



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC.....PROSECUTOR

*versus*

FRANCIS MURAGURI MURURU.....ACCUSED

JUDGMENT

1. This case; where **FRANCIS MURAGURI MURURU (Muraguri)** is charged with **murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63**; was heard by three different judges, I being the third judge. Muraguri pleaded not guilty to the offence and his trial commenced on 29<sup>th</sup> September 2010. The prosecution called a total of ten witnesses while Muraguri who gave a sworn defence but did not call any witnesses.

2. Before commencing to consider the evidence adduced it is important to state that the burden of proving the case against Muraguri remains throughout on the prosecution. This was clearly stated in the case **REPUBLIC –v- DAVID RUO NYAMBURA & 4 OTHERS High Court Nairobi Criminal Case No. 116 of 1999** viz:-

*“It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution through out to prove the guilt of an accused.”*

PROSECUTION’S CASE

3. The prosecution’s evidence was that Muraguri on 2<sup>nd</sup> August 2009 killed his father **Stephen Mururu Munuhe deceased**. That evidence revealed that on that day at around 7.30 p.m. Muraguri requested his nephew **Charles Mwangi (PW 2)** to go and collect for him his battery where it was being charged at nearby center. His nephew declined to go because it was dark. Muraguri then slapped his nephew and his nephew screamed. The screams caused **Geoffrey Kinyua (PW 3)**, a brother of Muraguri, to come out of his house. Muraguri’s brother told Muraguri that it was not wise to send the nephew to collect the battery because it was late. The brother offered to collect the battery the next day. The screams also caused the mother of Muraguri, **Gathoni Mururu (PW 1)** who was also wife of the deceased to get out of her house. She saw Muraguri beating the nephew. The mother also questioned Muraguri why he was beating the nephew. Muraguri’s brother, nephew and his mother in their testimony stated that there was an exchange between Muraguri and his brother whereby Muraguri told his brother that he should not question him because he was his younger brother. All the three witnesses stated that a fight ensued

between Muraguri and his brother PW 3. When the fighting ended the deceased, father to both Muraguri and his brother Geoffrey PW 3, came out of his house carrying a *simis* (panga) and an axe. According to the mother PW 1, Muraguri told her and her husband the deceased to go back to their house. They began to go back to their house in a procession whereby the nephew PW 2 was ahead, followed by the mother PW 1 and lastly following was the deceased. The nephew in his testimony stated that what happened next was that Muraguri hit the deceased at the back of his head. This what the nephew state in his evidence:-

***“Muraguri came from behind and hit at the back of the head of my grandfather (the deceased). The accused (Muraguri) used a metal bar to assault the deceased. I saw Muraguri hit my grandfather thrice. He hit him first while the deceased was standing but continued to assault him over (sic) after he fell down. I heard my grandfather ask Muraguri as to why he was assaulting him. Kinyua (PW 3) came to the scene but chased (sic) away by Muraguri.”***

4. Muraguri’s brother PW 3 in evidence stated:-

***“Our father (the deceased) came when he heard the commotion. I went to my house. Shortly I heard the deceased shout saying ‘Muraguri do you want to kill me?’ I came out and saw the accused (Muraguri) assaulting the old man (deceased). He was using a metal rod. I was about 4 metres away. When the accused saw me he left assaulting (sic) the deceased and started to pursue me. I saw the accused (Muraguri) assault my father. I sought refuge in the house of my neighbour. The accused passed that homestead. I went home and found our father already dead.”***

5. Muraguri’s mother testified twice. In her first testimony she stated:-

***“Muraguri told Mururu (the deceased) to go back to his house since the quarrel had ended. Mururu went back to his house. Muraguri did not let the deceased go back to his house. I saw Muraguri hit the deceased (Mururu) at the back of his head. He used a metal bar to assault him thrice. Mururu just dropped dead.”***

