



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2012**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**JOSEPH NJAGER WAHERI.....1ST ACCUSED**

**EUNICE IKAMBA.....2ND ACCUSED**

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

1. The accused persons denied the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code during plea which was taken on 20/07/2012 before Ong'udi J. It was alleged that on the 08/07/2012 at Kieruri village in Ndurumori location of Mbeere North District within Embu county, they murdered one Mwaniki Waweru.
2. The prosecution called ten (10) witnesses, six (6) of whom were heard by Ong'udi J. before I took over the case and proceeded to hear the other four and the defence.
3. In summary, the evidence of the prosecution was that on 8/07/2012 around 5.00 p.m., the deceased had visited his son PW5 and the two were inside the house. They heard people throwing stones on the iron sheet-made roof of the house. The deceased went outside to find out what was happening. Immediately after, PW5 who was still in the house heard his father calling for help and went outside.
4. PW5 found the two accused persons and their daughter Janet Njeri beating up the deceased. The deceased lay on the ground as the first accused boxed him with his wife, the second accused and the daughter also hit the deceased using different objects. PW5 tried to rescue his father but was attacked and injured. He fell down unconscious with fractures on the left arm.
5. PW2 saw the accused persons attacking the deceased at about 500 metres away beyond a river. He rushed to the scene just to find the deceased dead and PW5 lying down unconscious. The matter was reported to the police who removed the body to the mortuary. PW5 was taken to Ishiara District hospital and later transported to Thika Aga Khan hospital for further treatment.
6. Postmortem was conducted and later showing that the deceased died of head of injuries during the attack. The accused persons according to PW9 reported a case of assault allegedly by the deceased on 09/07/2012. The 1<sup>st</sup> and 2<sup>nd</sup> accused were charged with the offence in this case.
7. In defence, the 1<sup>st</sup> accused told the court that in the evening of the material day, PW2 and PW5 both of whom were sons of his brother, the deceased went to his house and borrowed his mobile phone to make a call. When he refused, the two young men attacked him and left him with injuries. He denies there was a

land dispute between him and the deceased. He said that it was PW2 and PW5 who were pressing their father, the deceased to give them portions of land and that he had been called at one time to arbitrate in the dispute.

8. The 2<sup>nd</sup> accused said she was away in church the whole day with her grandchild. On her return home, she found that her husband the 1<sup>st</sup> accused had been attacked and had sustained injuries. The following day, she took the 1<sup>st</sup> accused to report the matter at Ishiara police station and then go to hospital. However, she and the 1<sup>st</sup> accused were arrested and later charged with murder.

9. The prosecution's two witnesses who are the sons of the deceased was testified that they witnessed the incident. PW5 said he was with the deceased in his (PW5's) house when he went out to find out who was throwing stones on the roof of the house. After a short time the deceased was screaming meaning he was under attack. When he went outside, he found the two accused and their daughter Janet assaulting the deceased.

10. PW5 said he found the 1<sup>st</sup> accused sitting on the deceased, hitting him with fists as the 1<sup>st</sup> accused used a stick to hit the head of the deceased. Janet picked stones which were behind PW5's (at the scene) and used them to hit the deceased. PW5 was assaulted persons when he tried to help out the deceased.

11. The evidence of PW2 is that he witnessed the attack at a distance and rushed to the scene. By the time he arrived, he found the deceased was not breathing. He saw the accused persons running away from the scene.

12. The two eye witnesses being their uncle and aunt who lived in the same land with them knew the two accused persons well. It was around 5.00 p.m. and it was day- light. The circumstances favoured positive identification. For PW2 and PW5, it was recognition of the attackers for they them well. Both witnesses saw the accused persons attack the deceased. The 1<sup>st</sup> accused used his fists while the 2<sup>nd</sup> accused used a stick to hit the deceased on the head. Janet is said to have used stones in the attack.

13. The cause of death was cardio-respiratory arrest secondary to intercranial bleeding following blunt trauma to the head. The blunt injury was most probably caused by a stick or a stone both of which are blunt objects.

14. PW9 collected blood-stained stones from the scene which were sent to the government chemist together with the clothes of the 1<sup>st</sup> accused. PW7 determined the source of the blood on the exhibits. The stones had blood of the deceased while the 1<sup>st</sup> accused's T-shirt and jumper contained his blood and that of deceased.

