



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 19 OF 2011

REPUBLIC.....PROSECUTOR

-VS-

SILAS KILEMI NTHIKA.....ACCUSED

JUDGMENT

1. SILAS KILEMI NTHIKA (“the accused”) is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. It is alleged that on the 28th day of March 2011 at Mikinduri market, Mikinduri West Location, Tigania East District within Eastern province the accused murdered David Kimathi Nthika. The accused denied the charge with the prosecution calling a total of 7 witnesses.

2. **PW1 Abraham Ithalii** testified that on the material date at about 5PM, he was in the company of Kimathi David (“the deceased”), Zacharia, Kaume, Lacia and Ntoiti and others he could not remember at Makadara area of Mikinduri market selling Miraa. That while seated there selling miraa, he saw the accused emerge from the corner of a house where the accused had been hiding and suddenly slash the deceased with big long knife like locally known as C-Line.

3. That the accused hit the deceased on the head 3 times occasioning him deep injuries. Blood gushed out from the deep cuts on the deceased’s head. The accused took off but was pursued by members of the public and apprehended from a house he had entered and locked himself in. The accused was beaten by the members of the public who took him to the Mikinduri Police Station where he was re-arrested and placed in custody. **PW1** later learnt that the deceased had passed away. He had known both the accused as well as the deceased for about five years.

4. **Peter Ntoiti (PW2)**, testified that on 28th March 2011 at about 5PM, he was at Mikinduri market with PW1 and others selling Miraa. That he saw the accused emerge with a panga and cut the deceased on the head. It was his testimony that the cuts were very deep and that the deceased’s head opened into half and blood gushed out. That after the vicious attack, the accused run towards Thite area and entered someone’s house but was apprehended by members of the public who took him to Mikinduri Police Station. He later learnt that the deceased had passed on.

5. **Patrick Koome (PW3)** testified that on the material date and time, he was at the scene selling Miraa with PW1 and others. That suddenly, he heard some sound on his right and when he turned to look, he saw that the deceased had been cut and was bleeding profusely. He did not see the assailant but he later heard that the assailant had been apprehended by members of the public.

6. **PW4 Jacob Lacia**, a Miraa businessman at Mikinduri market testified that, on 28th March 2011, he was at Makadara area of Mikinduri market selling Miraa with his colleagues among them PW 1 and 2. That at about 5PM, he saw the accused cut the deceased with a panga on the head. The accused run away and entered someone’s house but was apprehended by members of the public and handed over to the police.

7. **PW5** was **Zachary Murungi** who told the court that on the material date and time, he was at the scene and saw the accused fatally assault the deceased. That after assaulting the deceased, the accused run away but was apprehended by members of the public who handed him over to the police.

8. **Dr. Kepha Chui (PW6)** a medical doctor at Meru Level 5 hospital testified and produced a post mortem report in respect of the deceased. According to the report, the body had 3 deep cuts on the scalp each measuring about 8 centimeters long and had a compound fracture of parietal bone (middle of the skull). The brain was found to be contused (tearing) and there was haematoma (blood clots) on the right celebra (brain). He formed the opinion that the cause of death was severe head injury.

9. **PW 7 CPL Ezekiel Kiome**, a police officer based at Mikinduri Police Station told the court that he took over the file from CPL Anthony Limboke. That according to the police file, on 28th March, 2011 at about 5:30 pm, members of the public brought a person to station with deep cuts on the head. The person was in bad shape and was taken to hospital. That after 20 minutes, members of the public brought the

accused to the station as the person who had assaulted the injured person.

10. PW7 further testified that members of the public also surrendered a blood stained panga to CPL Kimutai and the suspect was also taken to hospital. That investigations revealed that the accused and the deceased were brothers. That the deceased had harvested the accused's Miraa and had gone to sell the same at Mikinduri market. That it is then that the accused followed the deceased and fatally assaulted him.

11. In his defence, the accused gave sworn statement and called 2 witnesses. He told the court that the deceased was his brother and that on 28th March 2011, he woke up and went on with his Miraa business. At about 2pm, he decided to visit his farm where he found the deceased harvesting his Miraa. That when he inquired from the deceased why he was harvesting his Miraa, the deceased chased him away with a panga. The accused ran to his home but the deceased followed him there and threatened him with death.

12. This infuriated the accused so much that he entered his house, took a panga and followed the deceased from a distance and kept on asking him to return his Miraa. He went to Mikinduri Police Station to report the deceased but found the police busy. It is then that he headed to the market and cut the deceased twice with a panga on the head and left. He told the court that he had been angered by the deceased and provoked beyond control.

13. **DW2 Solomon Kaindio** testified that the accused was his cousin. He knew the accused and the deceased to be brothers. That the deceased used to steal things from the accused's house including Miraa. He admitted that he was not there when the incident occurred and that before the incident, the accused and the deceased were not in good terms. He told the court that the accused's father had brought a charm into the family which had made two brothers and a sister of the accused become mad.

14. **DW3 John Ntongai** testified that the deceased and the accused were his cousins. That there had been a pro-longed between the deceased and the accused brought about by frequent thefts of the accused's items by the deceased. That the accused's father had brought charms to the family which must have been the caused the incident.