6. When the mother testified the second time this is how she narrated the event that led to the death of the deceased:-

***“As we were going back to our house and I was ahead of my husband (the deceased) I was about two metres from my husband. As I walked I heard my husband said (sic) “Muraguri you have hit me.” I went backwards and found accused was not there. I heard my husband say “Muraguri you are killing me.”***

She further stated that when she went backwards, after the deceased said he had been hit by Muraguri, she saw Muraguri running away to his house. She then said:-

***“I saw it was him (Muraguri) then I screamed.”***

As she screamed she again heard the deceased say:-

***“Muraguri has hit me.”***

7. Muraguri gave sworn defence. In testifying on the events of 2<sup>nd</sup> August 2009 he denied that he killed his father. On that day he said he had a female visitor at his house. When he reached the homestead on that day at 6.30 p.m., in the company of that female visitor he did not find anyone else at that home. He stated that 2<sup>nd</sup> August 2009 was a Sunday. Muraguri did not say what time he sent his nephew but he confirmed that he sent him to Ngenia Market to collect the battery for his television. The nephew refused to go because he said it was getting dark. Muraguri said that his nephew was an orphan for whom he paid school fees. He also stated that he used to send him on errands.

8. When his nephew refused to go collect the battery, Muraguri said that he pinched his ears. It is then

his brother Geoffrey Kinyua (PW 3) came to ask Muraguri what he was doing. Muraguri further stated in his testimony:-

***“..... my brother (PW 3) was interfering ..... My brother was aggressive ..... My brother spoke to me aggressively. We fought. I was drunk. I had taken changaa. We had a bitter fight. My brother was overcoming me. I felt my brother was interfering. He had left his house and was interfering with me.”***

9. Muraguri stated that he and his brother had no weapon as they fought for one hour. That as they fought people gather to watch them fight. The deceased was standing at his house about 30 metres from where Muraguri and his brother were fighting. That when Muraguri realized he was being overcome by his brother he declared the fight to be over. They both went to their respective house and their parents also went into their house.

10. However that after five minutes his brother knocked at his house wanting to fight some more. On opening his door Muraguri saw that his brother had a metal bar. It was a 2 meters in length. When Muraguri notice the metal bar he said he took a panga from his house and went out. His brother hit him on the head and hand with the metal bar and he screamed. The screams caused their deceased father to come out of his house with an axe in his hand. The deceased asked his brother why he was hitting Muraguri. Muraguri said he went away leaving the deceased quarreling with his brother.

11. Muraguri said he went to an Administration police (A.P.) post at Mailo Nane to report the fight he had with his brother, but that because he was drunk he was ignored by the police officers at the post. On returning home at 10 p.m. He found his brother with his friends who beat him because his brother told them that he (Muraguri) had attacked their father. Those friends of his brother took him to the Gitugi Police Station. That he was arrested by police even though he did not witness the deceased being hit. He said that it was his brother who killed their father although he did not see him do it.

12. The offence of murder is under section 203 of Cap 63. That section states:-

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

13. From that section it becomes clear that the prosecution must prove beyond reasonable doubt three ingredients, that is:-

- **The death of the deceased;**
- **That Muraguri committed the unlawful act which caused the deceased’s death; and**
- **That Muraguri had malice aforethought.**

14. Before I begin to consider those ingredients it is important and for better understanding, that I describe as far as possible the deceased’s homestead which housed Muraguri, his brother, his nephew and his mother, wife of the deceased, and the deceased.

15. The geography of the deceased’s homestead was provided by **P.C. Stephen Agutu (PW 10)**. He drew a sketch map of that homestead (prosecution’s exhibit No. 7). The homestead is surrounded by a fence. It has two gates, one at the front and the other at the rear. The homes are clustered near to each other, with each being 10 metres apart. On the map marked as ‘C’ is the home of the deceased and his wife. It is the larger house compared to the other two. Marked ‘D’ on the map is the home of Geoffrey Kinyua (PW 3), Muraguri’s brother. Marked ‘F’ on the map is the home of Muraguri. In the middle of those three homes is the kitchen.

