



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPENGURIA
CRIMINAL CASE NUMBER 2 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

JOEL YEGO NGULENGULE.....ACCUSED

JUDGMENT

JOEL YEGO NGULENGULE is charged with the offence of **Murder, Contrary to Section 203 as read with Section 204 of the Penal Code.**

The Particulars of this offence are that on the 22nd day of April 2015 at Olwo Village, Korellach Sub-Location, Weiwei Location, within West Pokot County, the accused murdered Peter Domonyang Ngolengula.

The prosecution called 6 witnesses and their case is that the accused herein, PW-2, PW-4 and the deceased, are all brothers. The deceased and the accused had a land dispute. On 22.4.2015 PW-1 and the deceased were working in the land of PW-1. They left the farm at about 6.30pm, heading home. They had left the working tools in the farm house. When they reached near the water camp, they met the accused person. The accused was armed with a panga. The accused asked the deceased why he wanted to beat him the previous day. The deceased did not answer. The accused pounced on him with the panga he had. He cut the deceased with it in the head. The deceased fell down as a result. The accused picked a huge stone and hit the deceased with it on the head. The accused then escaped. PW-1 called PW-2 and told him about the incident. PW-2 was at the time with a friend (PW-3) at Sigor Market. The report he received from PW-1 was that the deceased had been killed by the accused. PW-2 and PW-3 ran to the water camp. On the way they met the accused person. The accused had a panga in the right hand and a small stone in the left hand. The accused told his brother (PW-2) to go and pick his meat, and should know that he'll be next. PW-2 and PW-3 ran away from the accused, who vanished into the forest. At the water camp they found many people where the deceased was lying injured. Those present were screaming and crying. The deceased had a huge stone on his head. PW-2 removed the stone. The deceased was not dead at the time. With the help of PW-3 they carried the deceased beyond a nearby trench. PW-2 called Sigor Health Centre and requested for an ambulance. Within 5 minutes the ambulance appeared. The deceased was placed in it and rushed to Sigor Health Centre. Doctors administered First Aid and decided to take him for proper treatment at Kapenguria County Referral Hospital. While on the way, at Kamatira, the deceased passed on. They proceeded on to Kapenguria Country Referral Hospital where he was confirmed dead. They took the body back home. The following day, on 23.4.2015, the body was taken to Kapenguria County Referral Hospital Mortuary for preservation and postmortem.

On this very same day, 23.4.2015, the accused presented himself to PW-6 at Marich Police Station. He told the police that he had committed an offence. PW-6 and CPL Abdul proceeded to the scene. There were blood stains at the place. PW-1 was there and explained to them what he had witnessed. At the scene they collected two weapons. They were a huge stone and a panga.

The postmortem was conducted on 24.4.2015 by Dr. Munyalo at Kapenguria County Referral Hospital. The body was identified to him by PW-4. External appearance revealed multiple bruises on the right side of the head i.e. the parietal region and fronto parietal region, consistent with blunt trauma. There was also a deep cut of 13cm on the left Temporo-occipital region, deep to the caldarium. Therein there was a linear fracture of 15 cm at the temporo-occipital region with associated perondicular linear fracture of 4cm. There was obvious excessive hemorrhaging from the fracture site, consistent with a sharp object. The doctor as a result, formed an opinion that the cause of death to the deceased was penetrating trauma to the head with associated intracranial hemorrhage.

The accused was then charged with murder. The recovered stone and panga; and the filled P-3 forms, were produced in court as exhibits.

The accused in his defence gave unsworn testimony and called no witness. His defence is that on 22.4.2015 he was ploughing his land. He left at 1.00pm and went to Opulo where Mama Edu was selling illicit brew. She informed her customers that police were patrolling the area and they should move to the high areas so as to sport them approaching. They did so and took beer till darkness fell. The deceased joined them at the place. He ordered for beer. The place was up the ridges and there were stones. The deceased told the accused that he heard he had ploughed the land. The accused said he did as the land was left for him by their late father. The accused was taking care of his late step-mother's children. The deceased told him he should take the children to their uncle. The accused said he could not do that as they were left with him by their deceased parents. The deceased said their late father left him in charge and the accused could not address him that way. The deceased took a club and attacked the accused with it seriously. The accused held him. The deceased fell on a stone. The accused ran away as the deceased was stronger than him and if he rose would have killed him. He went to the police station and reported the incident. He cried as they had not quarrelled before then. He was then charged. He denied commission of the offence.

The accused's advocate submitted that the death to the deceased was accidental. Both the accused and the deceased were highly intoxicated. They fought and the deceased fell down on a rock and sustained injuries which led to his death.

Under **section 203 of the Penal Code**, any person who of *malice aforethought* causes death of another person by an unlawful act or omission is guilty of murder. **Section 206 of the Penal** reveals that 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.

Given the foregoing, the ingredients for the offence of Murder of which the prosecution are obliged to establish beyond reasonable doubt are:-

i. The fact of the death of the deceased.

ii. The cause of such death.

iii. Proof that the deceased met his death as a result of unlawful act or omission on the part of the accused person.

iv. Proof that the said unlawful act or omission was committed with malice aforethought.

The death of the deceased is not in dispute. PW-2 and PW-3 confirmed that the deceased died on his way to Kapenguria County Referral Hospital, at a place known as Kamatira, on 22.4.2015. The post mortem report filled on 24.4.2015 buttresses the fact.

PW1 is an eye witness as to how the injuries leading to the death of the deceased were inflicted and by who. He was with the deceased and saw as the accused pounced on his brother while armed with a panga. He cut him in the head, and when he fell down struck him on the head with a huge stone before he vanished. PW-1 called PW-2 who's the deceased's brother. On his way to the scene in company of PW-3, they met the accused who was armed with a panga and a small stone. The accused told PW-2 to go and collect his meat, and warned him that he will be next. The evidence by these three witnesses shows vividly that it's the accused person who killed his own brother, the deceased in this case, out of a land dispute. The postmortem attributed the cause of death to the injuries inflicted by the accused. I am convinced by the evidence beyond reasonable doubt that it's the accused who killed the deceased. The accused used a panga to cut the deceased in the head. When he fell down he hit him on the head with a huge stone. The said panga and the stone were produced in court as exhibits. The weapons used and the way they were applied to injure the deceased in the head, was intended to kill him or to cause him grievous harm. The words the accused used thereafter to his brother (PW-2) and of which were heard by PW-3, whereby he told PW-2 to go and collect his meat, knowing he'll be next, shows explicitly that accused was out to kill the deceased, of which he achieved in his death. Malice aforethought is therefore well established.

Accused defence cannot be true. It was not captured during cross-examination of the witnesses. In case he was drunk it was not to a point of negating *mens-rea*. He knew well what he was doing and the probable result of his actions. That is why he told PW-2 to go and collect his meat, knowing he'll be next. The evidence of PW-1 is vivid that the accused did not kill the deceased in self defence. He was the aggressor, who attacked the deceased with a panga and a huge stone. The deceased was empty handed. The defence is just a crafted story and is dismissed.

The upshot is that the offence of murder is proved against the accused by the prosecution beyond reasonable doubt and the accused is convicted of it under **section 203 as read with section 204 of the Penal Code.**

Judgment read and signed in the open court in presence of the convict, his advocate and the state prosecutor (Ms Kiptoo) this 29th day of November 2017.

MS KIPTOO

He is a first offender.

MADAM OPONDO

The accused is remorseful. He prays for leniency.

COURT

The offence carries a mandatory death sentence. It's the sentence pronounced by this court against him. Right of appeal 14 days.

S. M. GITHINJI

JUDGE

29.11.2017