



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 20 OF 2012**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**EPHANTUS MUGENDI KARIUKI.....1<sup>ST</sup> ACCUSED**

**ISAAC KARIUKI NJERU.....2<sup>ND</sup> ACCUSED**

**SAMUEL NJUE NJIRU.....3<sup>RD</sup> ACCUSED**

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

**A. Introduction**

1. The accused persons are charged with the offence of murder, contrary to **Section 203 as read with Section 204 of the Penal Code**.
2. The particulars of the offence are that on the 5<sup>th</sup> day of May, 2012 at Miandari Village, Kianjokoma Location, Runyenjes Division of Embu East District they murdered one **Robert Muriithi Muriuki**.

**B. Prosecution Case**

3. The prosecution case is that on 5/05/2012 at about 10.30am PW1 in the company of his younger brother, the deceased, and PW4 one Jacob Muchangi headed to the scene of crime, where the deceased alleged there were people picking his tea. He further testified that the 1<sup>st</sup> accused started uprooting the boundary marks on the land and when the deceased warned him to stop this, the 1<sup>st</sup> accused cut the deceased with a panga on the right side behind the ear.
4. It is PW1's testimony that when PW4 asked the 1<sup>st</sup> accused why he had cut the deceased, on the leg with a panga. PW-1 further testifies that he ran towards the river, which was on the lower side of the plantation, and crossed to where motorbikes were waiting, leaving the deceased at the scene. PW-1 further testified that from where he was, he saw motorbike operators pick the deceased and Jacob and brought them beyond the river and he was rushed to Kianjokoma Health Centre and subsequently transferred to Embu Provincial General Hospital.
5. PW1 testified that his late father had subdivided the land in issue between some of his family members during his lifetime and that the accused's family were to have been given land elsewhere. PW1 positively identified the accused in the dock and stated that the family had never had any land dispute and that they were surprised by the violence of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons on that day.
6. In cross examination, PW1 reaffirmed that the plantation had been distributed between his siblings and mothers as well as his father during his father's lifetime. After his father's death, the portion held by his father was leased out by the accused persons herein against the wishes of the other family members.
7. PW1 further testified that the accused were not on the shamba when he and his team initially arrived but were present when they returned from the Assistant Chief's office. He further denied being in the company of 20 other people and further that he was the one who injured the deceased as he tried to cut the 1<sup>st</sup> accused nor the 2<sup>nd</sup> accused as he was not armed. PW1 further testified that the injury on the deceased was inflicted by the 1<sup>st</sup> accused in the presence of the 2<sup>nd</sup> and 3<sup>rd</sup> accused.
8. PW2, Anthony Muriithi Njeri, a boda boda taxi operator testified that he was hired alongside 2 other operators to transport some individuals to the plantation aforementioned. It is his testimony that he ferried 2 ladies, known to him only by appearance to the plantation where he and his fellow operators left their motorbikes on one edge and proceeded to the lower end of the plantation where they were to be paid their transport charges.

9. PW2 testified that he found about 6 people quarrelling, one whom he identified as the 2<sup>nd</sup> accused herein, who was known to him as he was also a boda boda operator. He testified that the 1<sup>st</sup> accused, who was visibly hostile, queried his presence there and immediately a scuffle ensued.

10. PW2 further testified that the 1<sup>st</sup> accused picked a panga that was behind him and attempted to strike him. He missed cutting PW2 and the panga hit the deceased. He notes that the 2<sup>nd</sup> and 3<sup>rd</sup> accused picked weapons, pangas for the 1<sup>st</sup> and 3<sup>rd</sup> accused and a sickle for the 2<sup>nd</sup> accused. He testified that nobody on his side had weapons. He further said that the 1<sup>st</sup> accused hit him with the panga on a second attempt.

11. PW2 testified that he pushed the deceased away from the scene and took him to a path where he could walk to the upper side of the land. He noted that the fight was still going on with the armed accused chasing the deceased's brothers including PW4 who had fallen down and had been cut on the knee by the 2<sup>nd</sup> accused. He testified that he had gone back at the scene where he pushed the 2<sup>nd</sup> accused away from PW4 just as he was about to strike him. On cross-examination, PW2 reaffirmed his testimony.

12. PW3, PW4, PW5 and PW6 all reaffirmed the statement by PW1, when they said that the accused persons were all armed. PW8 a boda boda operator corroborated the testimony of PW2, with whom he was hired alongside to ferry some individuals to the plantation herein.

13. PW-9, Dr. Joseph Thuo testified that the accused were mentally fit to face trial. PW10, Dr. Mercy Wanjiku Ndirangu opined that the cause of death was a severe head injury. PW11 testified that he conducted the investigations and the accused persons jointly with murder.

### **C. Defence Case**

14. In his defence, DW1, the 1<sup>st</sup> accused herein stated that he had not planned to fight anyone but circumstances influenced what happened. He denied being armed and testified that he uprooted one of the beacons on the land and used it as a weapon when he saw people approaching. DW2 testified that while on the shamba, he noticed 10 people on 10 motorcycles armed with sticks including the deceased and his brothers. They chased him and his fellow accused persons towards the river. He testified that he and his co-accused had not planned to cut the deceased prior to the incidence. He testified that PW1 was the one who cut him which matter he reported. DW3 adopted the testimony of the 1<sup>st</sup> and 2<sup>nd</sup> accused and further testified that he had never quarreled with the deceased before.

