



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 63 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MKK.....ACCUSED

JUDGEMENT

1. **MKK** (“the accused”) herein has been charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya.**

2. The particulars of the offence are that on the 28th day of August, 2014 in Tigania East district within Meru County, murdered **MUNYA NABEA** (“the deceased”). The prosecution called six (6) witnesses to establish its case.

3. **PW1 Harun Mwiti** testified that on the material day at about 8.00PM he was riding his motorbike heading towards Maburwa when the light of his bike shone on two people who were fighting. He heard one of them say “*Martin unanidunga*”. He stopped about 20 meters away from them. He went to some shops about 80 meters away where he found Kithinji and Muthee whom he asked to accompany him to the scene. It took them less than three (3) minutes to get there. When they got there they found the accused crying saying “*Munya we umenichapa*”. The deceased was besides the road lying on his belly in a small ditch bleeding from the back. They apprehended the accused and tied him up. Muthee asked the accused why he had killed the deceased and he said that he had beaten him. The accused had the knife which he used to stab the deceased and it had blood stains.

4. **PW2 Peter Muthee** recalled that on the 28/8/2014 he was with Kithinji when **PW1** came and informed them that the accused had stabbed Munya. They went to the scene where they found the deceased in the ditch with a stab on the back and the accused standing beside him. He apprehended him and tied him with a rope. Kithinji got a knife from the accused’s pocket which was blood stained. When he spoke to the accused he told him that he was not the one who stabbed the deceased. They then handed the accused to the chief when he arrived at the scene.

5. **PW3 John Thuruane alias Koronya** told the court that on 28/08/2014 at 8.00PM he was at a bar in Maburwa. The bar attendant informed him that he wanted to close as he had heard that someone had died. They went together to the scene which was 80 meters away where they found many people at the scene and the accused had been tied up. Upon inquiry they were informed that the latter had stabbed the deceased. The accused was crying and said that he was not the one who stabbed the deceased. The body of the deceased which was lying in the ditch and bleeding from the back.

6. **PW4 James Kimathi** the assistant chief of Maburwa Sub – Location Tigania East Sub County testified that on 28/8/2014 he received a call from Elijah Kithamia who informed him that a person known as Munya Nabea had been stabbed with a knife. He went to the scene where he found Muthee, M, Kithinji and a group of people. The accused had been tied with a rope from the back and upon inquiry he was told that he had stabbed the deceased who was lying in the ditch and had a stab wound on his back. Before he took the accused to the police station, Kithinji handed over to him a blood stained knife which they recovered from the accused.

7. **PW5 No. 105320 PC Geoffrey Kamau Wanjiru** stated that he is the alternative investigation officer for the initial officer P.C James Aswani was transferred and could not attend court due to personal matters. He stated that on 28/08/2014 the assistant chief of Maburwa brought the accused for having stabbed the deceased who succumbed to his injuries. He brought the dagger which was blood stained which was recovered from the accused (produced as **Ex P1**). Also an empty dagger porch/ sheath was recovered from the accused’s waist (produced as **Ex P2**). In the company of other officers P. C. Aswani proceeded to the scene at around 10.00PM where he found the body of the deceased in a trench near a bridge lying in a pool of blood facing downwards. The body was taken to Meru Level 5 Hospital mortuary. The next morning they went to the scene and recovered one akala shoe, a brown marvin cap and a jacket which witnesses had seen the deceased in (produced as **Exh. 3, 4 and 5**).

8. It is alleged that an argument arose between the deceased and accused after they had taken several drinks at Riverside Bar. The deceased managed to run away but the accused pursued him and stabbed him on the back along the road. The sketch map shows the position of the body, the bridge and Riverside Bar (produced sketch map of the scene as **Ex P6**). Upon investigations by P.C Aswani he established that the

accused had stolen some pesticides from the deceased so that he could spray his tomatoes. It turned out to be the wrong pesticides as it burnt down all his tomatoes which the deceased was ridiculing him for. The accused got annoyed and attacked the deceased.

9. **PW6 Dr. Wendo Kubai** produced the post mortem report which was conducted by Dr. Guantai, *Ex P7*. The external appearance of the body of the deceased had a large stab wound at C6 on the right side of the back. Internally on the respiratory system there was haemothorax and severe descending aorta artery cut. On the head there was a small bruise on the left side of the chin. The cause of death was established as haemothorax secondary to severed thoracic aorta secondary to assault with sharp object.

10. When put on his defence the accused gave a sworn testimony. **DW1 MKK** testified that on 28/8/2014 he was with the deceased from 7.00PM taking traditional brew in a bar where they were alone. They then left to go home at which point they were totally drunk. When on their way the deceased started beating him with a panga he had of which he had not seen him with while they were drinking. He sustained injuries and was taken to hospital. He learnt the following day that he was in the police station and later taken to a hospital in Nairobi where he stayed for one and a half months. He affirmed that when he was arrested he was not 18 years as he was born in 1998 and had not taken his identity card yet (produced birth certificate as *Ex D1*). He stated that he had no weapon and did not plan to kill the deceased. They had not differed as the deceased was like his parent. He came to learn of the incident the next day.

