



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**HIGH COURT CRIMINAL CASE NO. 28 OF 2015**  
**(FORMERLY MERU HCCR NO. 10 OF 2014)**

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK KIRIMI MUGIRI.....ACCUSED

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

1. **FREDRICK KIRIMI MUGIRI**, the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars as per the information presented to this court is that the Accused herein jointly with another before court murdered **EDWARD KIBERENGE STEPHEN** (hereinafter to be referred to as the deceased) on the 15<sup>th</sup> November, 2012 at Ngotika, Muiru Location within Tharaka Nithi County. The Accused person denied committing the offence and the prosecution called seven witnesses to prove or support their case.

2. (a) **The Prosecution's Case:**

The prosecution's case against the Accused person majorly rested on the evidence of two eye witnesses and the expert evidence showing what caused the death of the deceased in this case. According to the wife of the deceased Janet Chelangat Kiberenge (PW1), she was with the deceased looking after sheep with her husband (deceased) at their home at around 6 pm, when the Accused herein in the company of Mwenda both of who were neighbours of the deceased family, passed by. The witness testified the Accused proceeded to where the deceased was and greeted him as Mwenda proceeded on his journey and that shortly after greeting the deceased, the Accused wrestled the deceased to the ground and started strangling him. The witness added that the deceased screamed attracting the attention of Lucy Muthoni Njeru (PW2) who had left the scene shortly before the duo of the Accused and one Mwenda arrived. PW1 further told this court that Muthoni (PW2) rushed back and wrestled the Accused to the ground and that his screams attracted his companion one Mwenda who came back armed with a panga and iron rod. The witness (PW1) testified that the Accused took an iron bar from Mwenda and hit the deceased on the head felling him down in the process. She further stated that she was screaming all the while and that Humphrey Mwiti (PW5) brother to the deceased and one Kibara, a brother to Mwenda came to their rescue and assisted in taking the deceased to Chuka District Hospital where he was treated and later transferred to Kenyatta National Hospital where he succumbed to the head injury on 20<sup>th</sup> December, 2012.

3. **LUCY MUTHONI NJERU** (PW2) also testified and confirmed that on the material date and time, she was passing by the road near the deceased home where she found PW1 and her husband (deceased) looking after goats near their homestead and that after passing them and going for around 100 metres, she heard screams coming from behind and on running back to check out what was happening, she found the

Accused person lying on top of the deceased person and strangling him with a coat. She added that she took hold of the coat and threw it away while at the same time pushing the Accused from the top of the deceased. According to PW2, the wife (PW1) was then shielding the deceased from Mwenda who was trying to hit him (deceased). She further testified that Mwenda had an iron bar and when she arrived, he (Mwenda) had already hit the deceased on head as she found the deceased already injured. She also added that the deceased had also suffered a fractured right arm and that he tied both his head and the fractured arm with a piece of clothing before moving the deceased from the scene and later to Chuka District Hospital.

4. The other material witness called by the prosecution was Humprey Mwiti (PW5) who was also a brother to the deceased. He testified that on the material date and time he heard screams emanating from the homestead of his deceased brother and rushed there where he found that his brother (deceased) had been cut on the right side of his head. He then called one Mugendi who came with a vehicle that took his deceased brother to Chuka District Hospital. He accompanied him to Chuka District Hospital and later to Kenyatta National Hospital where the deceased later passed on.

5. Dr. Okemwa Minda Permenus (PW7) the Pathologist called to testify to give insights as to what caused the death of the deceased told this court that he carried out post mortem examination on the body of the deceased and found that the deceased had been operated on the head to remove a clot after suffering a skull fracture. His opinion was that the cause of death was ***"an operated head severe injury as a result of blunt trauma"***. He tendered the post mortem report as **P. Exh 3**.

6. The investigating officer, Corporal Benard Jangoyi (PW6) informed this court that he took over the investigation of murder from P.C Collins Mutwiri who had passed on and that he did not get a chance to visit the scene. According to his investigations the witness established that the deceased reported an assault case at Chuka Police station and reported that the Accused and Mwenda had assaulted him. He further testified that as per his investigation, the deceased and the Accused were fighting and that Mwenda came to the rescue of the Accused person and that all were from a drinking spree where a dispute that caused the fight arose.