15. It was submitted on behalf of the accused that PW-2 was the one who attacked the accused and further that testimony by PW-8 contradicted testimony by other witnesses. It was further submitted that the 1<sup>st</sup> accused cut the deceased in self defence and as such the prosecution failed to prove a charge of murder.

16. It was also submitted on behalf of the defence that the charge against the accused was fatally defective as it lacked the words, "jointly murdered". The accused relied on the cases of **AHMED MOHAMMED OMAR & 5 OTHERS VS REPUBLIC, Court of Appeal Criminal Appeal No. 412 of 2012** and **REPUBLIC VS POGHISIO AKUDOKI MERIMUK AND ANOTHER, Criminal Case No. 1 of 2016 High Court at Kapenguria**.

### **D. Analysis of the Law**

17. On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. The Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows in the case of **ISAAC OMAMBIA VS REPUBLIC, [1995] eKLR**:

*"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."*

18. Turning to the second limb as to whether the defect in the charge sheet is curable under *Section 382 of the Criminal Procedure Code* or not, I note the provisions of **Section 382 the Criminal Procedure Code** which provides: -

*"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

19. PW11, the investigations Officer testified that he charged the accused jointly. This evidence was not contested by the defence. Further DW1 admitted in his defence that the accused persons were charged jointly in this case.

20. The mere omission of the word "jointly" did not cause prejudice to the accused persons since they all understood from the time of taking the plea that they were jointly charged with the offence of murder.

21. The issue is whether the defects highlighted by the accused persons occasioned failure of justice. The case of **NJUGUNA VS R [2002] Ilr No. 3735 (CAK)** where the Court in considering whether a defect in a charge sheet is fatal stated:

***“We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him.”*** [Emphasis added]

22. It is my view that the defect, as raised by counsel for the accused does not render the information defective nor occasion failure of justice.

23. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

***(a) Proof of the fact and the cause of death of the deceased;***

***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;***

***(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.***

**a. Proof of the fact and cause of death of the deceased:**

24. The prosecution proved death of the deceased from the evidence of PW10 the doctor. He produced a Post Mortem Report in which she opined that the cause of death was due to a severe head injury which was consistent with assault. The evidence of the prosecution witnesses on the assault was corroborated by the postmortem report.

**b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:**

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25. There is no doubt that the deceased died out of the injury he sustained in the struggle with the 1<sup>st</sup> accused person. PW1, PW2, PW4, PW6, and PW8 all identified the 1<sup>st</sup> accused as the one who struck the deceased. There is corroborated evidence that the accused persons were armed at the time of the attack thus rendering the defences incredible. There was no evidence to support the allegation that the deceased to support the allegation that the deceased and his companions were armed. The attack on the deceased was sudden. I am of the considered view that the prosecution have established that the 2<sup>nd</sup> and 3<sup>rd</sup> accused struck the deceased.

26. The other issue is whether the 1<sup>st</sup> accused person indeed acted in self-defense as he claims in his defence. **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya states as follows: -

***“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”***

27. It was held in the Court of Appeal case of **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** that: -

***“The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in DPP v. MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (supra) it was held that:***

***“.....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”***

28. I fully concur with the analysis in that decision not only given that the legal position was rightly and clearly settled. The 1<sup>st</sup> accused was not being attack and was not in imminent danger of being attacked by the deceased or any other person. There is ample evidence that the deceased and his companions were attacked by the accused persons who were armed.

29. It is my considered opinion that the 1<sup>st</sup> accused person did not act in self-defence. The 1<sup>st</sup> accused bears the burden of proof of the defence which he has failed to do. The defence therefore is not available to him in the circumstances.

30. As to whether all the accused were liable, the Court of Appeal held in the case of **NJOROGE VS REPUBLIC (1983) 197** that:

***... “If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”***

31. Their common intent may be inferred from their presence, their actions and omission of either of them to disassociate himself from the

assault. The accused persons had gone to the disputed land already armed. When the 1<sup>st</sup> accused hit the deceased, the 2<sup>nd</sup> and 3<sup>rd</sup> accused were present and also armed.

32. The 2<sup>nd</sup> accused cut PW4 on the leg. It was the evidence of PW4 that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused had leased out the tea of the deceased and his brothers. They were therefore armed to defend their course for they had labourers on the land picking tea for them on the material day.

33. It is my considered view that proof of common intention has been established.

#### **D. Determination**

34. I reach the conclusion that the prosecution have proved the act of inflicting the injury that caused the death of the deceased against the accused persons who acted in execution of a common purpose.

#### **c. Whether malice afterthought was proved**

35. Malice aforethought is provided for under **Section 206 of the Penal Code** thus: -

*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) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

36. In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR**, (Bosire, O’kubasu and Onyango Otieno JJA.) while considering what constitutes malice aforethought observed as follows:

*“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.”*

37. Also in the **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

*a) Intention to cause death*

*b) Intention to cause grievous bodily harm*

*c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn’t matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.*

38. Considering the weapon used to strike the deceased, the extent of the injury and the cruelty meted out on the deceased it leaves no doubt that the accused persons knew that the assault on the deceased would either cause him grievous harm if not death.

39. From the foregoing, I am convinced that malice afore thought has been established in terms of **Section 206(b) of the Penal Code**. Consequently, it is my finding that the prosecution has proved its case beyond any reasonable doubt.

40. The accused persons are hence found **guilty** of the offence of murder contrary to **Section 203 as read with 204 of the Penal Code** and are accordingly convicted.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 26TH DAY OF NOVEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for State**

**Mr. Kathungu for accused persons**

**All 3 accused**