



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.21 OF 2009

REPUBLICPROSECUTOR

VERSUS

MULINGE NONI NGUSYIACCUSED

JUDGEMENT

1. The accused herein **MULINGE NONI NGUSYI** faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the information are that on the night of 30th September, 2006 at Kyaani village, Kaliambeu sub-location, Mbaani Location, Yathui Division in Machakos District within Eastern Province murdered **KIOKO MULULI**.

2. The Prosecution's case is that the deceased herein **KIOKO MULULI** left for a nearby market to go and purchase foodstuffs for his family. However, he failed to return back and which, alarmed his wife Domitila Mueni Kioko (PW.1). The following day the body of the deceased was found lying along a certain footpath to his home. The area Chief Isaac Ndii Muthini (PW.2) was alerted who in turn alerted police officers at Masii Police station. The body was found with some injuries and clothes were soaked in blood. The said chief informed the police officers that word going rounds in the village was that the accused herein was the culprit. The chief and the police officers proceeded to the house of the accused which was about 200 metres from where the body had been found the police recovered a bag containing bloodstained clothes that had been kept in a store nearby. The accused's house was broken into and a bloodstained panga was recovered. The body of the deceased as well as the exhibits were collected by the police. A post mortem was later conducted on the body by Dr. Willis Omoyo of Machakos Level Five Hospital who established that the body had bruises on chest as well as a fracture on the head and hand a fracture involving 4th, 5th and 6th ribs on the right side. The said doctor formed the opinion that the cause of death was pulmonary arrest secondary to head injury and acute haemorrhage as a result of abdominal trauma. He produced the post mortem report as *exhibit 7*. A sample of blood from the deceased together with the recovered blood stained clothes and panga were taken to the Government Chemist for analysis. Stephen Matinde Joel Oribe (PW.6) a senior principal Chemist performing duties of a Government analyst stated that he subjected the specimens to analysis and established that the bloodstains found on the clothes and panga recovered had indeed come from the deceased. He produced the analysis report as exhibit 9(a). The accused was arrested and charged with the offence by Abdullahi Noor Maalim (PW.7) who investigated the case and produced the bloodstained panga and clothes as exhibit (1 – 5).

3. At the close of the case for the prosecution, the accused was put on his defence. He tendered a sworn testimony. He stated that on the material date he had gone to the nearby Mbaani Market to have a drink and left the pub at 8.30 p.m. and arrived at his house around midnight. He stated that he knocked on his door and was expecting his wife to open it only for a stranger to emerge from therein while armed with a panga and ran only to hit a stone and stump nearby and fell down injuring himself. The accused discovered the stranger to be the deceased who hailed from the same area and that he chased him for

some distance before returning to his house only to be arrested afterwards for the murder of the deceased. He maintained that he had no differences with the deceased before and further had not suspected him to have had an affair with his wife.

4. Learned counsels for the Prosecution and defence filed written submissions. It was submitted for the prosecution that the case against the accused has been proved beyond any reasonable doubt as all the essential ingredients of the offence of murder had been established to the required standard in that the accused had malice aforethought and inflicted serious injuries or grievous harm on the deceased leading to his death.

It was submitted for the defence that there was no evidence linking the accused to the crime because the incident took place at night and there was no eyewitness and further there was no evidence placing the accused at the scene of crime. It was further submitted that the malice aforethought was not proved since no evidence was adduced to that effect such as that he had harboured a grudge or ill intention towards the deceased. It was finally submitted for the defence that the prosecution's case had not been proved beyond reasonable doubt and that the accused be acquitted of the charge.

5. I have considered the evidence presented by the prosecution and the defence as well as the submissions of their respective learned counsels. It is not in dispute that the deceased herein sustained bodily injuries from which he succumbed. The cause of death was established by the Pathologist Dr. Willis Omoyo of Machakos Level five Hospital to be cardiopulmonary arrest due to haemorrhage as a result of blunt abdominal trauma. It is also not in dispute that there were no eye witnesses to the brutal murder of the deceased. It is also not in dispute that the blood stains on the panga and clothes recovered from the store and house of accused were established to belong to the deceased. This being the position, the following issues are necessary for determination:-

(1) Whether the accused was the perpetrator.

(2) Whether the prosecution has proved its case beyond the required standard of proof.

6. As regards the first issue and this being a charge of murder the prosecution was under a duty to prove that the person who caused the death of the deceased had malice aforethought as provided under section 206 of the Penal Code. The said Section provides 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.

The above ingredients were to be established by the prosecution and which were to support the other ingredients namely that of the death of the deceased and the cause of death so as to comply with the provisions of Section 203 of the Penal Code which provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. As there was no eyewitness linking the accused to the murder of the deceased, I find that the issue of his involvement or otherwise will be established upon analysis of the key prosecution witnesses as well as the recovery of the bloodstained clothes and panga from accused's house and store and also the evidence tendered by the accused himself in his defence.

