



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 5 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MUKUNGI KIMUILU.....ACCUSED

JUDGEMENT

1. The accused Jackson Mukungi Kimuilu stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 3rd February 2014 at Muliluni Village, Ngoo Sub-Location, Mui Location of Mwingi East District in Kitui County murder Joel Mwangangi Kimuilu.

2. He has denied the charge and the prosecution has called several witnesses in support of their allegations.

3. PW1 was Mia Kimuilu the mother of both the accused and the deceased. According to her, on the 3rd February 2014 she was at home in the evening when the deceased arrived after the accused had already eaten and gone to his home. When the deceased was informed that two children of his brother who lived in Nairobi went to the river, she asked why the children could be left alone to go to the river at night. Then the girl who took care of the children called Kasuli stated that the children defied her instructions and the mother of the deceased asked him to connect her on the phone to the father of the children who was in Nairobi. The accused then intervened and he disagreed with the deceased, went to his house and took a bow and arrows. He came back and shot the deceased who was sitting beside her with an arrow. The deceased then dislodged the arrow, ran towards his house but fell outside the house and when they followed him they found his wife assisting him. She stated that the accused came with three arrows. They then called on the phone the Assistant Chief by the name Musyoka who stated that he was in Kitui. The police were then called and they came and arrested the accused that night, and other police officers came in the morning and took away the deceased's body.

4. In cross-examination, she stated that each of the accused and the deceased had their separate house. She said that, that evening she was with grandchildren who had returned from school when the accused came first and the deceased came later at around 7 pm. She stated that she was aware that both accused and deceased took alcohol. She said that both were drunk that evening. She said that the two had cordial relations but used to disagree when drunk. She did not know the main reason which made them disagree. She maintained that accused used a bow and arrow to shot the deceased. Though it was at night, there was moonlight and one could see well. She stated that the accused asked the deceased to wait for him and he went to his home and came back and shot his brother.

5. In re-examination, she maintained that the bow and arrows that were in court belonged to the accused. She said that when the accused came back she was busy talking to the deceased about making a telephone call to the brother who was in Nairobi.

6. PW2 was M K M a 19 year old school girl in Form IV and a daughter of the deceased. She knew both the deceased and the accused. She also knew PW1 as her grandmother. According to her, they lived in the same homestead with the grandmother's house being between the house of the accused and the house of the deceased.

7. According to her, on 3rd February 2014 at 8 pm while at home her grandmother called his father to go and make a phone call to Nairobi. When the father went to the grandmother he asked why young children were left to go to the river at night. She went there after she heard the accused threatening the father and by saying he would go and come back. According to her, after 10 minutes the accused came back carrying a bow. He asked the father where he was and when he said I am here the accused said he should not be obstructed as he wanted to shoot him. He then shot him with an arrow and ran away. Her father then moved from the chair and ran for a distance, pulled the arrow from his body but when he reached near his house he fell down. He asked them to dress him to control the bleeding but after 5 minutes he died. They phoned the Assistant Chief who said that he was at Kitui but called the Administration Police from Mathuki who came and arrested the accused. On the next day, police came from Ukasi Police Station and took the body away.

8. In cross-examination, she said she knew the accused as an uncle and that he did not have a wife or children because his wife left him. The accused was a third born in the family. She was aware that the accused and her father occasionally disagreed but did not know the cause of the quarrels. There were times when the accused said he would kill somebody but he did not do so. She maintained that on 3rd February 2014

she was at home when her father arrived and was called by the grandmother. According to her, the accused did not want his uncle in Nairobi to be informed about the children on the phone. She maintained that the accused asked where the deceased was before he shot at him.

9. PW3 was Joyce Maria Mwangangi the wife of the deceased with whom they were married in 1995 and had 5 children. She also knew the accused as her brother-in-law and they lived in the same homestead but different homesteads. At that time, another brother of the deceased called Kimanzi also lived in the same homestead but had now shifted to another place.

10. According to her on 3rd February 2014 they were at home with her children KM, JKM, KM and KM when her husband arrived and was called by the mother. The mother of the deceased wanted the deceased to flash on the phone his brother called Kimanzi who was in Nairobi which he did but Kimanzi did not call back. The issue was that the children of Kimanzi had gone to fetch water at night when they were very young and had not come back. The children did not actually come back until the next morning.

