



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 74 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

LAWRENCE KIOGORA MBAABU.....1<sup>ST</sup> ACCUSED PERSON

DENNIS MWENDA JOSEPH.....2<sup>ND</sup> ACCUSED PERSON

JUDGEMENT

1. The accused persons herein have been charged with the offence of 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 the 4<sup>th</sup> day of October 2014 at Kathera Sub-location in Imenti South Sub-County within Meru County jointly murdered **Morris Mutwiri Mbaabu**.

3. During the Hearing the prosecution called four (4) witnesses. On 24<sup>th</sup> June 2019 this Court found that the prosecution had raised a prima facie case and therefore put the accused persons on their defence. The Defence called two (2) witnesses.

**Prosecution Case**

4. Pw1 **Geoffrey Muraguri**, a cousin to the deceased and the accused persons testified that he was attacked by one Patrick Gikunda who pelted stones and cut him on the head using a panga. He later reported the matter at Nkubu Police Station and was taken to hospital at Consolata Mission Hospital. He later learnt on the next day that the deceased had been killed. He told the Court that he has no idea who killed the deceased.

5. **Pw2 Gervasio Kinyanjui** testified that on the material date he was at his home with his grand-daughter, Edith Karambu and a person named Rosio when the accused persons came together with Patrick Kigunda came to his home and threatened to cut him with a panga. He testified that the 1<sup>st</sup> accused person cut him on the head with a panga whereas Patrick Kigunda proceeded to the home of Pw1. He also stated that the 2<sup>nd</sup> Accused persons was armed with bows and arrows. He later attended a private clinic where e was treated for his injuries.

6. In cross-examination it was his statement that he did not see the deceased on the material date and it was after he came home from the hospital that he learned of the death of the deceased. The deceased was not with the accused persons and he could not therefore know the caused the death of the deceased.

7. **Pw3 Dr. Vincent Mutunga** a Medical officer attached to Meru Teaching and Referral Hospital presented the Post-mortem report. It was his testimony that the cause of death was due to cardio respiratory failure secondary to massive haemothorax due to stab wounds on the chest. He presented the Post-mortem report marked as **Pexh 1**.

8. **Pw4 P.c. Charles Nyongesa** narrates the course of the investigation. It was his testimony that on the material date they received a report from the Area Chief and they then proceeded to the scene of the crime where they found the accused persons herein accosted by a crowd. They also found 3 arrows and a bow together with a blood stained panga which members of the public had grabbed from the accused persons. He told the court that the body of the deceased lay 50 metres from where the crowd was and equally had severe injuries on the head as well as stab wounds on the chest and back.

9. It was his testimony that they arrested the accused persons. He stated that in the cause of his investigations he established that the 1<sup>st</sup> accused person while armed with 2 pangas was seen attacking the deceased. Patrick Gikunda tried to intervene but his small and ring fingers were chopped off. The 2<sup>nd</sup> accused person while armed with bow and arrow started chasing the members of the public.

10. That the cause of the dispute was that the 1<sup>st</sup> accused person claimed that the deceased and his father had planned to kill him, a claim that was not established.

11. Pw4 produced the blood stained panga (noted by the court) as **Pexh2**. The bow and arrows as **Pexh 3a and 3b**.

12. In cross-examination he testified that he did not see a need to take the panga to the Government analyst because the accused persons were accosted with the same. He also testified that Patrick Kigunda escaped from the home after committing an offence. It was also his testimony in re-examination that he had bonded some witnesses e.g. one Mr. Kinyanjui who were at the compound but they escaped, warrants of arrest were issued but the witnesses could not be traced.

### **Defence Case**

13. **Dw1 Lawrence Kiogora** testified that the deceased is his elder brother and that they reside on a 5 acre farm together with **Pw1 and Pw2**. That on the material date he was just from the farm and was with the deceased resting at his home when he heard Patrick Mwenda shouting 'utakatwa'. That **John Mwenda, Son of PW1**, had caused his panga to cut him. He was cut on the right hand as he shielded himself and when he tried to run away he was cut on his right shoulder. He testified that he ran to the house and locked himself inside. That he was at first hesitant to open the door but when informed that it was the police he opened the same. It was then that he was informed that his brother had been killed.

14. It was his testimony that he was taken to the car and the deceased body was brought. He was beaten by the police, taken to Nkubu Police Station, then to Kanyakine Hospital where the cuts were treated.

15. In cross-examination he testified that he did not have a panga and that it is actually Patrick Kigunda who had the panga. He denied that it was the members of the public who apprehended them. He also told the court that the dispute was that Pw1 claims that two of his brothers are not born of his father although they are from the same mother. That Pw1 and Pw2 want Samson Mbaabu and Japheth Mworira to vacate the land because they are not from their father. He also stated that in the year 1995 Pw2 fought with his father and was convicted for the offence of assault causing grievous harm.