The wife of the deceased namely Domitila Mueni Kioko (PW.1) together with her son Mutuku Kioko (PW.3) and the area chief Isaac Ndii Muthini (PW.2) accompanied the investigating officer Abdullahi

Noor Maalim (PW.7) to where the body of the deceased lay and all confirmed that it had several injuries and clothes were bloodstained and from there they all proceeded to the house of the accused where bloodstained clothes were recovered from a nearby store. The witnesses further testified that the police officers broke into accused's house where a bloodstained panga was recovered. The recovered items were handed over to the government chemist where Stephen Matinde Joel Oribe (PW.6) subjected them to a DNA profile analysis and who later established in his report that the blood stains on the exhibits matched with the blood obtained from the deceased. The panga and clothes were produced as exhibits 1–5 while the government analyst report was produced as exhibit 9(a). The evidence of these key witnesses as well as the recovery of the bloodstained panga and clothes from the accused's house and store left no doubt that indeed the accused was linked in one way or the other to the death of the deceased.

Now turning to the defence evidence presented by the accused, it was his testimony that he had arrived at his house around midnight and on knocking his door, a stranger emerged from therein while armed with a panga and took off but fell down and injured himself. The accused further stated that he managed to identify the stranger as the deceased who was a village mate and that he chased him for some distance and then returned to his house only to be blamed for his death. The accused on being cross-examined admitted that the bloodstained panga belonged to him and that he had kept it in his house and further that the recovered bloodstained clothes stashed inside a green bag and hidden inside his granary belonged to him.

Since the bloodstains on the recovered panga and clothes had been established by the Government analyst to have emanated from the deceased the question to be asked is ***“How did the deceased's blood end up on the clothes belonging to the accused?”*** The only irresistible conclusion is that the accused must have come into contact with the deceased and point to a struggle with the deceased before he died. The injuries found on the deceased were so severe to rule out an accidental fall as alluded to by the accused. The deceased had deep cuts on the head as well as several fractures on the hand and ribs. The recovered bloodstained panga and a huge bloodstained stone near the body of the deceased were likely the murder weapons that had been used by the accused to inflict the injuries on the deceased. The manner in which the injuries were inflicted left no doubt that the accused had an intention of inflicting serious injuries or grievous harm on the deceased that led to the death. These kind of injuries could only have been intended to cause the death or grievous harm to the deceased. Even though the accused stated that he had not suspected the deceased to have had an affair with his wife, I find from the nature of injuries inflicted that indeed the accused had malice aforethought. The area chief Isaac Ndi Muthini (PW.2) stated in his evidence that he had learnt from the village elder that the accused and deceased had been together and left Mbaani market together at night. This then seems to put into doubt the accused's assertion that he had found the deceased emerging from his (accused's) house. It would appear therefore that the irresistible conclusion one makes is that the accused's version of events is not convincing since were that to be so then there would have been bloodstains outside the accused's house. It is highly likely that the accused murdered the deceased far away and after the incident rushed to his house to hide the murder weapon and the bloodstained clothes. Even if there might not have been an express malice on the part of the accused, I find there was an implied malice since the injuries inflicted upon the deceased left no doubt that the accused intended to cause serious and grievous bodily harm. The intention was not only to cause grievous bodily harm but to cause death to the deceased. Even though the accused was not found at this house, I find it is highly unlikely that somebody else other than him had been behind the murder of the deceased because no other person could access the accused's house and store so as to hide the bloodstained panga and clothes apart from the accused himself. Indeed the accused's house was broken into by the investigating officer and which led to the recovery of the bloodstained panga. Further the evidence of the investigating officer is that during his investigations he established from the accused that the deceased had been having an affair with his (accused's) wife. I find this to have been the motive behind the accused killing the deceased. The accused and deceased had been reported to have left Mbaani market together at night and therefore it is highly likely that the accused waylaid the deceased and killed him and that his assertion that he had caught him emerging from his house is not convincing. The accused herein was the last person seen in company of the deceased leaving the market at night and was thus squarely placed at the scene of crime.

7. As regards the last issue, I find that the prosecution's seven witnesses have given consistent and

credible testimonies. The defence evidence did not shake that of the prosecution which is quite overwhelming against the accused. The evidence of the seven witnesses places the accused squarely at the scene of crime. The accused in his testimony confirmed that he had no problems with the deceased before and further the area chief confirmed that he had never received a report of any disagreement between accused and deceased and therefore there was absolutely no reason whatsoever to suggest that the accused had been framed up in this offence. The breaking of the accused's house by the investigating officer in his absence did not prejudice the accused in any way since he admitted in his defence evidence that he was the one who had kept the bloodstained panga in the house as well as admitting that the bloodstained clothes recovered from a store within his compound belonged to him. I find the prosecution has proved the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code proved against the accused beyond any reasonable doubt. I find him guilty as charged and convict him accordingly.

It is so ordered.

Dated and delivered at Machakos this **19th** day of **December**, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Langalanga- for the Accused

Machogu - for the state

Kituva - Court Assistant