



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 28 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILLIAM KARUTI ALOISE.....ACCUSED**

**J U D G M E N T**

1. **WILLIAM KARUTI ALOISE** (“the accused”) has been 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*. The particulars of the offence are that on the 9<sup>th</sup> February, 2013 at Nkinyanga Location in Igembe South District within Meru County, the accused murdered **ALOISE MWAMBIA NTOIMUNYA** (“the deceased”). The prosecution called five witnesses to prove its case.

2. **PW1 Paul Muthee** told the court that on 10<sup>th</sup> February, 2013, he was guarding miraa belonging to the deceased because thieves had been invading it. At about midnight, the accused came and banged the gate with a panga saying in Kiswahili “*Hapa ni kwangu*”. The witness was inside the miraa farm about 15 meters away from the gate when he heard the noise and the accused’s voice. Shortly afterwards, he heard screams from Sofia Kanyiri, a daughter of the deceased. He rushed to where she was and she told him that the accused was beating their father.

3. The two then proceeded to the deceased’s house. They saw the accused come out of the deceased’s house. The accused was about 5 meters away. The witness flashed a torch at the accused and saw that he had a panga and he was wearing a red jumper and brownish trouser. That the accused said that whenever he went back, he would kill and then he ran off. On entering the house, **PW1** found that the deceased had 3 deep cuts on his forehead. Family members, Francis Mwenda, Wilson Mwititi and Julius Kinyua came. He then informed Gerald Muchiku (**PW2**) to get somebody to assist in taking the deceased to hospital because he was guarding the miraa. Gerald and Mwititi took the deceased to Gerald’s house. The next day he heard that the deceased had died. He knew the accused as a neighbor and related very well with the deceased but the accused used to steal the miraa he was guarding.

4. **PW2 Gerald Muchiku**, a son to the deceased and elder brother to the accused, told the court that on 10<sup>th</sup> February, 2013 at about midnight, his sister Sofia and **PW1** came to call him. He went to his father’s house and found him vomiting and bleeding. He had been cut on the head and hit on the ribs. The deceased told him that the accused had assaulted him. They cleaned him to take him to hospital. When they reached his house they noticed that he had died.

5. **PW2** told the court that he was with Sofia, Paul, Mwititi (his nephew) and Stephen (brother to Mwititi). They left the body at home and reported the matter at Maua Police Station. The accused was later arrested by the public. Before that day the accused and deceased were always in disagreement. In cross-examination, he stated that it is **PW1** who told him that the accused had assaulted the deceased.

6. **PW3 Francis Mwititi** testified that on 10<sup>th</sup> February, 2013 at about 5 pm, he was called by Sofia who told him that he should go to **PW2**’s house and help take the deceased to hospital. He went there and found that the deceased had been cut and was bleeding. That the deceased said that the accused was the one who cut him and broke his nose.

7. **PW4 NO. 48469 PC Peter Muli** was the investigating officer. He told the court that on 11<sup>th</sup> February, 2013 at about 2.00 am, three men came to Maua Police Station to report that a relative had beaten the father and killed him. He accompanied other police officers to the scene. At the scene, they found the body in the garden near a house. The body had injuries on the head inflicted by a sharp object. He arrested the accused after he was brought in by members of the public.

8. His investigations revealed that the accused is a son of the deceased and they often used to quarrel. On the material day, the accused had been drinking and went to demand money from the deceased and he cut him with a panga. He noted that the accused was drunk when he was brought in by members of the public.

9. **PW5** was **Dr. Kenneth Muthuuri** of Meru Level 5 Hospital. He produced the postmortem report of the deceased. The body had a swollen face with deep lacerations on the left frontal region of the head. Internally, the head had a fracture of the frontal bone of the left side. The pathologist formed the opinion that the cause of death was severe head injury secondary to a blunt force on the head.

10. When placed on his defence, the accused gave sworn testimony. He testified that he was a student at Father Soldati Teachers Training College in Maua. That on 9<sup>th</sup> February, 2013 he had been sent home to go and collect fees. He got leave out at 4pm and went home. When he reached home, he found the deceased, Sofia Kagwiria and her child B M. He told them he was expected to clear fees by the following Monday. He has elder brothers who had been shown their own land by the deceased with miraa. His fee was from his own portion. His elder brother (**PW2**) used to harvest his miraa. He reported to the chief and was told to get someone to look after it and he got Elias Karuti.

11. On 10<sup>th</sup> February, 2015, in the morning hours, his father told him not to bring anyone from outside to look after his miraa. The deceased wanted **PW2** to be the one looking after the miraa yet he was one of those stealing it. He quarreled with the deceased. He went to the market and stayed there up to 8.30pm when he returned home drunk. Reaching home, he heard screams and heard his sister calling **PW1** and telling him that someone had entered the home and had killed their father. **PW1** had a spot light and saw him. When he got there they informed him that his father had been killed. He did not reach where his father was lying. They told him to explain what had happened as he had quarreled with the deceased that morning. They then began to beat him. He did not have any grudge with **PW1** or Sofia but with **PW2**. He denied killing his father.

12. 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.”*

13. In Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR the court held 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.”*

14. With regard to the fact and cause of death of the deceased, **PW1**, **PW2** and **PW3** testified that, after the deceased was injured on the night of 10<sup>th</sup> February, 2013, they tried to take him to hospital but he died on the way. They took the body back home. On 11<sup>th</sup> February 2013, **PW4** went to **PW2**'s home and removed the body to the mortuary.

