



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 113 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS-

ANTONY CHACHA MWITA..... ACCUSED

JUDGMENT

1. **Obadiah Chacha Getang'anyi** (hereinafter referred to as '**the deceased**') lost his life on 23/11/2014 just a day after he sustained a stab wound. The incident was reported to the police and on completion of investigations, the accused person herein, **Antony Chacha Mwita** was charged with the murder of the deceased. The particulars of the offence were that the accused person murdered the deceased on 22/11/2014 at Kegonga market in Kuria East District within Migori County.

2. The accused person denied the offence and a trial was ordered. The prosecution availed six witnesses in a bid to prove the charge. **PW1** was one **Joseph Kerario Mosama** who was a cousin brother to the deceased. **Sofia Robi Mwita** testified as **PW2**. A step-brother to the deceased testified as **PW3**. He was one **Harrison Chacha Paul**. One of the brothers to the deceased one **Peter Musama Getanginya** testified as **PW4** whereas **Dr. Ruwa Sammy Mwatela** testified as **PW5** and **No. 232903 Insp. Capis Otieno** who took over the conductor of the case from the initial investigating officer testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. I will now revisit the evidence as presented before Court. The prosecution's case was that in the morning of 22/11/2014 at around 08:00 O'clock the deceased and the accused person joined other people at the home of **PW2** at Kegonga town where they took the local brew commonly known as '*chang'aa*'. That the accused person preceded the arrival of the deceased. Shortly the wife of the deceased one **Catherine Gati** (not a witness) followed the deceased at the home of **PW2** and asked him about her phone. That the two picked a quarrel and **PW2**, with the help of other revelers, managed to get the deceased and her wife out of the main house where the drinking took place. That the two continued quarrelling outside the house and the accused person followed them. In a very heated argument, the accused person insisted that the deceased must give the wife her phone. The accused person then removed a knife and pointed it at the deceased while sternly warning him that were it not that he was his friend he would kill him.

4. **PW2** saw the wife of the deceased leave the homestead as she also proceeded to and prepared herself as to join other villagers in a circumcision ceremony that morning within the village. **PW2** left the deceased and the accused person outside her house still quarrelling and went inside her house. After a while **PW2** came out of her house and saw the deceased lying down. The accused person was not there. **PW2** however did not bother with the deceased as she rushed to the circumcision ceremony. While on her way, **PW2** met a person who told her that he was rushing to get a motor cycle to take the deceased to hospital as he had been stabbed by the accused person.

5. **PW1** learnt from one of the local *boda boda* riders that the deceased had been stabbed at **PW2**'s homestead and that he was being rushed to a hospital in Kegonga town. **PW1** rushed to the hospital and truly found the deceased lying on a bed with a stab wound around the stomach. That on medical advice **PW1** in company of one **Musa** (not a witness) took the deceased to Kehancha District Hospital. The deceased was briefly attended to and referred to the Migori County Referral Hospital where he was treated and discharged. Later that day they returned to their home in Kegonga.

6. When **PW1** went to see the deceased at his home the following day, he was shocked that the deceased was instead getting worse. **PW1** rushed the deceased back to Kehancha Hospital where he passed on while undergoing treatment. **PW1** organized and took the body to Migori County Referral Hospital mortuary for preservation and post-mortem examination.

7. **PW3** received the news of the death of the deceased at around 01:00 O'clock on 23/11/2014 as he was on his way home from a lunch-hour prayer meeting in one of the local churches. He received the news from one **Wambura** (not a witness). Since **PW3** knew the accused person well and as an Assistant Chief of their neighboring sub-location he rushed to and reported the matter to the District Commissioner's office, now the Deputy County Commissioner's office. **PW3** was advised to and reported the matter to the police.

8. It was PW4 who identified the body of the deceased and witnessed the post-mortem examination which was conducted by Dr. K'Ogutu who then prepared and signed a report. That was on 25/11/2014 at the Migori County Referral Hospital mortuary. PW5 produced the report in evidence on behalf of Dr. K'Ogutu whom they had worked together for around 7 years and he was well conversant with his handwriting and signature which he identified both in the report. PW5 stated that the deceased had sustained a deep penetrating stab wound measuring about 4cm just above the left posterior ilial spine running from down medially penetrating the peritrium. The wound was 10-13cm deep. Internally, there was a bruise on the chest wall around the 6th rib and the lower end of the aorta was nipped. The colon was also pierced. Two litres of blood were removed from the peritrium. The cause of death was opined to be shock due to internal hemorrhage due to an assault.

9. The body of the deceased was then released to the family and interred. The deceased had a wife and several children. All the police investigations were conducted by one **No. 46471 PC Mwangi Kimani** ('**the initial investigator**') who preferred the information of murder. The initial investigator arrested the accused person on 25/11/2014 at Mabera in what was described by PW6 as 'an attempt by the accused person to escape into Tanzania.' The accused person was later arraigned and charged before Court. It was PW6 who tendered the evidence of and produced the statement of the initial investigator who had long been transferred to Nairobi on medical grounds and was not able to attend Court. PW6 also produced as exhibits, various documents and some long trousers belonging to the accused person which were recovered by a police officer one **Daniel Kerario** (not a witness) inside the house of the deceased. Daniel Kerario was a close relative of the deceased. PW6 also produced the statements of the said Catherine Gati and Daniel Kerario in his evidence and with his evidence, the prosecution's case was closed.