15. In her submissions, Ms. Thibaru Learned Counsel for the accused submitted that the offence of murder had not been proved. That while it is not in dispute that the injuries inflicted by the accused on the deceased led to his death, there was no *mens rea* on the accused. That the accused had raised the defence of provocation which arose out of the deceased's regular theft of the accused's Miraa. That this was corroborated by the defence witnesses. In this regard, Counsel urged the court to find that the accused did not intend to kill the deceased and acquit him of the charge of murder and find him guilty of a lesser charge of manslaughter.

16. On his part, Mr. Namiti relied entirely on the evidence on record and submitted that *actus reus* had been admitted. On *mens rea*, Counsel submitted that the accused left his home armed with a panga and went to the market where he cut the deceased several times. **Section 208 of the Penal Code** did not apply in this case as there were differences over a long period of time and the accused had a period for resolution and to cool down his tempers.

17. I have carefully considered the evidence adduced by the prosecution and the defence of the accused. The issues for determination are; whether the accused caused the death of the deceased and if so, whether there was malice aforethought.

18. The accused is facing a charge of murder. The burden lies with the prosecution to prove its case against the accused on the standard of proof beyond any reasonable doubt. PW1, 2, 3, 4 and 5 were eye witnesses. They told the court that, on the material day at Mikinduri Market, they saw the accused attack the deceased with a panga with which he cut him several times on his head. The panga was produced in evidence and the postmortem report that was produced confirmed that the deceased had deep cuts on the head which resulted in his death.

19. In his defence the accused admitted that he is the one who inflicted injuries on the deceased from which he died. In this regard and as quite rightly submitted by Learned Counsel, *actus reus* is not in contention. It is the accused who caused the death of the deceased.

20. An important ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are set out under **Section 206 of the Penal Code**.

20. In his defence, the accused stated that he was provoked beyond control by the deceased who regularly used to steal his Miraa.

21. The defence of provocation is found in **Section 208 of the Penal Code** which provides as follows:-

“208(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit the assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.”

22. In the case of ***Tei S/O Kabaya v Republic [1961] 580 EA***, the court held:-

“In considering whether the provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”

22. The testimony of the accused was that the deceased had been stealing his Miraa. That on the material day, he found the deceased in his, the accused's farm harvesting Miraa. That the deceased was at the time armed with a panga. That the deceased chased and followed the accused all the way to the accused's home. That all this time the deceased was threatening to kill the accused and to continue harvesting his Miraa.

23. Up to that point, it could be said that the deceased had provoked the accused enough. However, the deceased then left and went to Mikinduri market to happily sell the Miraa he had harvested. The accused then picked a panga and followed the deceased from a distance all the way to the market where he assaulted the deceased when he found him selling the stolen Miraa. The Mikinduri market was said to be at some distance from where the deceased had seriously provoked the accused.

24. The accused even had the time to detour and go to Mikinduri Police Station to report but found the police officers to be busy. It is then that he followed the deceased to the Mikinduri market and fatally assaulted him. PW 1, 2, 3, 4 and 5 who were eye witnesses testified that the accused emerged and suddenly viciously attacked the deceased after which he took off. There was no evidence that there was any provocation while at the market place where the vicious attack took place.

25. Well, it may be true that the deceased was troublesome and was used to regularly steal from the accused. He may have provoked the accused when he harvested the latter's Miraa by force while threatening him with death. However, it is the opinion of this court that the accused had the time and opportunity to cool down and reflect on his actions when he followed the deceased all the way to the market. Further, he had the opportunity of reporting the deceased to the police but decided to viciously deal with the deceased himself. To the mind of this court, the defence of provocation cannot be available to the accused in the circumstances of this case.

26. As regards the allegation that the charms introduced in the family by the father of the accused was the cause of the incident, I find the same to hold no water at all. The accused was mentally examined and found to be mentally stable and there was no suggestion or evidence that he was of unstable mind when he committed the act.

27. Did the accused have the necessary malice aforethought at the time of the commission of the offence? In ***Daniel Muthee v Republic Case No. 218 OF 2005 (UR)***, the Court of Appeal held:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

28. The same reasoning was adopted in the case of ***Joseph Mwongera Rukaria v Republic [2013] eKLR*** where the court held:-

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

29. In the present case, the accused attacked the deceased with a sharp panga locally known as C-Line. He cut the deceased thrice on the head, a very sensitive part of the body. The accused person must have been aware that such an action would lead to death or cause grievous bodily harm to the deceased person. PW1, 2, 3, 4 and 5 testified that the cuts were very deep that the skull opened up. Based on the severity of the injuries, the accused must have had the intention to either kill the deceased or inflict grievous harm.

30. In view of the foregoing, I find that the prosecution proved malice aforethought within the meaning of ***Section 206 (a) of the Penal Code CAP 63 of the Laws of Kenya*** and that the accused had the requisite malice aforethought to support a charge of murder.

31. Accordingly, I find the accused, Silas Kilemi Nthika guilty of the murder of David Kimathi Nthika and convict him accordingly under ***Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya***.

DATED and **DELIVERED** at Meru this 21st day of March, 2018.

A. MABEYA

JUDGE