



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL CASE NO. 26 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JULIUS MUNGATHIA KABERIA**

**alias KUBWA.....ACCUSED PERSON**

**JUDGMENT**

1. The accused person herein has 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 13<sup>th</sup> Day of May 2016 at Mwangaza B area in Isiolo town within Isiolo County murdered **Andrew Thurania**.
3. During the hearing the prosecution called seven (7) witnesses.
4. **Pw1 M'ArithiM'Ituuru** testified that on the material date he was sitted on the gate to the entrance of the deceased house when the deceased came on a motor-bike carrying Kagwira and the wife of the accused. That the accused came a short while later.
5. It was his testimony that after a short while he heard screams from the house of the Kagwira. That later the accused person came out of the deceased house carrying a knife raised in his hand. He identified the knife's handle as white in colour. That the accused person ran to the tarmac where he was apprehended.
6. In cross-examination he testified that he never went to the deceased house to know what happened. He also testified that he knows the accused since he had sought to buy land from him.
7. **Pw2 John Mugambi Rintani** testified that on the material date he received a phone call from Florence Kanyiri who informed him that his brother (the deceased) had been stabbed. That he arrived and found his brother, lying on the airport fence and had been stabbed at his right side abdomen and breathing with difficulty. The police took the deceased to hospital. That they later followed the police vehicle which took them to the scene where they found a woman screaming and saying someone had been stabbed. It was his further testimony that the accused person was arrested in his motorcycle. He conceded that he never saw the accused person at the scene.
8. **Pw3 Ibrahim Mutea** testified that he was not within Meru nor within the scene of the crime. That on the material date he was informed that his brother was stabbed. That together with members of public and Florence Kanyiri they took the deceased to the hospital where he was taken to theatre where he died. That

the post-mortem report was done and the doctor said the stab touched the deceased kidney.

9. **Pw4 Boniface Miritu** testified that he was with the deceased on the material date at around 10:00 a.m. when he had sought to fix his phone at his shop. That the deceased however found customers to ferry using his motorcycle. That later on he received a call from Florence Kanyi who informed him that the deceased had been stabbed and his motorcycle stolen. That at the scene they found a woman who informed them that it is her husband who had stabbed the deceased. That they arrested a person who was riding the accused person motorcycle. That after a while the employee was called by the accused person and informed to take to him the motorcycle. That they followed the employee from afar. The accused person would later emerge from a construction site and board the motor cycle. That he intentionally hit the motor vehicle carrying the accused persons. The accused persons produced a knife and tried to stab him but he was stopped by the police.

10. It was his further testimony that he was present during the post-mortem and that the accused person was known to him during the arrest.

11. On cross-examination he stated that the woman who informed him that her husband had stabbed the deceased was referred to as Kagendo. He stated that the accused was not known to him at the time. He also did not know the owner of the house the accused came from to board the motorcycle.

12. **Pw5 Dr. Mohammed Abdi Kadir** testified that he is a medical Officer attached to Isiolo County Referral Hospital. That he is familiar to the hand writing of Dr. Robert Taabu who made the post-mortem Report. That the cause of death of the deceased was established as a stab wound on right iliac of abdomen. He produced the post-mortem report as exh 2.

13. **Pw6 Cpl Kennedy Ochieng** testified that he was stationed at Isiolo Airport Ap Camp. That he received a call from the member of the public that there was a person crying for help at the Airport fence at a place called Mwangaza. That he made arrangements and had the deceased taken to hospital. That after the deceased was taken hospital they went to the scene of the crime where they found the wife of the accused person who informed them that it was her husband who had stabbed the deceased.

14. It was his testimony that he arrested the wife of the accused who took them to where the accused stayed and later the employee of the accused called him and he directed them to where he was thus arresting him. That when they arrived at the station they searched the accused person and recovered a knife from his waist.

15. In cross-examination he stated that when they first arrested the accused they searched him and nothing was recovered. That when they conducted a further search at the station they recovered the knife.

16. **Pw7 Samson Mwituu, the investigating officer** testified that on 13/5/2016 he was instructed to record the statement of **Frida Kagendo And Cpl Kennedy Ochieng**. That Frida Kagendo reported that as they were in the house of Elizabeth Kagwira together with the deceased, the accused person came with a dagger and stabbed the deceased on the right side abdomen after which he ran away. That a search was mounted and the accused person was arrested and a knife recovered By Cpl Kennedy Ochieng who handed the same over to him. He produced the knife as **exh 1**.

