



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 8 OF 2016

REPUBLIC PROSECUTOR

VERSUS

MOSES MUTEMBEI MUREITHI ACCUSED

J U D G M E N T

1. **MOSES MUTEMBEI MUREITHI** (Accused herein) is charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars as per the information presented to this court are that on 7th October 2016 at Kabaliange village Kamonka Mutino Location within Tharaka Nithi County the accused herein murdered Mary Nthama (deceased). The accused denied committing the offence and the case went for trial where the prosecution presented seven witnesses.

2. The deceased's husband **JULIUS MUTHENGI MWENDA** (PW1) told this court that he was with the deceased on the material date on 7th October, 2016 at their matrimonial home and that the deceased went for "**chama**" meeting at around 5 pm within Kamonka village at a public place known as Mukuu. He later heard from his son R M that his wife had been killed at a neighbour's house, the house of the accused herein. He told this court that he called the Assistant Chief on mobile phone before heading to the accused's homestead where he found his wife, (the deceased herein) lying down dead. According to him, the deceased had been hit with a huge stone on the head crushing it in the process. He identified the stone (weighing over 10kgs) which was marked and later produced as P.Exhibit 1 by the investigating officer C.I.P Juma Wamire (PW7).

3. The husband (PW1) further told this court that he suspected that the huge stone was the murder weapon as it had blood stains and was next to where the deceased lay with her eyes popping out and teeth broken as a result of the impact of the stone. He further informed this court that the accused lived around 100 metres away from them.

4. M K (PW2), a witness aged 13 years old told this court that she was at home on 7th October, 2016 at around 6 pm when her father (the accused herein) picked a quarrel with her mother Evangeline Kajoka (PW4) because she had reported home late from church. The witness told this court that the accused picked a stick in an attempt to beat her mother but the mother took off to a neighbour's house for safety. According to the minor, the deceased shortly thereafter arrived and inquired whether her mother was at home and it was at that point that the accused stood up and slapped her as a result of which she fell down. She added that the accused then kicked her in the stomach as she together with other children screamed for help and that their father (accused herein) chased them away and as they ran for cover she saw her father (accused) take a huge stone and threw it on the deceased who was then lying down. She added that she clearly saw her father throw the stone which was used as a cooking stone outside their house and that the stone hit the head of the deceased near the ear as she lay down after being slapped and kicked in the stomach.

5. The evidence of M K (PW2) was corroborated by J M (PW3) another child belonging to the accused who told this court that he was also at the house at the material time. He told this court that he also saw his father (accused) slapping the deceased before descending on her with kicks as she fell down backwards. He also stated that he saw his father (accused) take a huge stone outside their home, lifted it up before aiming it down at the head of the deceased who was then lying down.

6. Evangeline Kajoka (PW3), the wife of the deceased and mother of M K (PW2) and J M (PW3) testified and told the court this court that on the material date (7th October, 2016) she was from church meeting and I arrived at her home at around 6 pm when her husband (accused) picked a quarrel and attempted to beat her forcing her to run for safety at her brother in law's house nearby. She told this court that even before she settled down she heard screams from her children whom she had left at home. She clarified that she had left behind her children namely J M (PW3), M K (PW2) N K (PW6) and two other young ones and that she saw the children running fast following her as they screamed. She further stated that when the children reached where she was she inquired what had happened and that the children appeared so shocked and that J M (PW3) told her what had happened. She later in the company of two women named Gatune and Doreen Kawira went back home and confirmed that indeed the deceased had been hit on the head with a huge stone which was beside her head. According to her the deceased lay dead as her head had been crashed causing her eyes pop out of their sockets and her face looked disfigured. She further identified the stone (P.Exhibit 1) and told this court that the stone was one of the three cooking stones she used for cooking outside her house. According to her the fragments of the stone were on the smashed head of the deceased when she arrived. She added that the accused was not present at the scene when they arrived to find out what had taken place.