15. The post mortem report produced as **PEXh1** showed that the body had swollen facial fractures, deep laceration on the left frontal/forehead region. The conclusion was that the cause of death was severe head injury due to a blunt force to the head. Accordingly, the fact and cause of death of the deceased was proved to the required standard.

16. On the third issue, the prosecution must prove 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.

17. The record shows that, on that fateful day, the deceased and accused had an argument in the morning. Later that night, **PW1** heard the accused bang the gate while he was in the miraa plantation guarding Miraa. Then he later heard screams from one Sofia Kanyiri. When he went there, Sofia told him that the accused was beating the deceased. They walked to the deceased's house which was within the same compound about 15 meters away. **PW1** flashed his torch at the accused who was coming out of the deceased's house and he had a panga in his hand. That the accused told them that whenever he went back he would kill. When **PW1** went inside the house, he found the deceased had three deep cuts on his forehead.

18. **PW2** was called to assist to take the deceased to hospital. He told the court that the deceased told him that it was the accused who cut him. The accused testified that he did not kill the deceased. On 10<sup>th</sup> February, 2013 he went home at around 8.30pm after having taken some alcohol. He heard screams from Sofia calling **PW1** saying that someone had entered the house and harmed the deceased.

19. The information laid against the accused state that the offence was committed on 9<sup>th</sup> February, 2013. However, the testimonies of all the prosecution witnesses was that, the offence occurred on 10<sup>th</sup> February, 2013. The prosecution did not amend the information despite the glaring discrepancy.

20. **PW1** told the court that on the material night, after responding to an alarm by one Sofia Kanyiri, he saw the accused emerging from the deceased's house with a panga/knife. The weapon did not have any blood stains on it. **PW1** said he flashed his torch to see the accused. It is not clear, whether the murder weapon was recovered and if not why. This is important considering that the accused is said to have been arrested immediately after the act.

21. Further to the foregoing and most important, the post-mortem report concluded that the cause of death was severe head injury due to a blunt force to the head. It is not clear how a knife or panga can exert blunt force on a human body. It is expected that, the application of force by a knife or panga would result in sharp injuries and not blunt. It is therefore doubtful if the kind of weapon the accused is alleged to have used would have caused the kind of injuries the body was found to have sustained.

22. It is clear that the prosecution relied on circumstantial evidence and a dying declaration. It was circumstantial in that, no one saw the accused assault the deceased. Circumstantial evidence is as good as any other evidence. However, it has been held by the Court of Appeal that such evidence must not only be consistent but must unerringly point towards the guilt of an accused and no one else. ***See the case of Kariuki Karanja v Republic [1986] KLR.***

23. In the present case, the evidence does not unerringly point towards the guilt of the accused. The weapon which the accused is alleged to have used could not be the one that caused the injuries found on the deceased as per the post-mortem report.

24. The other issue is the dying declaration. **PW2** stated ***“We prepared (washed) him to take to hospital. He said he had been cut by William”.*** On the other hand, **PW3** testified that ***“I was called by Sofia who told me that I should go help take the fellow to hospital as he was cut. I went with her. I found the old man. He said Karuti had cut him. I got in the house of Gerald Micheku, with nephew to take him to hospital, he died. He said Karuti cut him and broke his nose. I was with Sophia, Gerald Muchiku”.***

25. From the evidence of **PW2**, the deceased made the dying declaration in the presence of **PW1, PW2, PW3** and one Sofia. It should be recalled that despite his lengthy testimony, **PW1** did not mention this fact. **PW1** stated that the deceased spoke only once. If that be the case, why then were the words allegedly spoken by him were different as heard by **PW2 and PW3?**

26. While under **section 33 of the Evidence Act Cap 80 Laws of Kenya**, a dying declaration is admissible in evidence, such evidence must be admitted with caution considering that the maker is usually not present to be cross-examined on it and further, the circumstances in which such declaration are made are ordinarily not in the usual cause of business.

27. From the foregoing, I reject the dying declaration as evidence in this case.

28. Sofia Kanyiri is said to have been the one who alerted **PW1** about the alleged assault by the accused on the deceased. She was there throughout the episode. She was present when **PW1** went to the deceased's house. She was present when the deceased allegedly made a dying declaration to **PW1, PW2 and PW3**. This was a very crucial witness. Why she was not called to testify. There being no explanation, the court has no other way but to make adverse inference that if she had been called to testify, she would have given adverse evidence against the prosecution.

29. There is also the defence of the accused. He stated that he came that night and heard the alarm by Sofia. When he neared the scene, he saw **PW1** and the others. He asked him to explain what had happened to the deceased because they had quarrelled that morning. It is when that they set upon him and had him arrested.

30. From the foregoing, I am not satisfied that the prosecution has proved its case beyond reasonable doubt. There is doubt as to who and what caused the death of the deceased. I will resolve that doubt in favour of the accused.

31. Accordingly, I find the accused not guilty of the murder of Aloise Mwambia Ntoimunya and I acquit him of the charge accordingly. He is to be released from custody forthwith unless otherwise lawfully held.

**DATED and DELIVERED at Meru this 27<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**