15. The 1<sup>st</sup> accused person said he was attacked in his house by PW2 and PW5 when he denied them use of his phone to make a call. He did not give any reasons why he did not report the matter to the police the same day. The report of the murder of the deceased was made the same day. The 1<sup>st</sup> accused's report of assault was made a day after the incident. This means it was an afterthought designed to pre-empt the earlier report.

16. The 1<sup>st</sup> accused's defence contradicts the report made to PW9 as to who had attacked and injured him. He said it was PW2 and PW5 in his defence, while to PW9 it was said it was the deceased. The 1<sup>st</sup> accused says he was attacked in his house and this remains his word alone. The attack or incident supported by the prosecution's evidence took place in the home of PW5.

17. The 1<sup>st</sup> accused has not convinced the court that there was a second incident. Due to these discrepancies and given the overwhelming evidence of the prosecution, the court did not believe the defence of the 1<sup>st</sup> accused.

18. As for the 2<sup>nd</sup> accused she said she spent the whole day in church. However, she was seen by PW2

and PW5 assaulting the deceased on the material day. Using a stick, it is most probable that she inflicted the fatal blow on the head. I found her defence not truthful.

19. The prosecution did not explain why the 3<sup>rd</sup> aggressor Janet was not charged although she was seen hitting the deceased with stones. PW9 indeed recovered two blood- stained stones at the scene. It was held in the case of **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR** that the ingredients of murder are as follows:-

*(a) the death of the deceased and the cause of that death;*

*(b) that the accused committed the unlawful act which caused the death of the deceased; and*

*(c) that the accused had the malice aforethought.*

I find that the prosecution have established that the two accused persons jointly did the acts of assault which caused the death of the deceased. *Actus reas* has therefore been proved as required by the law.

21. The prosecution have adduced evidence on the assault and injuries inflicted on the deceased. The two accused and another not before the court assaulted the deceased and jointly and severally inflicted grave injuries namely: an open skull fracture on the right frontal parietal region; a skull fracture on left temporal region; among other injuries on the face, neck, ears and on both lower and upper limbs.

22. Its the head injuries which caused the death of the deceased. The description, nature and extent of the injuries leaves no doubt that the accused had intentions to kill the deceased. Due to the excessive force and the weapons used, the accused persons were aware that the injuries would cause grievous harm to the deceased or cause his death.

23. Malice aforethought was explained in the case of **MBIU & 8 OTHERS VS REPUBLIC [2008] KLR 496** where it was held that:-

*....the inflicting of serious injuries on the deceased leading to her death showed that they intended to kill her or cause harm to her. Therefore, malice aforethought was disclosed.*

24. The two accused persons and another not before the court acted with common intention with attacking the deceased. It did not matter which of the three inflicted the fatal shot. Even if it was by the person not before the court, the common intention binds them together in tandem with the provisions of Section 21 of the Penal Code which provides:-

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

25. It was held in the case of **NYABUTO & ANOTHER VS REPUBLIC [2009] eKLR 409** that:-

*(1) The appellants had a common purpose of attacking the deceased and his brothers as they were armed with assorted weapons and were in the company of two other persons whose actions were the direct cause of the death of the deceased. The fact that it was not the appellants who made the fatal shot was immaterial in law and it did not absolve them from culpability as long as they were with the actual killers and they were all actively executing the unlawful common purpose. The Judge had correctly invoked the doctrine of common intention under Section 21 of the Penal Code.*

*(2) .....*

*(3) **Mens rea**, an ingredient of murder under Section 206 of the Penal Code had been satisfied as the evidence established that the appellants and others had set out with the intention to cause death*

*or to do grievous harm to the deceased and his brothers.*

26. Section 206 of the Penal Code defines malice aforethought 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 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.*

27. There was evidence of existence of a long-standing land dispute between the 1<sup>st</sup> accused and the deceased. This may supports the motive of the attack. Its the 1<sup>st</sup> accused and his family members who attacked the deceased. However, it is trite law that an offence of murder, the prosecution must not prove motive.

28. Its my considered opinions that the act of the accused persons, in execution of the common intention, the force used and the gravity of the injuries falls within the description of malice aforethought under Section 206 of the Penal Code.

29. I find that the malice a forethought has been proved in this case.

30. Consequently, it is my finding that the offence of murder has been proved against the accused persons beyond any reasonable doubt. The accused persons are accordingly convicted of the offence of murder under Section 306 of the Criminal Procedure Code.

31. Its hereby so ordered.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 29TH DAY OF MARCH, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Momanyi for 1<sup>st</sup> Accused**

**Ms. Muriuki for Nduku for 2<sup>nd</sup> Accused**

**Both accused persons present**