17. It was also Pw7's testimony that from the evidence he gathered it was alleged that the deceased had an affair with Fridah Kagendo wife to the accused person. He testified that he not been able to avail Fridah Kagendo and Esther Kagwira.

18. **The accused person was put on his defence. He produced sworn testimony.** In his testimony he stated that on the material day he was constructing a house for a neighbour when he was called by Kagwira who wanted him to buy ballast from her. That she refused but later on went to Kagwira's house where he found the deceased with Kagendo drinking changaa. That Kagendo forced him to take changaa but he refused. She later held him by the collar so she pushed her aside the result of which she fell on Kagwira.

19. It was his further testimony that the deceased stood and slapped him and started beating him. That at the same time he saw the Kagendo take a knife and so he pushed the deceased to shield himself as a result of which the knife which Kagendo had aimed at him stabbed the deceased.

20. In cross-examination he testified that he had disagreed with Kagendo over the custody of their children on the same month. It was also his testimony that he left the Scene and went to do his business.

### **Analysis and Determination**

21. 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**

22. Regarding the fact of death, and the **cause of death** of the deceased, **Pw5** presented the Post-Mortem Report that stated that the cause of death was as a result of a stab wound on right iliac of abdomen. The cause of the death was therefore proved. All the prosecution witnesses confirmed the death of Andrew Thurania the deceased herein.

23. Whether or not the death was caused by **an unlawful act or omission the evidence of the prosecution is that the deceased died due to stab wound in the abdomen. The stab could not have been lawful and therefore this court finds that unlawful act resulted in the death of the deceased.**

24. Whether the unlawful act that resulted in the death of the deceased was committed by the accused the prosecution called the evidence of PW1 M'Arithi M'Ituoria who said that on 13<sup>th</sup> May, 2016 he saw the deceased carrying Kagendo and Kagwiria on his motor bike and entered into Kagwiria's house. He said that Kagendo was the wife of the accused person. That the accused person came and followed the three into Kagwiria's house and shortly there after he heard screams emanating from that house and the accused came out running while holding a knife with a white handle. Pw1 identified a knife in court as the one that the accused person was armed with. He said that the accused person was known to him as he bought land near by and said that the incident happened at 11.am. in the morning.

25. The accused person in his defence admitted having been in Kagwiria's house, but claimed that Pw1 was also inside the house and that pw1 is the one who handed over the knife to Kagendo to stab him but he pushed the deceased towards Kagendo in defence of himself and in the process Kagendo stabbed the deceased person. Although the prosecution did not call an eye witness to the incident inside Kagwiria's house, this court can not believe the accused person's defence for reasons he did not raise it with pw1

when pw1 testified in chief and also in cross- examination. Secondly, the accused person does not explain how he came to be in possession of the said knife if it is true that its Kagendo who used to stab the deceased person.

26. Pw4 testified that when he went to the scene of the offence, Kagendo told him that it was her husband the accused person herein who stabbed the deceased. Kagendo and the accused person's motor bike rider employee, led pw4 and pw6 together with other officers to arrest the accused. When the accused person was accosted by pw4 he produced the knife in an attempt to stab him but he was stopped by the police officer who were in a motor vehicle and he was arrested. Pw6 recovered the knife and handed it over to pw7 the investigating officer herein. In consideration that pw1 had no relationship with the accused and had no ill motive this court finds that his evidence that he run out of the house wielding a knife is sufficient to connect him to the murder of the deceased herein.

27. The accused person was arrested in the process of escaping from Isiolo where he had committed the offence. This court finds that his defence was an after thought and cannot be regarded. The prosecution have established beyond all reasonable doubt that the accused person committed the offence of murder. The accused is found guilty and is accordingly convicted under section 322 of the Criminal Procedure Code.

**HON A. ONG'INJO**

**JUDGE**

**JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 28<sup>TH</sup> DAY OF NOVEMBER 2019.**

**In the presence of : -**

C/A: Kinoti

State : Ms. Mbithi for state

ACCUSED :- present in person

Ms. Ntarangwi Advocate holding brief for Omari Advocate for accused.

**HON A. ONG'INJO**

**JUDGE**

**28/11/2019**

**Ms. Mbithi:** I pray for time to find out if accused has any records.

**Order:** Mention on 15<sup>th</sup> January, 2020 for records, mitigation and victim impact statement.

**HON. A. ONG'INJO**

**JUDGE**

**28/11/2019**