11. As the deceased talked to his mother, the accused told him to leave his mother's house. Then the accused said that he was leaving but would come back, went home and came back with bow and arrows. According to her, the accused was drunk. He held his bow and shot his brother. However this witness said that at that time she was at home and merely heard the voices outside. The accused then shot the deceased and went to his house and the deceased pulled out the arrow, threw it away and as he tried to get home he collapsed. They tried to give him first aid but he died. The mother then came and they tried to call the Assistant Chief who informed them that he was at Kitui. The Assistant Chief however sent the Administration Police from Mathuki Administration Police post who came and checked the body and arrested the accused who was hiding in the farm. The police from Ukasi police station came the next day and took the body to Mwingi Hospital. She maintained that she knew the accused well as a brother-in-law.

12. In cross examination she stated that the accused was a farmer and also burnt charcoal and sometimes ate in his mother's house but not in his late brother's house. She said that the relationship between the accused and the deceased was not always good as the two quarrelled and sometimes threatened each other with bows and arrows. She agreed that on 3rd February 2014 both the accused and the deceased had taken alcohol. She agreed also that she did not witness the shooting but maintained that the accused planned to kill the deceased.

13. In re-examination she said that the accused was in the habit of saying that he would kill somebody.

14. PW4 was Joel Muse Choyo an artisan. He was an uncle of both the deceased and the accused. On the 6th February 2014 he accompanied police to Mwingi Hospital where he identified the body of the deceased together with the wife of the deceased Joyce Maria Mwangangi. The doctor said no internal organ was injured but the arrow injury let in air and caused bleeding and thus the deceased died.

15. In cross-examination he said that he saw the injury on the side of the chest.

16. PW5 was GKM a son of the deceased who was at the time of testifying was in Form III.

17. According to him on the 3rd February 2014 at 8 pm he was at home with the mother and the young sisters when the father arrived from Miambani and was called by the mother Mia Kimuilu who wanted him to call on the phone her son Kimanzi who was in Nairobi. When the father flashed the phone to Kimanzi, the accused intervened and said that the deceased should not sit there at his mother's house and the two exchanged harsh words and the accused then said he would go away and then come back. He went and came back and shot the deceased with an arrow. His father then ran towards home saying he had been shot and fell near the house. He saw the arrow. They tried to assist the father with the grandmother but the father died.

18. He explained that, that night he was at home and the story was explained to him by M K his sister. He maintained however that he saw the arrow.

19. In cross-examination he maintained that he was in the house but said that his grandmother's house was about 15 metres away and that the accused's house was about 45 metres away. He agreed that his father took alcohol that day as well as his uncle the accused. He agreed however that the accused had never caused a fracas in their house.

20. In re-examination, he maintained that the accused said that his father did not deserve to talk to his grandmother.

21. PW6 was Inspector Augustus Muzunguli, Deputy District Administration Police Commander, Mwingi East Sub-County.

22. According to him on the 3rd February 2014 at about 9 pm he was called by his incharge C.I. John Munyoki and informed about a death through shooting. He immediately left station, proceeded towards the place at Niambani market they met the chief who directed them to the scene where they found the deceased lying near his house. Family members were present and were surrounding him. They cordoned the area and arrested the accused while he was holding a bow and arrows. He took him to the Administration Police Camp and in the morning the OCS Ukasi Police Station took him together with the exhibits. He did not know the accused before, but knew his brother the deceased who worked at Mathuki market. They found the accused standing in the maize plantation and he said he had shot his brother. Of the three arrows recovered, one was blood stained. During arrest the accused appeared calm and they walked with him peacefully. He did not stagger.

23. They also took away the shirt of the deceased. He knew the deceased as a butcher man.

24. In cross examination he said that he found the accused in the maize plantation. He maintained that the bows and arrows were the one used to kill the deceased. He said he saw only one arrow wound on the deceased.

25. PW7 was PC Kenaz Kimutai of Ukasi Police Station who was at Nguuni Police Post during the incident. He was the investigating officer

assisting the OCS C. I. Sarah Chumo.

26. On 4th February 2014 he was at Nguuni Police Post when the OCS came and they accompanied her with Corporal Maina and PC Gatheru. They found suspect at Mathuki. They proceeded to the scene and saw a body outside the house covered with a piece of cloth with an injury on the left side of the chest. They made inquiries and recorded statements, took the suspect to Mwingi Police Station and the body to Mwingi Mortuary. They took possession of the arrows, the bow and cloth of the deceased. He produced the bow and arrows and a shirt as exhibits.

27. They took blood samples to the Government Analyst comparison with the blood on the arrow and the shirt and they received the report. He produced the exhibit memo. He identified the person whom they arrested as the accused on the dock.

