



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 35 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

SIMEON KUBAI MUGAMBI.....ACCUSED

J U D G M E N T

1. The Accused, **SIMEON KUBAI MUGAMBI**, has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence being that on the 31st March, 2007 at Baraimu village, Mbeu sub-location, in Tigania District within Eastern Province the accused murdered **JULIUS THURANIRA NG'OLUA**. He pleaded not guilty to the charge and the prosecution called seven witnesses to establish its case.

2. **PW1 Stephen Kirimi Mwiraria** testified that on 31st March, 2007 at around 2 pm, he and the deceased went to get the deceased's bicycle from the home of David Murerwa. They found Murerwa preparing tobacco outside and the accused was seated there. **PW1** and the deceased picked a help Murerwa with the tying of tobacco when the accused started to quarrel with them for having passed through his Land. To get to Murerwa's place, the two had used a foot path which passes through the accused's place and which was being used by neighbours.

3. A fight then broke out between the accused and deceased started to fight but Murerwa separated them. The accused left and returned shortly from the bananas plantation with a knife with which he stabbed the deceased on the left side of the head and away to his home. The deceased was taken to Kiburine hospital and the incident reported at Kiburine Police station. The deceased was treated and discharged but died later that night at his home.

4. **PW2 Moses Kobia Mugambi** recalled how he heard noises from his neighbour's home on the material day at about 2.30pm. When he went to check, he found **PW1**, the deceased, accused, Murerwa and Nancy Kagendo. He heard the accused question **PW1** and the deceased why they had passed through his farm for that path had been closed. He returned to his home but shortly thereafter heard the noises from Murerwa's home became louder. When he returned, he saw people chasing the accused and the deceased had a wound which was bleeding on the left side near the ear. They took the deceased to hospital but he learnt the following day that the deceased had died.

5. **PW3 Jacob Ngolua**, is the father of the deceased. On the material day, he was informed that his son had been stabbed. He went to the hospital and found that the deceased had been treated and they took him home. However, he was called the following morning by **PW1** who informed him that the deceased had died.

6. **PW4 David Murerwa Michubu** testified that on 31st March, 2007, he was at his home with the accused when **PW1** and the deceased came to collect a bicycle which his daughter had come with. The accused started quarrelling **PW1** and the deceased for having used a foot path which passes through his home. He sent the accused away. However, shortly thereafter the accused emerged from a banana plantation, removed a knife from his trouser, stabbed the deceased and run away. They chased him to his home but the accused's father told him to take a panga and defend himself. They returned and took the deceased to Mbeu Health Centre.

7. **PW5 No.218460 Chief Inspector Joseph Mutemi Kitheka** was at the time in charge of Nchiru Police Station. He told the court that on the material day, the deceased made a report at the station and went to Mbeu dispensary where he was treated and released. The following day, **PW3** reported that the deceased had died at home. He went to the house of the deceased and found the body lying on the bed. He took statements of witnesses. He was later transferred from the station and that the deceased was arrested by officers from Mbeu Police Post.

8. **PW6 Doctor Brian Bett** and **Dr. Mwangi Maria** appeared but could not produce the postmortem report since they were not the makers thereof. **PW7 Dr. Victoria Kanana Kimonye** produced the post-mortem report that had been prepared by Dr. Samuel Ogombe. The report showed that on examination, the body had a deep wound on the head 4cm long stitched. It passed through the skull to brain open fracture of the temporal bone about 3cm. There was haematoma around the tract at the wound. The cause of death was opined to be the intra-cranial haemorrhage secondary to stab wound.

9. When placed on his defence, the accused gave sworn testimony and called one witness. **DW1 Simon Kubai Mugambi**, the accused, testified that he knew the deceased as his neighbour. That on 31st March, 2007, he left his home at about 1pm and went to the home of **PW4** to assist in preparing tobacco. The deceased together with **PW1** came through his land and he asked them why they had trespassed. The deceased insisted that he will continue to trespass and they started quarrelling.

10. He further testified that while quarreling, the deceased had a knife which injured him on the left side of the head by mistake. That he together with **PW1, PW2 and PW4** helped to take the deceased to hospital. They passed through Tigania police station where the deceased was given a P3 form to go to hospital with. They took him to Mbeu hospital where he was stitched and told that he will be ok and discharged. The following day he heard that the deceased had died at his home. He was arrested on the allegation that he was the one who caused the deceased's death.

11. **DW2 James Mathenge**, the acting clinical officer in charge of Mbeu sub-county hospital produced copies of the treatment notes (DExh1) which were made by Mr. Githaiga who saw the deceased on the material date. That the notes are shown to have been made on 11.05.2007 but there was another date of 31.03.2017 and both were of a different handwriting. That original notes had been given to the police during investigations. He testified that the patient presented a history of having been assaulted by a person well known to him. He was examined and found to have a stab wound on the left temporal legion. Although it was swollen, there was no active bleeding. He was treated with tetanus capsules, analgesic injection, and had the wound stitched. The patient was to return for removal of stitches on 6. 04. 2007. He clarified Mbeu dispensary is the same as Kiburine Hospital.