16. The first ingredient prosecution needed to prove is that the deceased died. Our first port of call on this ingredient is the evidence of **Doctor Ayub Kitaka (PW 7)**. Dr. Kitaka produced the postmortem report,

prosecution's exhibit No.4, on behalf of Doctor Mathaiya. It was dated 10<sup>th</sup> August 2009. It was the post mortem report of the deceased Stephen Mururu Munuhe. The deceased's body was identified to the doctor by Lydia Gathoni (PW 1) and Geoffrey Kinyua (PW 3). That report noted that deceased body had Rigor Mortis and Livor Mortis. The external examination of deceased's body revealed:-

- **Deformed head especially on the scalp region and right facial region.**
- **Multiple segmental skull bone fracture;**
- **Avulsed teeth with dislocation of the right temporal mandibular joint; and**
- **Bilateral bloody otorrhea and rhinorrhea.**

17. The internal examination revealed multiple laceration and bruises of the scalp at the impact site; deformed skull bone; depressed multiple segmental skull bone; fractures involving the frontal and right temporal squamous, zygomatic, orbital maxillary, nasal occipital bones and bilateral parietal bones; multiple avulsed teeth with dislocation of the right temporal mandibular joint; ruptured right eye ball; multiple sutural diastasis; macerated brain parenchyma subdural and intracranial haematomas. The examination revealed that the cause of death was due to cardiorespiratory arrest due to severe head injury resulting from heavy solid blunt object. The doctor when performing the postmortem extracted the deceased's blood for further examination.

18. Further the evidence of Muraguri's mother (PW 1), that of Geoffrey Kinyua his brother (PW 3) and that of the police officers I.P. Lesa Mutuku (PW 9), P.C. Stephen Agutu (PW 10) and P.C. Charles Gichuki (PW 6) confirmed that the deceased died at the scene on 2<sup>nd</sup> August 2009. They all confirmed having observed the deceased body and having noted that he was dead.

19. From the above it is clear that the prosecution proved that the deceased died on 2<sup>nd</sup> August 2009.

20. The second ingredient to consider is whether Muraguri committed the unlawful act that caused the death of the deceased. This is what is referred to in law as *actus reus*. In the book by Smith and Hogan entitled Criminal Law 14<sup>th</sup> Edition at Page 53 the authors have this to say on *actus reus*:-

***“..... Murder, manslaughter, wounding, etc. It has been said ..... The law is interested only in the result and not in the conduct bring about the result. Similarly, a well-known definition of actus reus is ‘such result of human conduct as the law seeks to prevent. But a dead person with a knife in his back is not the actus reus of a murder. It is putting knife in the back thereby causing the death that is the actus reus.’”***

21. In this case the *actus reus* is the hitting of the deceased on the head with the blunt object. The evidence of Muraguri's mother, the nephew and his brother (PW 1, 2 and 3 respectively) is clear that the deceased was on his way back to his house when Muraguri hit him at the back of his head, with iron bar. Muraguri's brother (PW 3) stated, as the other two witnesses, that when he went back to his house he heard his deceased father say “Muraguri – do you want to kill me?” He further said he saw Muraguri assault the father.

22. The brother, the mother, and P. C. Agutu (PW 10) all of them said that there was moonlight on that night. That light would have assisted the witnesses to see that it was Muraguri who struck down the deceased and continued to hit him even when he had fallen down. It should be recalled that Muraguri hit the deceased immediately after they had dispersed from where Muraguri and his brother had fought. There was no possibility of mistaken identity.

