



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 43 OF 2014

REPUBLICCOMPLAINANT

VERSUS

MICHAEL NTHINGE KISINA.....ACCUSED

JUDGEMENT

1. The accused herein is faced with the offence of murder contrary to section 203 of the Penal Code to which he pleaded not guilty. The particulars were that the accused on 23rd January, 2014 at Githumba sub location in Nzau within Makueni County jointly with others not before court murdered Musau Kang'au. The prosecution called a total of seven witnesses.

2. PW1, Jonathan Mwaka Musau's was on the material day at about 10.00 am at his house when he heard noise. He went out of his house and found that it was his neighbours that were screaming. There was Michael Nthinge, Musembi Mwanithe, Nzomo Mwombe, Peter Mwombe and Musau Kangau who were fighting. When Musau fell down, all the rest ran away. Musau Kangau was bleeding profusely from the head. PW1 went to inform his brother Mutula Musau about the incident. When they came back they found Musau Kangau dead. The two reported the matter to Kithimani Chief. The police came to the scene and took the body to Kilome Mortuary. He stated that the deceased was not armed but that the others were armed. The accused was said to have a stick and the rest shakers and that it was the accused that hit the deceased prior to his fall.

3. PW2, James Nzomo Musau testified that he received a call from PW1 informing him that their father had been injured and was dead. He went home the following day and a report was made to Emali Police Station. He was informed that the culprits were the accused, Musembi Mwombe, Nzomo Mwombe and Peter Mwombe. He later saw the accused but when he reported, he was advised by the police to find community policing to arrest him.

4. PW3, Antony Mwema Mwia received a call from the area chief who informed him that Musau had been killed. He decided to go the deceased's home. On his way there he met Emali OCS who he went with to collect Musau's body. He stated that they were accompanied by his sons Mutula Musau and Mwoke Musau.

5. PW4, Mbengwa Musau confirmed that she identified the deceased's body for postmortem purposes.

6. PW5, Boniface Mutula Musau stated that he was on the material day selling clothes when PW1 informed him that he left the accused, Nzomo Mwombe, Peter Mwombe and Musembi Mwombe assaulting the deceased. They went together to the scene and found him already dead. He stated that the deceased had cut wounds on the head. They reported to the area chief and to Kithimani Police. He went to the AP camp and informed the OCS Emali Police who collected the body. He stated that his family and that of the accused had a land dispute. That the accused's family used to trespass to their land. He however confirmed that he did not witness the alleged assault.

7. PW6, Chief Inspector Evans Radibo received a call from Kithimani assistant chief informing him that Meshack Kangau Musau was killed after he deterred them from passing through his land. That they were driving their herd of cattle to another land. He proceeded to the scene which was bushy with nappier grass. There he found the deceased's body lying facing downward. The deceased had a deep cut wound on the head and had bled. There was no murder weapon. He received information from the deceased's children among them Mwaka that he saw the four fighting the deceased. The accused was said to have been one of the assailants. He took the body to Kilombe mortuary where postmortem was conducted. One of the deceased's sons later saw the accused at Wote Market. The accused was arrested with the help of members of the public and was later charged. Other suspects were said to be at large.

8. PW7, Dr. Patrick Musyoki Kibwana stated that he found the deceased to have three (3) deep cut wounds on the scalp. One about 6 cm on the right side of the upper scalp, the second was about 8 cm on the left upper scalp and the third about 2cm on the left side of the lower scalp. That there was dried blood over the entire scalp, face hands and torso. On the limbs he stated he noted bruises on both knees, forearm and right shoulder. That there was an embleming wound on the left thigh used to put on prostafine the body. That the deceased muscles between the ribs and thorax above the chest and liver were pale indicating heavy bleeding. Bleeding was also said to have occurred on the head. He concluded that the deceased died of cardio pulmonary arrest secondary to severe head injury and bleeding.

9. The accused was found to have a case to answer and was put to trial. He gave sworn statement that a fight ensued because the deceased was unhappy that Peter had allowed cows to pass through the disputed land. That the deceased had problems with neighbours since he kept blocking the access road. He stated that PW1's evidence was false because he was not present when the incident took place and that the distance was far and he could not have seen him. He stated that his grandmother witnessed what transpired but he would not call her since she was old and that she was the one taking care of his children since his wife passed on.

10. It was the prosecution submission that the death of the deceased and the cause thereof was proved by PW4 and PW6. On whether it is the accused who committed the unlawful act which caused death and malice, it was submitted that PW1 saw the accused assault the deceased on the material day and that it was from the injuries he suffered therefrom, that he succumbed. It was further submitted that the injuries were so severe and were intended to cause death. That when the accused was placed on his defence, he tendered a defence of alibi but which did not raise reasonable doubt. The accused on the other hand tendered no evidence to support the alibi.

11. Section 203 of the Penal Code provides as follows:

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

It follows therefore that the prosecution must prove the following four ingredients beyond reasonable doubt:

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

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

12. The fact of death was confirmed by all the prosecution witnesses particularly, PW7 and I do not wish to rehearse their evidence with regard to death.

13. On the cause of death, PW7 who conducted the postmortem confirmed that the deceased died as a result of cardio pulmonary arrest secondary to severe head injury and bleeding which he attributed to the injuries he sustained i.e. three deep cut wounds on the scalp; 6 cm on right parietal scalp, 8cm on left parietal scalp, 2cm on left temporal scalp; bruises over both knees, forearms, right shoulder, 6 cm embalming wound left thigh and 10 cm transverse fracture mid parietal skull extending laterally to the right temporal skull.

14. What follows is whether or not the prosecution proved that the accused is culpable for the death of the deceased i.e. whether or not he died as a result of the accused action and whether or not such actions were done with an intention to murder the deceased. On this aspect the sole witness is PW1 who stated that he heard noises and on going out to check, saw the accused and others assaulting the deceased. He categorically stated that it is the accused that gave the deceased the last blow before he fell to the ground. The accused denied that evidence and stated that PW1 was not at the scene and that he was so far to see what had happened. It is worth noting that the accused does not deny being at the scene. He however only gives a story about extraneous issues. He does not deny that there ensued a fight but conveniently avoids to narrate how exactly it happened. Further, the injuries sustained by the deceased were as correctly submitted by the prosecution to be so grave that they point to an intention to cause death and if not so the accused knew well that such injuries inflicted were capable of causing death. See section 206 of the Penal code which 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) Intent to commit a felony...”

The evidence of the prosecution witnesses squarely placed the accused at the scene of crime and that he was identified by the witnesses as the one who struck the final blow that fell the deceased before escaping. The accused had a motive to kill the deceased owing to the deceased's refusal to grant an access road for purposes of grazing animals which angered the accused.

15. In the circumstances, I find that the defence case does not cast any shadow of doubt to the prosecution case. I am satisfied that the prosecution has proved its case beyond reasonable doubt. I hereby convict the accused person of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Dated and delivered at **Machakos** this **22nd** day of **March, 2018**.

D.K. KEMEI

JUDGE

In the presence of:-

Miss Mutuku - for the accused

Machogu - for the state

Kituva - Court Assistant