



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 55 OF 2017

REPUBLIC.....PROSECUTION

-VS-

CHARLES MBATHA NTHIWA.....ACCUSED

RULING

INTRODUCTION

1. The accused, Charles Mbatha Nthiwa, is 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.
2. The particulars are that on 17th August 2012 at Kituluni Sub Location, Mbuvo Location, Kathonzweni District within Makueni County, the accused murdered Annah Mutindi Kimanthi.
3. The accused pleaded not guilty and the matter went for trial with the prosecution calling seven (7) witnesses in support of its case.
4. At the close of the prosecution case, the court was called upon to determine whether there was a prima facie case to warrant accused being put on his defence.

PROSECUTION'S CASE

5. PW1 was Veronica Mwongeli Nthiwa. She testified that she had travelled to Makueni on 14/08/2012 to visit her parents. That on 17/08/2012 she was in her mother's house, the deceased, who asked her for an axe to go collect firewood. That she then heard her mother screaming and on going outside, she found her dead. That she had heard Kimanthi screaming that someone was going to kill his wife. She ran towards the scream and saw Kimanthi trying to lift his wife who was already dead.
6. That she did not find Kimanthi struggling with Charles (accused) over the axe. She only found Charles's wife and Kimanthi who was bleeding from the side of the head. Kimanthi said he had been cut with an axe but did not see him being cut. Their neighbor, Michael Ndithya was also there. That she went with Michael to Kilungu Police station where they recorded their statements. That she did not get to know what killed the deceased and did not follow up.
7. On cross examination, she said that the accused is her brother. That after giving the deceased the axe, she did not see what happened next. That she had her mother screaming that Ann had killed herself. That she did not see the deceased struggle with Annah but only saw them standing together.
8. In re-examination, she said that she didn't know why her mother said that Annah had killed herself.
9. At that juncture, the prosecution Counsel applied to re- open the examination in chief to enable the witness identify the axe. PW1 identified the axe and further stated that she did not find it at the scene where Annah died. On further cross-examination, she said that the axe did not have the writings it had in Court.
10. PW2 was Kimanthi Nthiwa. He testified that on 17/08/2012, his wife, the deceased woke up and went to fetch water for sale. She returned at 10.00 a.m., prepared breakfast and proceeded to look for firewood in the bushes. He then heard his wife screaming and ran towards the direction of the screams. He found the accused holding his wife by the neck and beating her. He asked the accused to release her so that they could talk and agree.
11. The accused said that he would not allow anyone on his border and refused to let go of the deceased. PW2 held the accused by the neck who then released the deceased. The struggle took about 20 minutes. The accused's wife, Wavinya found them and asked PW2 to release

the accused which he did. The accused ran, took the axe and cut the deceased on the face. That PW2 went to hold his wife but the accused turned on him and cut him on the forehead. He started bleeding and fell. That PW2 was holding the axe and the accused started to drag him while on the ground. PW2 then stood up and let go of the axe. The accused ran away and went to the police.

12. That Michael Mwangeli and his sister Veronica Mwangeli witnessed the struggle. He identified the axe because it had a bladder at the blade. He spent one week at Makeni hospital. It was his further evidence that the accused was his twin brother. That they were not living in peace at home and at one point, he (accused) had bitten him on the neck causing him to be admitted in hospital. That his wife was at a neighbour's land but had used a path belonging to the deceased to get there.

13. On cross examination, he said that before 2012, the accused was living in Nairobi with his family. That in 2010 when the accused went home, there was a land dispute between him and the accused. That after the dispute, everyone was given their portion of land to live in. That there was a road to get to the neighbour's land but his wife used to pass through the accused's land.

14. That after hearing the screams, he went and found beating the deceased with his hands-blows and slaps. That he persuaded the accused to stop for one hour. That people gathered after the accused had already cut the deceased. That his mother's house was nearby and she heard the screams. That while he was holding the accused, his wife stood by. That he did not see his wife getting the axe from his mother's house. That when he got to where his wife and the accused were, he did not see the axe. He denied that there was a plan between him and his wife to kill the accused.

15. That he was not aware that the accused had taken the axe from the deceased when she was trying to cut him and threw it away. That he held onto the axe after being cut to prevent the accused from cutting him again. That the accused was not charged in Court for cutting him with an axe. That when the accused bit him on the neck, he forgave him and did not take him to Court.

16. That the land they were fighting over belonged to their father. That the witnesses were Michael, his mother and his sister. That the axe belonged to his mother and the deceased was given the axe by his sister. That there was no difference between the axe he was shown in Court and the one he saw on the day of the attack.

17. In re-examination, he said that people used to pass through the accused's land as a short cut and that the deceased was cutting wood at a neighboring land. That he saw the axe when the accused was getting it from his wife. That his wife had picked the axe and stayed with it and upon the accused being released by PW2, he snatched the axe from the deceased, cut her and then cut PW2.

18. PW3 was Michael Ndithya Musangania. He testified that on 17/08/2018, he was headed home from Kavumbu where he had gone to sell cotton. He heard screams from his neighbor's but before he could get to their gate, he saw the accused with an axe running. The accused said that the axe he was carrying had killed someone.

19. He proceeded to where the screams were and found PW2 crying and the deceased lying down. PW2 had been cut on the right side of the head. He went to the police station with PW1 and found that the accused had already arrived with the axe and had been put in the cell.