23. The evidence of the brother was that when he heard the deceased father cry out that Muraguri wanted to kill him he went to the scene only for Muraguri to begin pursuing him. This was corroborated by **Grace Karimi Mwangi (PW 4)**. PW 4 stated that she was a resident of Gitugi. That on 2<sup>nd</sup> August 2009

at about 7.30 p.m. she heard screams. The brother of Muraguri knocked at her door. She opened for him. He informed her that he was being chased by Muraguri. She gave him refuge in her house. Both of them saw Muraguri go past PW 4's house. It was then Muraguri's brother went back to their homestead and found the deceased dead.

24. **P.C. Agutu (PW 10)** in his testimony stated that Muraguri was re-arrested by police on the same night, after being restrained by members of the public. P. C. Agutu stated that on the following morning he went to the police cell with a view to interrogate Muraguri. As he was at the cell he noted that Muraguri's trousers were stained with blood. He requested Muraguri to hand over the trousers to him. Muraguri was also requested to provide, which he did, sample of his blood. The trousers, an axe and Muraguri's blood sample and the deceased's blood sample were taken to the government chemist.

25. **Stephen Matinde Joel Waithe (PW 9)** is an assistant government chemist who does analysis. He confirmed receipt of the blood of samples of Muraguri of the deceased, an axe and the trousers. After his analysis PW 9 found that the blood on Muraguri's trousers and on the axe both matched the blood group of the deceased. It ought to be noted that the axe had only been lightly stained with human blood which was found to be that of deceased. His conclusion therefore was that the trousers P.C. Agutu removed from Muraguri, the morning after the incident, were stained with the blood of the deceased.

26. In this court's view, bearing in mind the above evidence, the prosecution proved, beyond reasonable doubt, that Muraguri committed the unlawful act of causing harm to the deceased which resulted in death of the deceased. Prosecution proved the *actus reus*.

27. The third ingredient for consideration is whether Muraguri had malice aforethought or in other words *mens rea*. The prosecution, needed to prove the mental fault, bad intention, guilty mind of Muraguri. *Mens rea* is also proved where someone takes unjustified risks of causing *actus reus*. The literal meaning of *mens rea* is a guilty mind. The book Smith and Hogan – 'CRIMINAL LAW' **malice aforethought** is said to be where:-

**“ ..... A parent who kills a suffering child out of motives of compassion is 'malicious' for this purpose; and there is sufficient aforethought if an intention to kill is formed only second before the fatal blow is struck.”**

28. The prosecution in this court's view proved *mens rea* on the part of Muraguri. Muraguri was said by his mother, nephew and brother, the eye witnesses, to have struck the deceased more than once. That evidence was corroborated by the doctor who carried out the post mortem. Doctor Kitaka stated that the post mortem report showed that the deceased was hit several times on the head. This left the deceased skull with fractures, lacerations and bruising. That evidence shows the intent of Muraguri to cause harm. That is to say his state of mind when he struck the deceased was culpable. He intended to kill the deceased.

29. Muraguri by his defence he raised alibi. It is accepted in law that an accused who raises alibi defence does not assume any burden of proving it. Muraguri stated that his brother hit him with a metal bar which prompted their deceased father to come to the scene in defence of Muraguri. As the deceased quarreled with his brother Muraguri said that he left and went to report his fight with his brother at a police post.

30. Muraguri stated that his brother had a motive to kill the deceased because he had “bad blood” with the deceased.

31. When one considers the alibi defence raised by Muraguri juxtapose it with the evidence of the prosecution the alibi defence can only be rejected. Muraguri's trousers that he wore on the night in question were blood stained with the deceased's blood. How could that have happened if indeed Muraguri had nothing to do with the death of his father and was away when his father was killed. The presence of those blood stains can only mean that Muraguri was involved in the injuries suffered by his father. Moreover Muraguri in cross examining his brother, through his counsel did not ask his brother any

question leading to a suggestion that his brother killed the deceased. It follows that defence was an afterthought.