7. Dr. Justus Kitili (PW5) the doctor who performed postmortem examination gave his evidence and told this court that he carried out post mortem examination on 13th October, 2016 on the body of the deceased herein at Chuka hospital mortuary. His findings were that externally there was blood in the mouth, nostrils and ears with the left eye damaged. Internally, he noted depressed skull fracture on the base of the skull and blood clot (subdural hematoma) on the frontal part of the brains. His opinion on the probable cause of death was severe head injury inflicted by a blunt object.

8. N K (PW6) a child to the accused also gave evidence and largely corroborated the evidence given by her siblings M K (PW2) and J M (PW3). She added that on the material date and time her father (the accused) came home and when he noticed that their mother had not arrived home, he threatened that he was going to kill her and that when her mother (PW4) arrived, the accused chased her and that her mother managed to run away to their uncle's home for safety. It was her evidence that shortly thereafter the deceased arrived inquiring about their mother and it was at that point that the accused rudely told her off telling her that he did not want *"evil spirits"* in his compound before descending on her with a slap and kicks as she fell down. She also saw her father hit the deceased on the head with a huge stone before running away together with her siblings.

9. The investigating officer CIP Juma Wawire (PW7) told this court that he received a report about the murder from the Assistant Chief who called him on his mobile phone on at around 10 pm on the material date. He told this court that he together with other officers proceeded to the scene where they found deceased person lying down in front of the home of the accused. According to him part of the deceased's head had been smashed by a stone which he recovered at the scene. He told this court that the stone was blood stained and he took it as an exhibit because he had reason to believe that it was the murder weapon. He tendered the round stone weighing about 15 Kgs as P. Exhibit 1. He further added that they did not get the accused at his house as he had ran away but that on 15th October, 2016 he was called by OCS Marimanti Police Station that the suspect (accused) had been arrested. He went for him and charged him with the offence of murder. According to him, the accused in his statement admitted that he killed the deceased.

10. When placed on his defence, the accused denied the offence stating via unsworn statement the deceased died due to back luck. He told this court that on the material day he had gone to help a neighbour with construction of a house where he smeared mud on the walls and that later they went for a drink before returning home at around 5 pm. He further added that he found his children alone at home who told him that their mother had gone for a church meeting. He told this court that the wife later arrived and he asked her to wash his muddy clothes and inquired why she came home late. According to him a quarrel ensued before he told her to disappear which she did. He further told this court that as he prepared to leave the homestead, he saw the deceased looking annoyed. According to him, the deceased was annoyed because he had sent his wife away thus spoiling her party slated for that Sunday. He told this court that the deceased then jumped on him but he dodged her which made her stumble upon a stone in the compound before she fell. According to the accused the deceased fell down in his compound and could have been injured by rocks in the compound due to her drunken state. He further stated that he clearly saw her fell down head first with her forehead hitting the ground. He further added that he left her lying down and never bothered to find out whether she was dead or alive and did not know whether she died on the spot or on the way to hospital.

11. I have considered the evidence tendered by the prosecution in this case and the statement of defence offered. The accused herein faces a serious charge of murder and for a conviction to be sustained the prosecution in law is required to establish and prove two key elements namely;

(i) Actus reus

(ii) Mens rea

12. The state has submitted that they have proved their case beyond reasonable doubt and have established the two elements and proved them to the required standard.

There is no dispute that the deceased herein Mary Nthama is dead. All the prosecution witnesses testified seeing the deceased dead and in particular as per the evidence of Dr. Justus Kitili (PW5), the deceased died as a result of cardiopulmonary arrest due to severe head injury inflicted by a blunt object. He tendered post mortem dated 13th October, 2016 as P.Exhibit 2 and confirmed that he issued a death certificate No.0044112 in respect to the death of the deceased herein.