28. In cross-examination he stated that they picked the accused from Mathuki before proceeding to the scene. At the scene he saw that the mother's house was between the accused's and the deceased's. According to him the accused appeared to be normal. He could not say whether somebody else committed the offence as he got information only from witnesses. He was not aware that there existed a land dispute between the accused and the deceased. He was aware that the accused did not have a family nor was he married.

29. In re-examination he stated that M K a daughter of the deceased described to them the incident. The mother of the deceased and his wife also described the incident.

30. At this point, the prosecution stated that they were finding it difficult to bring the doctor from Mwingi Hospital Dr. Kiema who insisted of being facilitated but the police had not done so. The prosecution thus closed their case.

31. In his defence, the accused gave unsworn testimony and did not call any witness.

32. He stated that he was 68 years old and that on 3rd February 2014 he woke up and proceed to the marked at 4.30 am. He bought what he wanted and passed by a bar and bought whisky and took a whole bottle and ordered another bottle. He paid and left at about 12 noon but passed through a homestead where he took traditional liquor arriving home at 5.30 pm. In the evening he went to set animals traps at the farm and came back home. He then heard a quarrel at his mother's house and he asked why she was quarrelling. Before the mother answered he was hit by Mwangangi and he fell down. When he rose up they held each other and they fought. He did not know how long the fight lasted and nobody separated them. He then left and proceeded to his house but fell asleep in the farm where he was waken up at midnight by the administration police and the chief who took him to a vehicle and drove him to Mathuki. In the morning, he was handcuff and taken to court by the police at Mwingi. He was kept for two weeks then brought to Garissa.

33. He denied carrying a bow and arrows and said that he carried a machete. He agreed that there was a bow and arrows in his house but denied that he used the same that night. According to him they only had minor disagreement with his brother and he was surprised that he was charged in Garissa.

34. He said that the children who testified were not near the scene and said also that there was no quarrel because of children going to fetch water for him. He said that he was drunk that evening and his brother was also drunk and that their disagreement occurred only due to drunkenness.

35. This is a murder case. The prosecution is required to prove all the ingredients of the offence beyond any reasonable doubt. The accused has no burden to prove his innocence.

36. The prosecution is required to prove first of all that the deceased died. Secondly, the prosecution is required to prove that the death was unlawful. Thirdly, the prosecution is required to prove that the accused caused the death of the deceased. Fourthly, the prosecution is required to prove that if indeed the accused caused the death, then he did so with malice aforethought. All these elements of the offence had to be proved beyond any reasonable doubt.

37. Did the deceased die? Civilian witnesses and the police all agree that the deceased was seen dead near his house with an injury in one side of the chest. He was taken for postmortem examination and the cause of death is said to have been established through the postmortem form entries. The postmortem doctor did not come to court to testify. However in my view, depending on the circumstances, death may be proved even if no postmortem report is produced in court. In the present case, the prosecution has proved beyond any reasonable doubt that the deceased died because of a deep wound into his chest which caused bleeding. I so find.

38. Was the death of the deceased unlawful? There is no suggestion or proposition that there was any lawful reason why the deceased should have died the way he died. I find that the death of the deceased was unlawful and it was caused by unlawful means.

39. Did the accused kill the deceased? The prosecution contention is that he killed the deceased using an arrow. The mother of the deceased who is also the mother of the accused Mia Kimuilu (PW1) stated so. She was at the scene. The accused in his defence also agreed that he was there but said that he merely wrestled the deceased and went towards his home and ended up sleeping in the farm. He denied shooting the deceased or killing him. He stated that the children who testified about the killing were not present when the incident occurred. He stated that he was armed with a machete and that he did not have a bow and arrows.

40. I find no reason why the mother of the deceased who is also the mother of the accused would have lied about what happened as both were her children. Though the accused stated that he was armed with a machete, the police who were not at the scene when the incident occurred stated that they saw him in the farm carrying a bow and arrows. In my view, the defence of the accused is a mere lie. It is not believable. I find that the accused killed the deceased using one shot of an arrow.

41. Was the death of the deceased caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code. It is an intention to cause death or do grievous bodily harm. In my view, this is a border line case. The accused went to his house and took a bow and arrows and shot the deceased once. However, the surrounding circumstances were that there was a quarrel. There is also an allegation of drunkenness. It is on that basis that I find that the accused did not kill the deceased with malice aforethought. With that therefore, the offence committed by the accused is a lesser offence of manslaughter.

42. Consequently, I find that the prosecution has proved that the accused herein committed the offence of manslaughter contrary to section 202 of the Penal Code and I find him guilty and convict him of manslaughter accordingly.

Dated and delivered at Garissa this 19th day of December, 2018.

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George Dulu

JUDGE