16. **Dw2 Dennis Mwenda** testified that he is a cousin of the deceased and that on the material date he was in the farm when he saw John Mwenda, Pw1 and Pw2 armed with pangas. That Pw2 shouted that he was the one they were looking for. He decided to run away and report the matter. He heard screams as he was running away. He also saw a police vehicle that was going towards their home. It was his testimony that he followed the vehicle back home where they found a crowd of people. He was later interrogated by the area chief who he informed that the three people were armed with pangas. He further told the court that it was while he was being interrogated that he was arrested by the police. He stated that in the police car he found the 1<sup>st</sup> accused person who had cuts all over the body and the deceased person.

17. He also told the court that he was surprised by his arrest and it was only on the 5<sup>th</sup> day when he was released that he became aware that there were bows and arrows. He denied having the same.

18. In cross-examination he restated that he did not know what happened since he found the body of the deceased in the car.

19. After the close of the defence case the Court directed parties to file written submissions. On 2nd October 2019 advocate for the accused person dispensed with filing of written submissions.

### **Analysis and Determination**

20. The accused is charged with the offence of murder. Section 203 defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. **Section 206** defines Malice aforethought as follows;

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

**See Republic v M O O [2019] Eklr**

21. The deceased Morris Muturi Mbaabu was confirmed to have died by both the prosecution witnesses as well as the accused persons. Pw3 presented the post-mortem report that stated that the cause of death was due to cardio respiratory failure secondary to massive haemothorax

due to stab wounds on the chest. The cause of the death was therefore proved.

22. As to whether the accused persons caused the death of the deceased. It was the testimony of Pw1 and pw2 that they were not aware what may have caused the death of the deceased. The deceased was a nephew to both PW1 and PW2. PW1 said it is Patrick Gikundi who cut him on the forehead with a panga and ran away. That after his son Julius Muriuki had taken him to hospital he came back and found that the deceased Morris Mutwiri Mbaabu had been killed but he didn't know who killed him. He said that the deceased and Patrick Gikunda who cut him are son to his brother Mbaabu. Then PW2 said that the 1<sup>st</sup> accused person went into his home running while armed with a panga and cut him on the head. He said the 1<sup>st</sup> accused went into his home in company of one Koome who ran into a different direction. That while Kiogora and Koome remained at his home Patrick proceeded to the home Geoffrey Murangithi. He also said he didn't know who killed the deceased although he heard it was Kiogora his nephew. He said he didn't see the deceased person on the material day. The chief of Kathera Location Samson Makaju who reported the murder to the police did not testify. PW4 PC Charles Nyongesa who investigated the offence herein, didn't also take statements from the people he found surrounding the 2 accused persons to establish whether they saw the accused person the offence or to testify on why they had apprehended them.

23. From the evidence of PW1 and PW2, there was a fight involving PW1, PW2 and their sons but the 3<sup>rd</sup> brother to PW1 and PW2 as well as their sons and nephews like Patrick Gikundi didn't come to testify and so the cause of this fight was not established. The witnesses who testified for the prosecution did not provide any evidence that linked the accused persons to the death of the deceased. It was also the evidence of the investigating officer that he was informed by the crowd that it was the accused persons who had caused the death of the deceased. The investigating officer however did not call any witnesses from the crowd who could testify in this regard. A crucial witness, **Patrick Gikunda**, who was adversely mentioned was bonded to testify but could not be traced. It was the investigating officer's testimony that he found a crowd at the scene of the crime who had apprehended the accused persons. None of the bonded witnesses from the crowd came to testify in Court.

24. In retrospect the accused persons in their defence testified that it is actually Pw1 and Pw2 together with the said Patrick Kigunda who attacked them together with the deceased. The prosecution did not also take the panga, bows and arrows to the Government Chemist for analysis. The 2<sup>nd</sup> accused person was categorical that he only saw the bows and arrows on the 5<sup>th</sup> day after he was released.

25. The prosecution therefore failed to prove that the unlawful act and/or omission of the accused persons caused the death of the deceased.

26. I therefore find that the prosecution failed to prove beyond reasonable doubt that the accused persons murdered the deceased herein. I therefore move to acquit both the accused persons under section 322 of the Criminal Procedure Code. There are hereby set at liberty unless lawfully held.

**HON A.ONG'INJO**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND SIGNED ON 31<sup>ST</sup> DAY OF OCTOBER 2019**

**IN THE PRESENCE OF:-**

CA:Kinoti

State:- Ms Mbithe for state

Accused 1: present in person

Accused 2: present in person

Mr Wamache Advocate for accused .

**Court:**

Copy of Judgement to be supplied to defence and state counsel

**HON A. ONG'INJO**

**JUDGE**