#### **7. Defence Case:**

When the Accused was placed on his defence he gave evidence on oath that on the material date at around 2 pm, he had gone for a local brew known as ***"Kanga"*** which was within the village and that he met the deceased among other patrons as the at the drinking den. He testified that he knew the deceased as he was neighbour and that they had cordial relationship with him as they had no differences. He further added that after drinking he decided to go for a funeral arrangements at the home of Mwenda Ndesi who was also present at the drinking joint. It was his evidence that he left the place in the company of the deceased and Mwenda and that the two quarreled along the way and started fighting but he separated them. He added that after separating them, the deceased pinned him down and tried to strangle him with a coat as Mwenda dashed to his house nearby and came back with a wooden stick which he then used to strike the deceased on the head. The Accused stated that when the deceased was hit, he left him and chased Mwenda and when he screamed, the wife of the deceased appeared at the scene. He denied hitting the deceased saying that he had no weapon at the time of the incident. He also denied knowledge about the injuries suffered by the deceased saying that he only learnt after 3 months that the deceased had passed on. According to him, the deceased and Mwenda were the ones fighting and he only went to separate the two because both were his friends.

8. The called one witness Peter Njagi Mbungu (DW2) who testified in his defence. According to DW2, he was attending a funeral of a friend named Doreen at Mwenda's homestead on the material date when he heard screams from the homestead of the deceased person. He told this court that he then saw Mwenda running towards his house and came out with a ***"rungu"*** and ran back to where the screams emanated. He told this court that he followed Mwenda and found the deceased wrestling down the Accused person. He further testified that he saw Mwenda hit the deceased on the head with the ***"rungu"*** and after being hit the deceased fell down and the Accused ran away.

9. In his written submissions made through his learned counsel Ms Kijaru, Njeru & Co. Advocates, the Accused has faulted the consistency of the two prosecution witnesses who were present at the scene of crime at the material time. The defence has pointed out while PW1 in her evidence testified that he saw Mwenda come armed with a panga, '*rungu*', and iron bar and that Mwenda hit the deceased with a '*rungu*' while PW2 stated that she saw PW1 trying to shield the deceased from being hit by Mwenda. The defence also submits that the postmortem report did not support PW1 evidence that Mwenda had cut the deceased with a panga. The defence has casted doubts about the presence of PW1 at the scene and submitted that the deceased was hit by Mwenda as witnessed by Lucy Muthoni (PW2) and Peter Njagi Mbungu (DW2).

10. The defence has further contended that the Accused and the deceased were friends and used to drink together and that the evidence adduced by the investigating officer showed that the two were on a drinking spree when a quarrel ensued between the deceased and Mwenda. It is also contended that the Accused was not armed at the time. The defence submits that it was Mwenda who went and came back with a metal bar which he used to hit the deceased person. The defence submits that no malice aforethought has been established against the Accused person herein and that demonstrated that the prosecution has failed to prove its case against the Accused person beyond reasonable doubt. The defence has cited the cases of **Republic - Vs- Juma Munga Bidii [2012] eKLR**, **Republic - Vs- G.W.O [2013] eKLR** & **Raphael Isolo Echakara & Anor -Vs- Republic [2014] eKLR** to support their submissions.

11. The state in its part has submitted that they have proved their case beyond reasonable doubt as they have established all criminal ingredients of the offence of murder as enumerated in the case of **Republic-Vs- Mohammed Dadi Kokane & 7 Others [2014] eKLR**. The prosecution contends that the following ingredients are crucial to prove a case of murder namely:-

- a) The fact of death
- b) The cause of such death
- c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of Accused person and
- d) Proof that the said unlawful act or omission was committed with malice aforethought.

12. The prosecution has submitted that the deceased herein died on 20<sup>th</sup> December, 2012 at Kenyatta National Hospital due to injuries he had sustained. It is submitted that both the evidence of PW1 (Janet Chelangat Kiberenge) and PW2 Lucy Muthoni showed that the Accused person and Mwenda fought the deceased person and caused the injuries to him which later led to his demise and that the evidence of Dr. Okemwa Minda (PW7) clearly showed that the deceased died from the injury inflicted upon him. The prosecution has faulted the defence for trying to divert the guilt to Mwenda stating that the Accused has not demonstrated how he tried to stop Mwenda from smashing the skull of the deceased. The prosecution has further pointed out that the fact that the Accused did not report the incident to the police demonstrated that he was not as innocent as he claimed. Citing the provisions of **Section 20 (1) of the Penal Code**, the prosecution has submitted that the Accused person took part in assaulting the deceased person and he should be deemed guilty on account of common intention with his accomplice.