12. In his submissions Mr. Namiti Learned Counsel for the state submitted that the ingredients of murder had been proved beyond reasonable doubt through the direct evidence of **PW1** and **PW2** who were eye witnesses. That the defence of the accused did not displace the strong evidence of the prosecution. He urged that the accused be found guilty of murder.

13. 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.”

14. In **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR** it was held of murder that:-

“This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-

1. The fact of the death of the deceased.

2. The cause of such death.

3. 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

4. Proof that the said unlawful act or omission was committed with malice aforethought.”

15. With regard to the first and second issue, on the fact and cause of death of the deceased, **PW1, PW2 and PW3** testified that after the deceased was injured on 31st March, 2007, they rushed him to Mbeu dispensary where he was treated and discharged. He went back home where he died at night. The following day the police were called and removed the body to the mortuary.

16. On the other hand, **PW7 Dr. Victoria Kanana** produced the post mortem report and told the Court that on 13th April, 2007 at the Meru District Mortuary, Dr. Samuel Ogombe carried out post-mortem on the body of Julius Thurania. That on examination, there was a deep wound on the head, 4cm anterior to the left ear. That large subdural haematoma on the wound and he concluded that the cause of death was intracranial haemorrhage (subdural) secondary to a stab wound. Accordingly, the death of the deceased was proved and the death was a result of a stab wound.

17. On the third issue, it must be proved 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*. In this regard, the prosecution must adduce evidence to prove that it is the unlawful act or omission of the accused that resulted in the death of the deceased.

18. The record shows that, on that fateful day, **PW1** and the deceased went to the home of **PW4** to collect a bicycle. They found the accused there and a quarrel arose between the deceased and the accused regarding the trespass by the deceased and **PW1** over the accused's land. **PW1 and PW4** told the court that a fight broke out between the accused and the deceased but they were separated by **PW4**. The accused thereupon went away but returned shortly thereafter. He emerged from the direction of a banana plantation, removed a knife from his trouser and stabbed the deceased on the left side of the head near to the ear. **PW1 and PW4** corroborated each other on how the incident occurred. **PW7** told the court that the stab wound on the head near the left ear was the cause of the demise of the deceased.

19. This was further corroborated by the evidence of **PW5 Chief Inspector Joseph Mutemi** who stated that the deceased himself went to Nchiru Police Station and reported the incident.

20. On the other hand, the accused testified that during the fight, the deceased had a knife and he tried to hold the deceased's hand that had the knife but it stabbed him by mistake. That he, **PW4 David Murerwa, PW2 Moses Kobia and PW1 Stephen Kirimi** reported the matter to the police and escorted the deceased to hospital.

21. **PW4** who witnessed the incident told the court that, he clearly saw the accused remove the knife from his trouser and stab the deceased with it. His testimony was consistent and remained unshaken. He denied the suggestion that the accused was trying to cut a banana but by mistake cut the deceased with the knife. Further, the degree of injury, a deep wound that extended 3cm through to the brain, cannot be a mistaken cut by a knife during a scuffle but a wound consistent with a stab. The accused's own brother **PW2** mentioned the people who accompanied the deceased to hospital and the accused was not one of them. The accused's evidence does not discharge the strong evidence of the prosecution on how the incident took place.

22. Accordingly, this court finds that the deceased met his death as a result of an unlawful act on the part of the accused.

23. Did the accused have the necessary 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)”

23 **PW1** and **PW4** stated that after the accused and deceased had quarreled and fought, the accused went to his home came back and stabbed the deceased on the head. The conduct of the accused was consistent with an intention of causing harm on the deceased. He left the place they had fought, came back and stabbed the deceased on the head near the left ear. He attacked the deceased who was unarmed with a sharp and dangerous object. His intention was to cause him grievous harm. The accused must have been aware that such would lead to grievous bodily harm since the head is a sensitive part of the body.

24. In **Republic v O M G [2017] eKLR** it was held that:-

“In the present case, the accused hit the deceased twice with a fork jembe at the back of her head, a very sensitive part of the body. The accused must have been aware that such an act could lead to death or cause grievous bodily harm to the deceased.”

25. In this regard, I am satisfied that the accused had the requisite malice aforethought in causing the death of the deceased.

26. In this regard, the prosecution has discharged its burden and has proved beyond reasonable doubt that, with malice aforethought, the accused unlawfully caused the death of the deceased.

27. Consequently, I find the accused Simeon Kubai Mugambi guilty of the murder of Julius Thurania Ng'olua and convict him accordingly.

DATED and **DELIVERED** at Meru 12th April, 2018.

A. MABEYA

JUDGE