10. At the close of the prosecution's case, the accused person was placed on his defence and he elected to give sworn evidence without calling any witnesses. The accused person denied committing the offence. Whereas he admitted meeting the deceased at PW2's homestead in the morning of 22/11/2014 and whom he referred to as his good friend he however explained that he had gone to see the deceased so as to collect his motor cycle from the deceased whom he had assisted to carry some goods the previous day. That when the deceased gave him the keys and before he left the accused person saw the wife to the deceased enter PW2's homestead while very drunk and demanding her phone from the deceased. That the accused person left and proceeded to Kehancha and then to Mabera to see his sick child and that he returned to his home at around 11:00am.

11. That he again went to Mabera the following day and found that his sick child was fairing on well but decided not to take the child home because it was raining. He purposed to do so the following day. That he returned to Mabera town the day which followed and as he was preparing to collect his child and return home, he was stopped by someone and suddenly police officers appeared and arrested him. He was taken to an AP Post at Mabera before he was taken to Ntamaru Police Station. That he was eventually charged with an offence he knows nothing about.

12. As to how his documents and clothes were found in the house of the deceased, the accused person explained that due to the good relationship he enjoyed with the deceased he used to give his motor cycle to the deceased severally and that the day before he met the deceased at PW2's homestead he had given the deceased his motor cycle to carry some goods and that the deceased had to remove his documents and clothes which were at the rear of the motor cycle so as to create space. Those were the items found in the house of the deceased. To him that was not a surprise. He further testified that he learnt of the death of the deceased on 23/11/2014 but could not go to the home of the deceased as he was attending to his sick child at Mabera town and that he was arrested before he could get time to condole the family of the deceased.

13. At the close of the defence case, Learned Counsel for the accused person **Mr. Muniko** and **Miss Owenga** Learned Senior Principal State Counsel urged the Court to consider the evidence on record and give its verdict.

14. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused person is guilty as charged.

15. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(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.

16. There is no doubt that the deceased died. PW1, PW3, PW4 and PW5 so confirmed. As to the cause of death, PW5 took this Court through the Post Mortem Report prepared by Dr. K'Ogutu and opined that the cause of death was shock due to internal hemorrhage due to an assault. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

17. On the second ingredient as to whether the accused person caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

18. The foregone principles were set out in the *locus classicus* case of *R -vs- Kipkering arap Koske & Another (supra)* and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic (2013) eKLR*, *Musii Tulo vs. Republic (2014) eKLR* among many others.

19. The Court of Appeal in the case of *Musii Tulo (supra)* in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus:

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

20. The accused person confirmed that he met the deceased in the morning of 22/11/2014 at PW2's homestead. Likewise, PW2 testified that both the deceased and the accused person were at her homestead on the day and time in issue. What is at variance is exactly what happened at the home of PW2 that morning. PW2 testified of a confrontation between the deceased and his wife as the wife demanded her phone from the deceased. In order not to inconvenience the other customers PW2 managed to get the two out of the house. As they were outside, the accused person also came out of the house and joined the confrontation by supporting the wife as against the deceased who was his good friend. PW2 witnessed the accused person draw a knife and vehemently urging the deceased to return the phone to her wife and warned that had it not been their friendship the accused person would kill the deceased that morning. As the wife to the deceased left, PW2 stated that she also entered into her house leaving the accused person and the deceased outside. That the two were still bitterly quarrelling and that when she came out of her house later she only saw the deceased lying down but did not bother to find out if there was anything wrong.

21. The accused person denies PW2's version of what happened that morning and takes the position that he never quareled with the deceased at all as they were very good friends. I intently watched PW2 as she testified. PW2 was not forthright in her evidence. At first PW2 stated that after the three quarelled he saw the deceased and the accused person leave her homestead together as the wife of the deceased also left using another route. When PW2 was reminded that she had initially recorded a statement with the police on the events of that morning she changed her version of what happened and stated that she actually saw the accused person draw a knife and warned the deceased and that the accused person vehemently quarelled the deceased as she left the two outside her house as he returned inside. PW2 appeared worried and the Learned State Counsel had to severally ask her to relax and confine herself to only what she witnessed. From the way PW2 conducted herself before Court I can only draw an inference that although PW2 witnessed all what happened at her home, she for whatever reasons, did not want to tell the Court what truly transpired.

22. Be that as it may, when PW2 came out of her house she did not see the accused person but only the deceased who was lying down. PW2 did not even care to find out if the deceased had any problem even though PW2 left him quarelling with the accused person who had drawn a knife. Shortly afterwards PW2 was told by someone whom she did not name that the deceased, who was then lying down in her homestead, had been stabbed by the accused person but again PW2 was never concerned with the matter. She proceeded to the ceremony. These events further vouch the said inference. It is on record that PW2 was closely related to both the accused person and the deceased.

23. By placing the evidence of the prosecution on one hand and that of the accused person on the other hand I am satisfied that it was the accused person who drew a knife at the deceased and that after PW2 and the wife of the deceased had left the two outside PW2's house, it was the accused person who went ahead and actualized his threats by stabbing the deceased with his knife. I say so on the logical inference that the accused person was the last person to be with the deceased shortly before the deceased was found lying down with the fatal stab wound and that the events in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder was therefore proved.

24. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **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: -

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

25. 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 The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55”. (emphasis added).

26. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

27. In this case no evidence was led as to what exactly prompted the accused person to join the wife of the deceased in demanding the phone from the deceased. I strongly believe that had PW2 been more open to the Court may be the position would be different. Now, that being the case, I find no evidence of malice aforethought in this case and the third ingredient of murder fails.

28. Afortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

29. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

30. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February, 2018.

A .C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Muniko, Counsel for the Accused person.

Monica Owenga, Senior Principal State Counsel.

Evelyne Nyauke – Court Assistant