13. On malice aforethought, the state has submitted that the evidence laid before court has shown that the Accused initiated the attack on the deceased and that Mwenda only came to his rescue when he screamed. The prosecution has contended that the defence put forward is a sham, feeble and cannot shake their case. It is submitted that the offence committed against the deceased was a joint venture between the Accused and Mwenda and that in view of the decision in the case of **Republic -Vs- Mohammed Dadi Kokane & 7 Others [2014] eKLR** their against the Accused herein has been proved beyond reasonable doubt and should be found guilty of murder.

**14. Determination;**

The Accused in this case as indicated above is charged with the offence of murder which is defined under **Section 203** of the **Penal Code** as follows;

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

In my considered view, the above definition shows that for a charge of murder to be sustained the following elements must be established and proved beyond reasonable doubt.

- a) Death and the cause.
- b) The act causing death is actuated by malice.
- c) The act/omission is unlawful
- d) The act/omission is connected/committed by the Accused person.

15. In this case, this has no doubt in its mind based on the evidence tendered that Edward Kaberenge Stephen (deceased) is dead and died on 20th December, 2012 while undergoing treatment at Kenyatta National Hospital notwithstanding the absence of a death certificate. The evidence tendered by the brother of the deceased James Mugendi (PW4) who identified the body of the deceased and attended the postmortem together with the evidence tendered by Dr. Okemwa Minda Perminus (PW7) leaves no doubt in my mind that the deceased is indeed dead.

16. On the question of the cause of his death, again basing my judgment on the evidence of the doctor who performed post mortem examination on the deceased, it is apparent that the cause of death was a severe head injury as a result of a blunt trauma which had caused the fracture of the skull. I have looked at the post mortem report (P Exh 3) and, though I must admit that the doctor could have done better by being a bit clearer on what had caused the death of the deceased, it can be deduced from the post mortem report that the doctors at Kenyatta National Hospital had tried to save the life of the deceased by trying to remove a blood clot in the brain tissue perhaps. The doctor opined that the cause of death was;

***"an operated head severe injury as a result of blunt trauma"***

and looking at this on the face of it, it is hard to tell if the deceased died as a result of the operation to cure the blot clot or the death was a result of the blunt injury. Nonetheless either way as I have observed above the doctor could have done better but all the same this court satisfied beyond doubt that deceased died as a result of blunt trauma caused severe head injury, inflicted by a blunt object. The big question is who inflicted that fatal injury?.

17. The answer to the above critical question will determine the guilt or otherwise of the Accused person herein. In this case, four persons have testified stating that they were eye witnesses to the incident that led to the death of the deceased. These are;

- (i) Janet Chelangat Kiberenge (PW1) also wife to the deceased.
- (ii) Lucy Muthoni Njeru (PW2) who was a neighbour to both deceased and the Accused person.
- (iii) The Accused person himself
- (iv) Peter Njagi Mbungu (DW2)

18. According to the wife of the deceased (PW1) she was alone with her husband when the Accused person who apparently appeared drunk went to greet her husband (the deceased) as Mwenda proceeded on his way to his house nearby. And before long and for no apparent reason, the Accused wrestled the deceased to the ground after being told by the deceased to go home because he was drunk. As the

Accused pinned down the deceased trying to strangle him with a coat. PW1 says she screamed attracting Lucy Muthoni (PW2) who came and wrestled the Accused down enabling the deceased to rise up from the ground and according to PW1, it was at that point that Mwenda came back with a panga and iron bar and that the Accused took the iron bar and hit the deceased on the head. She further added that Mwenda hit the deceased on her left arm breaking it in the process and also cut him on the right side of the head with a panga. This version of events is slightly different from the version given by Lucy Muthoni (PW2) the other eye witness. According to her, she heard screams shortly after passing by the homestead of the deceased and on rushing back she found the Accused on top of the deceased strangling him. She says she pushed the Accused after throwing away the coat which was used to strangle him but as she was doing so, PW1 was trying to shield her husband (deceased) from being attacked by Mwenda who had an iron bar on his hands and that it was then that she realised that the deceased had been injured on his head and had suffered a broken right arm. It was her testimony that **"Mwenda had already hit the deceased before I arrived."**