11. At the close of defence case, the accused person advocate filed written submissions in which it was claimed that it had not been proved that the accused intended to kill the deceased. It was claimed that the accused was very drunk at the time that he committed the offence and that he only regained consciousness the following day. The appellant submitted that the prosecution has not proved their case beyond reasonable doubt. That at the time of the offence he was aged around 16 years and was a person of unsound mind. That in cases where the court is faced with a situation where malice aforethought or intention to kill is not proved the court substitutes the offence with that of manslaughter. That the court grants the accused the benefit of doubt. He relied on the case of Joel Kipkoech Langat v Republic Court of Appeal at Nakuru Cr. Appeal No. 266 of 2009 and Court of Appeal at Nairobi Joseph Karanja Kinuthia v Republic Cr. Appeal No. 122 of 2007.

12. The offence of murder is defined under **Section 203 of the Penal Code** as:-

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

Thus, the four ingredients that need to be proved by the prosecution beyond reasonable doubt in order to prove this charge are:

a) The fact of the death of the deceased

b) The cause of such death

c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

d) Proof that the said unlawful act or omission was committed with malice aforethought

13. The first and second issue is the fact and cause of death. From the evidence adduced is that the accused allegedly stabbed the deceased on the back. From the evidence of **PW1** and **PW2** is that when they arrived at the scene they found the deceased lying on his stomach with a stab wound on his back and the accused in possession of a blood stained dagger. **PW3** and **PW4** when they arrived at the scene they found the deceased with the wound on his back and the accused apprehended. Post mortem was conducted and according to the report produced by **PW6** is that the deceased died as a result of haemothorax secondary to severed thoracic aorta secondary to assault with sharp object. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved.

14. The third element that the prosecution needed to prove is that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, that is *actus reus*, that resulted in his death.

15. **PW1** stated that when he saw people fighting and heard someone say “*Martin unaidunga*”. He stopped and went and sought assistance from **PW2** and Kithinji who accompanied him to the scene. When they got there they found the deceased lying in a ditch with a stab wound on his back. The accused was at the scene and he was apprehended and found him in possession of the dagger which was blood stained. **PW4** came and took him to the police station together with a dagger and also he had the empty dagger pouch on his waist (*Ex P2*). **PW5** explained that upon investigations it was found that the accused and deceased did enter in a brawl. This was because the deceased ridiculed him for stealing his pesticides which the accused used on his tomatoes and they got burnt.

16. In his defence the accused told the court that they were totally drunk on that day and he cannot remember anything. During examination he stated that the deceased beat him with a panga and he sustained injuries and was taken to hospital. During cross-examination he stated that he could not tell if they were engaged in a fight because they were drunk. He cannot remember if he was found at the scene. He found himself at the police station the next day.

17. Whether the accused person was drunk or not and whether he was of unsound mind or not the fact that his unlawful action caused the death of the deceased cannot be disputed. The issue in dispute is whether the unlawful action on the part of the accused was actuated with malice aforethought. **Section 206 of the Penal Code** 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)

The injuries sustained by the deceased were fatal however, there is evidence that both the accused and the deceased were drunk and there is also evidence of diminished mental capacity on the part of the accused person as per Dr Mwikamba's report dated 12th September 2014 in which he established that the accused suffered from mild intellectual disability and he was therefore not fit to plead. By another report dated 8th December 2014, Dr Mwikamba again examined the accused in the presence of his mother and established that the accused had dropped out of class 5 the same year while 17 years old and that he suffered from mild intellectual disability and was therefore not fit to plead. A report from Mathari Hospital dated 16th June 2016 by Dr Mugo indicated that the accused was now capable of making his defence and he was returned to the court for this matter to go on. Subsequently, evidence was tendered from both the prosecution and the defence. The Court of Appeal in Leonard Mwangemi Munyasia v Republic [2015] eKLR had the following to say in relation to mental capacity of an accused person:

“Both section 12 aforesaid and the McNaughten Rules recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of Greene vs Queen, and who in turn reiterated Cicero who famously remarked that:-

“The thought of man is not triable, for the devil himself knoweth not the intendment of man”,

We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”

18. It is also instructive to note that the accused was presented to Meru District Hospital on 11th September 2014 where Dr. Kamere Elaine assessed his age as between 16 and 17 years. The accused person produced his birth certificate which shows that he was born on 5th August 2001. The accused person committed the offence when he was still a minor. The accused person herein is legally incapacitated both by age and unsoundness of mind.

That being the case it does not mean that a minor cannot be found guilty of murder. As stated in the case of J. M. K. v Republic [2015] eKLR the Court of Appeal stated :

“A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder.”

Age is necessary when it comes to sentencing of a minor but does not left off the hook an accused on the conviction of murder.

19. In consideration of the mental capacity of the accused person at the time that the offence was committed and in consideration of the age of the accused at the time the offence was committed this court cannot find that he had malice aforethought and therefore this court returns a verdict of guilty but insane for the offence of manslaughter under section 202 as read with section 205 of the Criminal procedure code.

HON A.ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2019

In the presence of:-

CA: Kinoti

State: Ms Mbithe for state

Mrs Kaume advocate for the accused.

Accused:- Present in person

HON A.ONG'INJO

JUDGE

Ms Mbithe:

I don't have records for the accused person.

Mrs Kaume Advocate for accused in Mitigation.

Accused regrets the offence and prays for leniency. The accused was a minor at the time the offence was committed and he was also suffering from mental incapacity. The court should invoke S. 191 of the Childrens Act in sentencing the accused.

Order:

Mention on 21st November 2019 for Victim Impact Statement and sentencing.

HON A.ONG'INJO

JUDGE