20. On cross examination, he said that the accused and PW2 were known to him because their father had bought land when he (PW3) was already there. That when he met the accused on the way he said "*do you see this axe, I have killed*". He denied the contents of his statement and said that he did not write it even though it had his signature. That he neither knew nor saw the person who cut PW2 and the deceased.

21. PW4 was CPL Faith Modi Mutiso. She testified that on 17/08/2012, she was on official duty at Mbuvo A.P camp. That the driver, APC Shadrack Kisandi received a call from a chief informing him that there had been an incidence at Kavumbu. That there was a murder scene and someone had also been assaulted by his brother. That PW2 was taken to the road and they escorted him to Makeni District hospital. That he never met the person who assaulted PW2 and was not involved in the investigations.

22. PW5 was CPL Alex Ogenda. He testified that on 17/08/2012 at 1.00 p.m., he got a call from Joshua Wambua telling him that he was required at the post. Wambua informed him that he had arrested somebody who had gone to the post with an axe saying that he had killed someone. PW5 was shown the axe and he saw the accused in the cells. Together with PC Erastus Kituku, they boarded a *boda boda* and went to the scene where the body was. It was covered with a *lesso*.

23. They removed the *lesso* and viewed the body. It had a deep cut on the face. There was another person lying down beside the deceased. He also had a cut on the forehead. He was speaking in Kikamba which he (PW5) could not understand. They carried PW2 to the roadside where and put him in the A.P vehicle. They went back to the scene to wait for the OCS Makeni who later arrived with CPL Langat and scenes of crime officer, Olayo.

24. Photographs were taken and the body was transported to Makeni hospital mortuary. He identified and explained the photos which were then marked MFI A-P. He also identified the axe (MFI2), the accused's clothing i.e. long trouser (MFI3), white vest (MFI4) and blue shirt (MFI5) He also said that the accused was the one in the dock.

25. On cross examination, he said that he was not the investigating officer. That on 17/08/2012, he saw the accused in the cells at the post.

26. That a report was made by Michael Nthiwa and the accused took himself to the police post. That he was shown the axe which had blood stains. That there were many people at the scene and it appeared that there had been a struggle. That the deceased's husband was also at the scene with injuries on the head. That nobody was charged for injuring him.

27. That the people at the scene wrote statements but he did not interview any of them. He was just told that the accused had killed the deceased. That he witnessed the taking of the photographs. That he talked to the accused while in the cells as he knew him. That there was a

problem between the accused and the deceased's husband.

28. That he did not know whether the accused had reported about being invaded. That he knew the reportee (PW3) as he was a watchman in a nearby school but he didn't know the relationship between him and the accused. He was aware that the accused and deceased's husband are twin brothers.

29. PW6 was Lawrence Kinyua Muthuri, the Government analyst who stated that he had worked as such for 9 years. He had a Kenya Police exhibit memo form which was received at the Government chemist on 23/08/2012. He also had the analyst's report.

30. He testified that on the same day, he received the following items from PC Joshua Wambua (PW7) of Makueni police station; blood sample indicated as of accused, axe wrapped with newspaper, black trouser, blue shirt and white vest in kaki envelopes indicated as of accused, blood sample indicated as of deceased's husband and blood sample indicated as of deceased.

31. That they were required to examine and determine the source of blood. That he did DNA profiling and there was a stable conclusion that the DNA profile generated from blood stains from the axe, the vest and shirt matched the DNA profile generated from blood sample of the deceased's husband.

32. That he wrote and signed the report on 07/06/2013. He produced the report as exhibit 6(a) and the exhibit memo form as 6(b).

33. On cross examination, he testified that if an axe cuts two people, in DNA profiling, the sample would be captured of one person. That they did the blood stains on the weapon and on the clothings, they picked various blood stains on the clothing parts.

34. That the blood on the axe, trouser, shirt and vest was that of the deceased's husband. That if there were blood stains of different people, the same would have been traced via profiling. That they report on profiles which they find even if they are many.

35. In re-examination, he stated that on the mentioned items, there was no other blood stains save for the deceased's husband.

36. PW7 was PC Joshua Wambua the investigating officer. He testified that on 17/08/2012, he was on duty at the police station when accused arrived running and was holding an axe. The accused said that his brother (PW2) and the deceased wanted to cut him with the axe. Shortly thereafter, two people arrived and said that the accused had killed somebody. PW7 took the axe and put the accused in the cells.

37. He informed the OCS Makueni, the OCPD and booked the report in the OB. That later, the OCS in the company of CPL Njagi, CPL Langat and PC Olago arrived at the post after visiting the scene. They had the deceased's body. That PC Olago photographed the accused as well as his clothes. They then proceeded to Makueni with the deceased and accused. He identified the person in the dock as the one who had gone to the station carrying an axe.

38. He produced the axe (EXH 2), the trouser (EXH 3), the white vest (EXH 4) and blue shirt (EXH 5). He said they had blood stains. He also said that he had photographs of the items, accused and deceased. He produced them as exhibits 1(a-p). He also produced EXH 1(q)-certificate of officer producing photographs.

39. Further, he testified that the post mortem was conducted on 21/08/2012 at Makueni District Hospital and the cause of death was indicated as '*head injuries caused by trauma*'. He produced the post mortem report as exhibit 7.

40. The evidence above adduced by the prosecution side discloses a *prima facie* case that the accused has to be put on his defence to give side of his story on murder of the deceased herein.

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF DECEMBER 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE