



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE (MURDER) NO. 40 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KEVIN BWALA MUKA.....ACCUSED**

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

1. The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars state that on 18<sup>th</sup> day of June 2015 at Yaanga village within Nyandarua County, he murdered **Clifford Muyale Joshua**. The Accused denied the charge. Mr. Owuor represented him during the trial.

2. The prosecution case was as follows. The Accused and **Clifford Muyale Joshua** (deceased) worked and resided at the family home of **Freshia Njoki Ngaru (PW1)** at Yaanga village. **PW1** had several sons among them **David Njuguna Nganga (PW5)** who resided at Yaanga, **Joshua Kimani Nganga (PW6)** who lived in Nairobi and a third known as **Samuel (Waweru)**. The Accused worked for the latter son as a labourer/herdsman. He had been at the home for some months. He had recently been joined by the deceased who was working for **PW6**. Both workers were accommodated in a shared quarters at the home. On the material morning, the Accused and deceased were alone in the homestead.

3. At about 9.00am **PW1** was away working at her nearby shamba, as were **Anne Wangari (PW2)** and **Alice Wambui (PW3)**. They were attracted to **PW1's** home by screams. The three women rushed there and met the deceased lying on the ground with a head injury. The Accused too stood by, wielding a blood stained *panga*. With the assistance of members of the public, they placed the deceased in the vehicle of a neighbor **John Kamau Mwangi (PW4)** and rushed him to the local health centre. He was pronounced dead on arrival.

4. Meanwhile, a report of the incident was received by **APC Samuel Matara (PW7)** of Kinamba Administration Police Post. He re-arrested the Accused from villagers who had restrained him. **PW7** also visited the scene of the attack where he collected the murder weapon (**Exhibit 3**). On 22/6/2015 a post mortem examination was carried out by **Dr. Ngulungu** who ascertained the cause of death to be an incision accompanied with a fracture over the head, leading to blood loss. The Accused was then charged.

5. In a sworn defence statement, the Accused testified that although he and the deceased lived in the same homestead they worked for different employers (sons of **PW1**) namely, **Waweru** and **Kimani (PW6)**. The Accused worked for the former while the deceased was employed by the latter. For the period of about one week since the deceased joined the Accused to work in the home, there had been no incidents between them. On the morning of 18/6/2015 the two workers allegedly escorted some guests before returning to the home.

6. The Accused further stated that he proceeded to work in the cattle shed while the deceased decided to lie down in the quarters. Presently, the deceased confronted the Accused while armed with a *panga*, demanding his (deceased's) identity card. The Accused tried to escape but the deceased caught up with him. During the ensuing struggle, the deceased fell upon the *panga* which cut his head, before the Accused grabbed it.

7. There is no dispute that the deceased and the Accused lived and worked together in the same homestead where they were on the material morning. Further, there is no dispute that an incident occurred involving both of them, at the end of which the deceased lay on the ground injured, and subsequently succumbed to the injuries.

8. The court must determine whether of malice aforethought, the Accused inflicted the fatal injuries on the deceased. There are no eye witnesses to the incident immediate to the injury to the deceased. However, the first witnesses at the scene, **PW1**, **PW2** and **PW3** stated that they rushed to the home and on arrival they found the Accused armed with a *panga* (blood stained) and the deceased lying on the ground, with a head injury. There is no evidence by the prosecution witnesses or the defence that in the fatal incident the Accused himself sustained any injury.

9. In reviewing the prosecution evidence which is primarily circumstantial, this court has considered the principles of enunciated in **Kipkering Arap Koskei -Vs- Republic [1949] 16EACA 135** as follows:-

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

Further in **Simon Musoke -Vs- Uganda (1958) EA 715** quoting from the case of **Teper -Vs- Republic [1952] 2 ALLER 447**, the court added further principle that:

**“It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

10. **PW5** testified that earlier on the material morning he had been approached by the deceased who requested him to help him secure another job. That the deceased while making the request seemed angry and stated that he was 'tired'. The witness seemingly did not investigate the source of the anger or the reason for the request but he promised to help.

11. The incident leading to the death of the deceased occurred within hours since the said conversation. The Accused's submission that the deceased was angry and therefore the aggressor is in my view not necessarily supported by the evidence by **PW5**, there being no indication that the deceased was angry with or had any problems with the Accused. Secondly, on the Accused's own account they related well and had together escorted some guests earlier in the morning.

12. The scene depicted by **PW1** to **PW3** on arrival at the home after hearing screams was that the Accused stood holding the *panga* as the deceased lay on the ground, wounded. It was not suggested to them that the Accused was unarmed or that he said the deceased was the aggressor. The defence clearly understood that under Section 111 of the Evidence Act only the Accused could explain in those circumstances what actually transpired. The defence allegation that the deceased fell upon and was cut by his own weapon – the *panga* – is difficult to comprehend.

13. The slash on the head of the deceased was deep and extended across the top of his head, went through the skin, scalp and into the brain, causing the oozing of brain matter. The doctor (**PW8**) refuted the suggestion that such a wound could have resulted from a mere fall asserting that such was only possible if the fall was from a height and the victim fell on a sharp object.

14. During cross-examination the Accused said that he snatched the weapon from the deceased in the course of the alleged struggle. In that case, it is difficult to understand how the injuries resulted on the deceased's head, and why, despite the alleged struggle over a seemingly well sharpened *panga*, the Accused himself sustained no injury. Equally, the reason for the alleged attack by the deceased, namely the demand of an identity card, seems too trivial for belief, bearing in mind that the two men admittedly had a good relationship until a few minutes before the incident.

15. It may well be that the Accused had a disagreement with the deceased over their chores because the deceased decided to lie down rather than carry out his duties. Possibly, the Accused felt more entitled to exercise authority on the farm, which in his view belonged to Waweru, his employer and not the deceased's employer. The fact that the brothers kept their animals on the same family patch may mean that their workers shared certain tasks.

16. Indeed **PW1** said that the two men had together delivered milk to the dairy by 9.00am on the material date. The fact that the scene of the attack was outside the quarters of the workers could give an indication that the Accused is the one who confronted the deceased who had decided to "malingering" in the quarters rather than go out to work. In his defence the Accused told the court that he had proceeded to the cowsheds while the deceased stayed behind in the quarters.

17. It is not necessary in an offence of murder to prove motive. As the Court of Appeal observed in **Libambula -Vs- Republic [2003] KLR 683**:

**"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."**

18. Whatever the case, it seems to me that the evidence on the circumstances of the scene by **PW1 – 3** who arrived almost immediately on hearing screaming, point to the Accused – the weapon wielder – as the attacker. His explanation that the deceased fell on the *panga* was not made to **PW1** to **PW3** at all at the scene or put to them during cross-examination. In my view the Accused's defence is not reasonable or capable of belief. Because, the injury on the deceased's head involved an extensive slash from ear to ear, clearly inflicted with a brutal force that was evidently intended to cause grievous harm or death.

19. 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."**

20. In the circumstances of this case, the facts rule out the absence of *mens rea* on the part of the Accused

as has been proposed in the defence submissions. I reject the defence offered by the Accused. The same has been displaced by the circumstantial evidence tendered by the prosecution witnesses, particularly **PW1** to **PW3**. I accept evidence that the deceased lay injured on the ground as the Accused stood by wielding the murder weapon, the only logical inference being that it is he who had inflicted the injury on the deceased's head.

21. All the facts proven in this case point consistently at the culpability of the Accused, and there are no intervening factors. I do find that on the evidence before me, the prosecution has proved the charge beyond any reasonable doubt. I will therefore convict the Accused of the offence charged.

Delivered and signed in Naivasha this **13<sup>th</sup>** day of **April, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Owuor for the Accused

Accused - present

CC - Barasa

**C. MEOLI**

**JUDGE**