19. It is evident that PW1 Janet Chelangat Kiberenge could do little on the fight that ensued because she had a small child on her back at the time. So when PW2 says she saw PW1 trying to shield her husband from being hit by Mwenda who was armed with an iron bar, the whole picture presents itself especially when considered alongside the evidence tendered by the accused and his witness Peter Njagi Mbungu (DW2). According to the Accused, the deceased was stronger than him and pinned him down after he had separated him and Mwenda from fighting and as he was being strangled, Mwenda came with a **"rungu"** and hit him (deceased) and upon being hit, the deceased left the Accused and chased Mwenda. DW2 corroborated this version that it was Mwenda who hit the deceased as he tried to rescue his friend the Accused herein. It is difficult going by the above evidence to clearly conclude that the Accused herein is the one who struck the deceased with the iron bar. This court finds that the evidence of PW1 as to who struck the deceased is inconsistent with PW2 who was categorical under cross-examination that;

***"I told the police that Mwenda hit the deceased with the iron bar...Mwenda is the one who had the iron bar."***

In view of the evidence tendered by the defence and the above inconsistency on the part of PW1 & PW2 in regard as to who struck the deceased person, this court finds that a serious doubt has been created as whether the Accused person indeed was responsible for the fatal injury suffered by the deceased person. It is trite law that where there are doubts as whether the Accused persons committed the offence, the benefit of those doubts should always go to the Accused person. I also agree with the defence submissions that the medical evidence tendered (read post mortem report) is inconsistent with the evidence of PW1 in particular when she states that Mwenda hit the deceased with a rungu and broke his left arm and also cut him on the right side of the head. PW7 (Dr. Okemwa Minda) in his findings did not observe those injuries described by PW1 and to some extent PW2. Further, if it is true that Mwenda cut the deceased on the head, it then presents another doubt because according to the doctor, the probable cause of death was as a result of blunt trauma and this court doubts whether a sharp object like a panga can cause a blunt trauma. It is therefore clear from the above that there is a serious doubt as to what and who caused the injury to the deceased. Whether it is Mwenda as per PW2 or the Accused person herein as per PW1.

20. This court has also found that the crucial element of malice aforethought has not been clearly established against the Accused herein. The evidence adduced by the prosecution shows that the Accused and the deceased were buddies who used to drink together and generally had a cordial relationship prior to the incident. The Accused person is reported by PW1 to have been going to where the deceased was for greetings. He was not armed at the time and that fact is supported by PW2 who told this court that;

***"I did not hear any quarrel between the deceased and the Accused."***

The state has contended that malice aforethought can be inferred under **Section 206** of the **Penal Code** and urged this court to apply the provision of that Section in finding that malice aforethought has been established in this case. However a look at the evidence tendered show that if there was any malice aforethought the same can only be attributed to Mwenda because PW1 clearly stated in her evidence that;

***"It is Mwenda who brought the iron bar."***

I do not find sufficient evidence tendered to show that the Accused harboured any prior intention to cause harm to the deceased. There is no evidence to also find either that he had a common intention with Mwenda to cause harm to the deceased or basis to draw any inference that the Accused together with Mwenda harboured ill motives against the Accused person. This is simply because the evidence tendered are on the contrary. The two Accused and the deceased were friends. This court was not told why Mwenda who appears to have been the culprit in this case was not arrested. The investigating officer did not shed any light as whether they are looking for him to answer to the charge of murder. I am not persuaded that the provisions of **Section 20 (i)** of the **Penal Code** do apply in this case because there is connection between what Mwenda did and the accused herein.

21. This court finds that on the evidence tendered as considered above, the prosecution's case in my view has failed to meet the threshold required in criminal law which is to prove their case beyond reasonable doubt. As analysed above, this court's doubts lingers as to whether it is the Accused person herein who actually hit the deceased with the iron bar and if he did whether the action was actuated by malice aforethought. The provisions of **Section 206** of the **Penal Code** is applicable only when the element of **ACTUS REUS** has been established and proved beyond reasonable doubt. The said provisions are not applicable here because besides lacking the element of "*actus reus*", the evidence tendered shows that both the deceased and Accused person were friends and no evidence of previous disagreement or altercation which could have established motive for the murder, was laid before this court.

The upshot of this that this court finds that the guilt of the Accused person for the offence for which he was charged has not been proved in accordance with the law. The Accused person is hereby acquitted under **Section 215** of **Criminal Procedure Code** and shall be set free forthwith unless lawfully held.

**Dated and delivered at Chuka this 25<sup>th</sup> day of July, 2017.**

**R. K. LIMO**

**JUDGE**

**25/7/2017**

**25/7/2017**

Judgment signed, dated and delivered in the open court in the presence of Mugo Advocate holding brief for Kijaru for accused and Machirah for State.

**R. K. LIMO**

**JUDGE**

**25/7/2017**