32. Further after the incident all the eye witnesses of the attack by Muraguri of the deceased stated that Muraguri ran away. Similarly PW 4 Grace Karimi said that she gave refuge to Muraguri's brother when he was being chased by Muraguri and Muraguri passed her house. The area chief, who went to the scene, on hearing the screams, said that he found the deceased dead and Muraguri had run away. The fact Muraguri had run away was confirmed by the police officers who went on the scene. Taking to flight is an indication of guilt. See the case of **PHILIP NZAKA WATU –v- REPUBLIC [2016]** where the Court of Appeal stated:-

***“Another important piece of evidence in this appeal, which the trial court did not advert to, and which we find provides additional evidence of corroboration of the prosecution case is the conduct of the appellant immediately after stabbing the deceased. His initial reaction was to attempt to flee, forcing PW 3 to accost and restrain him. The appellant’s attempt to flee the scene is indicative of his guilty mind and may be relied upon as evidence that corroborates the prosecution case. (See BUKENYA PATRICK & ANOTHER V. UGANDA, CR. APP. NO. 15 OF 2001, Supreme Court of Uganda.”***

33. The cumulative effect of the prosecution's evidence has a 'knock off effect' on the defence offered by Muraguri.

34. The counsel for Muraguri by his written submissions highlighted what he considered to be inconsistencies of prosecution's evidence. The 10 year old nephew stated that on the night in question it was dark. Muraguri's mother, brother and P.C. Agutu talked a moonlight. The other issue highlighted by Muraguri's counsel was the fact the nephew said is that the fight between Muraguri and his brother was at their neighbours compound while that was not supported by the evidence of the mother and brother of Muraguri.

35. The criminal standard of proof as stated herein above is beyond reasonable doubt. It is not beyond a shadow of doubt as submitted by counsel for Muraguri. Lord Denning in the case **MILLER V MINISTER OF PENSIONS [1947]** explained what beyond reasonable doubt means. He stated:-

***“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”***

36. In this case the evidence adduced by the prosecution is strong against Muraguri. In totality it indeed points to his guilt. If there were any contradictions in the prosecution's evidence they were minor and did not go to the roof of the matter. In this regard I refer to a Court of Appeal decision in the case **PHILIP NZAKA WATU V REPUBLIC [2016]eKLR** where the court stated:-

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

***In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence***

*and concluded as follows, a view we respectfully adopt:-*

***“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”***

37. On the submissions of Muraguri’s counsel in regard to his mother’s evidence where at one time she said that she saw Muraguri hit the deceased and heard the deceased say Muraguri was killing him and at another time she said she did not see him hit the deceased but heard the deceased say that Muraguri was killing him; that in itself is not an inconsistency that shakes the prosecution’s strong evidence. In any case the statement made by the deceased, just before he died, that is that Muraguri was killing him was dying declaration, which can be received in evidence. This was well discussed in the case PHILIP NZAKA WATU V REPUBLIC (Supra) viz:-

***“Decision of this court abound on admission and reliance on a dying declaration. Suffice to mention only two, CHOGE V REPUBLIC (1985) KLR 1, KIHARA V REPUBLIC (1986) KLR 473 and NELSON JULIUS KARANJA IRUNGU V REPUBLIC, CR. APP. NO. 24 OF 2008. Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33(a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence .....*”**

This court expressed itself as follows in CHOGE V REPUBLIC (supra);

***“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”***

38. Having considered the evidence adduced in this case both by the prosecution and the defence I am satisfied that Muraguri armed himself with a metal bar, which however was not recovered, and set upon the deceased by hitting him severally on the head and in that action no other outcome could have been other than the death of the deceased. In viciously attacking the deceased Muraguri intended to do him grievous harm. The prosecution proved beyond reasonable doubt a case of Murder against Muraguri. Muraguri his hereby **convicted of murder contrary to section 203 as read with section 204 of the Penal code.**

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF MAY 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Accused: Francis Muraguri Mururu.....

For Accused .....

For the State: .....

COURT

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**