13. The cause of death as per the doctors (PW5) opinion is consistent with the evidence tendered by the children of the accused herein (PW2, M K, PW3, J M and PW6- N K). They all saw or witnessed the murder of the deceased herein. They told this court that they witnessed the accused lift a huge stone up, normally used as a cooking stone, before smashing it down on the head of the deceased who was then lying down as a result of an attack by the accused person herein. That stone weighing between 10-15 Kgs in weight was tendered in evidence as P. Exhibit 1. Julius Muthengi (PW1) the husband of the deceased also identified the stone in court and confirmed that he saw the stone at the scene next to where the deceased lay dead. The wife of the accused Evangeline Kajoka (PW4) also identified the stone and observed that she saw the fragments on the stone on the head of the deceased and the fact that the stone had blood stains and the damage caused to the head of the deceased left this court with no doubt that the huge stone (P.Exhibit 1) was indeed the murder weapon used by the accused to inflict the sort of injuries noted in the post mortem (P. Exhibit 2) tendered by the Doctor (PW5). Those injuries caused the demise of the deceased herein. The accused stated in his unsworn statement of defence that the deceased may have died due to a fall or bad luck but I agree with the state or the prosecution that a fall would certainly not have caused a depressed temporal skull fracture and damaged eyes described by eye witnesses as almost popping out of their sockets. This court finds that the element of actus reus has therefore been well established and connected with the accused positively by the evidence tendered by the prosecution.

14. On the element of mens rea or malice aforethought, I also agree with the submissions by the Director of Public Prosecution that the element as defined under **Section 206** of the **Penal Code** does not only include intentional acts of an accused persons but it comprises reckless acts that causes death. **Section 206** of the **Penal Code** provides 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 death 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 same person killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not.....”

The accused told this court in his defence that the deceased fell down and that he simply walked away without bothering whether she had been injured or not or whether she was dead or still alive. This explanation though incredible in the face of the evidence tendered by the prosecution, shows that the accused was quite indifferent on the deceased even if he was to be believed. What is however clear from the evidence tendered is that the accused clearly knew the consequences of smashing someone's head with such a huge stone. The children if the accused (PW2, PW3 and PW6) were shocked and terrified by the action of the accused and that is why they screamed attracting the attention of the mother who had ran away for safety.

15. This court finds that the accused for reasons did not disclose to this court he was in a foul mood that evening and this is illustrated by the fact that he had attempted to beat his wife for allegedly staying late in a church meeting. When the wife (PW4) took off, the accused vented his anger to an innocent soul who was just passing by to see her friend. There is no defence to what he did to the deceased. He attacked her with kicks and slaps without any provocation and as she lay down writhing in pain, he took a huge stone and smashed her head with it causing instant death to her. I find that the prosecution has established and proved the element of malice aforethought against the accused herein.

In view of the foregoing this court finds that the prosecution has discharged its burden of proving its case against the accused beyond reasonable doubt. He is guilty as charged and he is hereby convicted accordingly.

Dated, signed and delivered at Chuka this 25th day of October, 2018.

R.K. LIMO

JUDGE

25/10/2018

Judgment dated signed and delivered in the open court in presence of Mugo for accused and Maari for state.

R. K. LIMO

JUDGE

25/10/2018

25/10/2018

Coram:

Before Hon. R.K. Limo- J

Mr. Machirah/Maari- State counsel

C/A Mwaniki/Martha

Accused- present

Interpretation- English- Kimeru

Court:

This court has considered the mitigating circumstances. The accused person is a first offender but he caused demise of an innocent woman in a brutal way. He now says he was drunk but that is an afterthought because he did not say so in his defence. Having considered all factors in this case and though the penalty provided under the law (**Section 204**) of the **Penal Code** is death sentence, this court is minded about the decision of the Supreme Court in **Muruatetu's case** stating that the court's hands are not tied to meting out death sentence in cases of murder. Guided by that decision, the accused herein is sentenced to life imprisonment.

R.K. LIMO

JUDGE

25/10/2018