately after the death of the deceased. The accused person denied the allegation and contended that he was all along at his home. I carefully watched the witnesses testify and observed their demeanors. I did not find anything to doubt their credibility and hence believed their testimonies. PW2 and PW4 stated the efforts they took with the police in tracing the accused person in vain until when he resurfaced 4 years later.

19. In defence thereof the accused person stated that he was all along at home. If that was the case one wonders why the police were not able to arrest him. Further even his close family members and the local administrator could not find him at home. As to the documents he produced from the Alliance One Tobacco Ltd, I find the same to be mere copies with no authentication. On the Land Sale Agreement, I note that the same was allegedly executed by Abisai & Company Advocates and not by a specific Advocate. A firm of Advocates cannot *per se* witness the execution of documents, but specific Advocates in that firm who must append not only their signatures but also their details in confirmation that they are duly authorized in law to practice law. That is the only way an Advocate can be held accountable and is in line with **Article 10** of the **Constitution**. I therefore find and hold that the documents produced by the accused person are of very little probative value, if any, and do not cast any doubt at all on the prosecution's case. The upshot is that the contention by the accused person that he did not disappear immediately after the incident is ill-founded and is for rejection.

20. The accused person also raised the issue of the grudge between PW4 and the accused person on account of some stolen cattle. I have considered the matter as well. I however note that even if it is true that the alleged theft and recovery took place PW4 was not the only witness who contended that the accused person had disappeared. The evidence of the other witnesses therefore remains unshaken. The contention is hence dismissed.

21. The foregone analysis therefore yields that the prosecution has proved the second ingredient of the information of murder. It is therefore the accused person who unlawfully caused the death of the deceased.

(c) **Proof that the said unlawful act was committed with malice aforethought:**

22. **Section 206** of the Penal Code defines malice aforethought as follows: -

**206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

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**(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 from custody of any person who has committed or attempted to commit a felony.**

23. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

**Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;**

**i) The intention to cause death;**

**ii) The intention to cause grievous bodily harm;**

**iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result**

of those acts.

***It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....***

My Lordships in the above case went on to say that: -

***In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -***

*There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...*

25. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

***We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.***

***In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.***

***In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.*** (emphasis added).

24. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. There is the evidence of a protracted land dispute between the family of the deceased and that of the father of the accused person. PW4 confirmed as such. PW1, PW2, PW3 and the police also confirmed the dispute. The denial by the accused person of the existence of that dispute goes a long way to prove that the accused person is well aware of its impact. It is on record that the family of the deceased and that of the father of the accused person have not known peace over the land. PW2 testified of how the accused person has been threatening the members of the family of the deceased over the land and that he is immensely feared and had vowed to kill someone over the land. PW2 has been a victim of such threats. I hence find and hold that there has been a longstanding land dispute between the family of the accused person and that of the deceased and the accused person has all along been out to ensure that no one else other than his family retains the land. The accused person therefore acted with an intention to clearly send that message across to the family of the deceased.

25. There is also the weapon used and the place of injury. The weapon was a sharp spear which caused a penetrating injury from the back running through to the lungs. The accused person knew that the spear was able to kill the deceased. Further, the accused person chose to spear the deceased on the back knowing for sure that the spear will penetrate and rapture the internal vital organs including the lungs.

26. By taking all the circumstances into account there is a clear manifestation of malice. The accused person pre-planned to kill the deceased. It is therefore this Court's finding that the prosecution likewise proved malice aforethought in this matter.

27. The prosecution having proved all the ingredients of the information of murder against the accused person leaves this Court with the only option of finding the accused person **Peter Chacha Mogaya** guilty of the murder of **Muruga Mwera Musungu** and so does. The accused person is hereby convicted under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

**DELIVERED, DATED and SIGNED at MIGORI this 26<sup>th</sup> day of July 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Muniko** Counsel for the accused person.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant