



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

HCCR NO.13 OF 2013

REPUBLIC.....PROSECUTION

VRS

GIDEON KIMUTAI.....ACCUSED

**JUDGMENT**

1. **GIDEON KIMUTAI** 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 being that the accused on the 24<sup>th</sup> day of March 2013 at Sosiot Trading Centre within Kericho County murdered Vincent Cheruiyot Mutai.

2. The prosecution case is that the deceased was the husband of PW1 (**Judith Chepng'eno**). On 23<sup>rd</sup> March 2013 midnight, the deceased and PW1 had arrived at their house in Sosiot. They lived in a storey building.

3. The deceased asked her for cigarettes which she did not have. He started beating her by slapping and boxing her. She screamed and ran downstairs. On the stairs, she met their neighbour Gideon Kumutai (the accused herein).

4. He accompanied her downstairs where they met other neighbours who had responded to the screams. These were PW2, PW3, PW4 and others.

5. PW1, **Judith Chepng'eno**, wiped the blood from her nose. The deceased was by then outside the door of their house. The accused who was downstairs told the deceased:

*“You Vincent (deceased) have disturbed us for long.”*

The deceased responded that each of them was paying for his house and he had beaten his wife.

6. The accused then retorted saying:

*“I have told you for a long time I will kill you.”*

After saying these words the accused ran upstairs.

6. The next thing they heard was the sound of something dropping down. They ran away briefly but returned to find that it was the deceased who had fallen on the ground. He was quiet. The accused was

also downstairs.

7. The accused held the deceased by the hands and dragged him for about 5 metres to the fence. They, assisted by the accused, later, carried the deceased to the accused's house where he slept until the next day. In the morning he was taken to his house but he was weak. Later he was taken to Sossiot Health Centre and thereafter Kericho District Hospital for treatment. He however, succumbed to the injuries and died.

8. PW2, **Beatrice Chebet**, PW3, **Dorothy Cherotich** and PW4, **Chebet Chepkwony** and accused, Gideon Kimutai all responded to the screams by PW1. They confirmed that PW1, deceased and accused were all drunk that night. They saw the accused going upstairs where the deceased was as he complained of his conduct. There was light from security lights on the building.

9. As they stood there, they heard, something fall down heavily. On checking they found it was the deceased.

According to PW2 and PW4, they saw the accused hold the deceased by the legs and throw him down. He fell on some rough part of the verandah.

10. PW5, **Dr. Edwin Kosgei** produced the post mortem report (EXB1) on behalf of Dr. Tony Oyoo who had conducted the post mortem. The cause of death was found to be a severe head injury and bleeding in the brain.

11. PW6, **P. C. George Acholla** is the Investigating Officer in this matter. Upon receiving the report he went to the scene at Sossiot Market at Standard Bank Building (one storey building). It has six (6) residential houses. From his investigations he was satisfied it that was the accused who pushed the deceased from upstairs and he fell down on a hard surface.

12. The accused had gone to the rescue of PW1 who was being beaten by the deceased. The witness produced the accused's mental assessment report (EXB2) which shows that he was mentally fit to stand trial. He also produced a sketch plan of the scene (EXB3). He confirmed that there was electricity in the building.

13. In his unsworn defence the accused stated that he was asleep on 23<sup>rd</sup> March 2013 at 12.30 a.m when he heard a neighbour screaming and shouting his name. They were neighbours in a storey building where they had rented rooms. The screaming neighbour was fighting with her husband. He went out and found the man holding the wife on the floor and hitting her.

14. He separated them by holding the man to enable the lady run away. The man fell down from where he held him. He did not realise he had applied a lot of force on him.

15. He ran downstairs and found that the man (now deceased) was injured. He had blood on his forehead. He left the others taking the deceased to hospital as he rushed to inform his parents.

16. Mr. Maengwe for the accused submitted that the accused's defence shows that there was no intention to kill. He was just being a good samaritan.

17. This is the case before court for determination. Section 203 of the Penal Code which defines murder provides:

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

18. The ingredients to be established in a murder case are:

- **The fact of death.**

- **The act of killing (*actus reus*)**
- **The intention/malice aforethought (*mens rea*).**

19. There is no dispute about the death of Vincent Cheruyoit Mutai the deceased herein. PW5 found the cause of death to be a severe head injury and bleeding into the brain. The evidence of PW1, PW2, PW3 and PW4 is that the deceased fell down on the verandah of a storey building. He sustained injuries which finally caused his death.

20. The deceased and PW1 who were husband and wife respectively had arrived at their house at Sosiot Market. They lived in some storey building which had other tenants e.g the accused and PW3.

21. Both PW1 and the deceased were drunk. A fight ensued between them and PW1 started screaming and attracted the attention of several people including PW2, PW3, PW4 and the accused. PW1 ran downstairs.

22. From the evidence, the accused went upstairs where the deceased was. He left everyone else including PW1 downstairs.

It is therefore not true when he says he is the one who separated PW1 and the deceased. Infact before he went upstairs, he was heard uttering words that were to the effect that he was tired of the conduct of the deceased.

23. The witnesses PW1, PW2, PW3, PW4 and the Investigating Officer, (PW6) have confirmed that there was electricity light from the security lights on the building. PW2 and PW4 testified that they saw the accused hold the deceased by the legs and throw him down. The point at which he fell was where these witnesses were standing. Therefore the witnesses were able to see him.

24. The accused has stated in his defence that the deceased fell from upstairs after he used excessive force on him. He in the process hit his head on concrete ground causing him a fatal injury. I therefore find that the accused is the person who committed the act leading to the deceased's death.

25. The next issue for determination is whether the killing was premeditated. Section 206 of the Penal Code defines malice aforethought as follows:

*“Malice aforethought shall be deemed to be established by Malice aforethought. 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.”*

By section 206 (a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. See **Ogeto V R [2004] 2 KLR 15**.

26. In **Republic V Ndalamia & 2 Others [2003] KLR 638**, Osiemo J (retired) held:

*“3. For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.”*

27. In **Nyabuto & Anor V R [2009] KLR 409** the Court of Appeal had this to say of *Mens rea*/intention to kill

*“3. Mensrea , an ingredient of murder under section 206 of the Penal Code had been satisfied as the evidence established that the appellants and others had set out with the intention to cause death or to do grievous harm to the deceased and his brothers”*

28. The court of Appeal also in **Mui & 8 Others V R [2008] KLR 50 para 5-15** stated thus:

*“Taking into the fact that these people went to the home of the deceased on 23<sup>rd</sup> October, 2002 and warned her on what she had allegedly done (bewitched 6<sup>th</sup> accused), the subsequent visit by the gang to the deceased's home on 5<sup>th</sup> November, 2002 and inflicting of serious injuries on the deceased leading to her death, malice aforethought was disclosed. In our view this was a wicked scheme based in the belief that the deceased had bewitched the 6<sup>th</sup> accused and for that reason took upon themselves to eliminate the deceased. The manner in which the gang behaved and the severe injuries inflicted could lead only to one conclusion that these people intended to kill or cause harm to the deceased. We are satisfied that the charge of murder was proved.”*

29. The thread running through the above authorities is that while determining the presence of intention one must look at all the circumstances of the case and what actually happened.

30. In the present case, it has been shown that PW1 and the deceased used to fight literally daily. Their downstairs neighbour (PW3) testified that on the fateful night PW1 and the deceased were drunk and were fighting as they came home. They were smelling of alcohol. The accused stayed with them upstairs and only came to the scene after the screams by PW1.

31. PW4 heard the accused utter the following words as he went upstairs:

*“This young man is treating us as if he has placed Kenya in his pocket.”*

The time of incident was 12.30 a.m and the fighting and screams by the deceased and PW1 may have caused offence to the neighbours moreso, the accused who stayed upstairs with them.

32. After the deceased fell down the accused came downstairs and pulled him to the fence. Thereafter, he assisted PW1 to carry him upstairs. According to PW1, she was unable to open the door to their house. The deceased therefore slept in the accused's house upto the next morning before he was taken to the hospital.

33. All these acts put together do not reflect the actions of a person who had premeditated to kill. The fightings and screaming by the deceased and PW1 could cause annoyance to other tenants hence the utterances by the accused.

34. I find that the prosecution has failed to demonstrate that the accused had the required *Mens rea* to kill. I however, find that the injury that the deceased suffered as a result of the fall caused his death. The killing was therefore unlawful.

35. I therefore reduce the charge of murder to manslaughter contrary to section 202 as read with section 205 of the Penal Code of which the accused is accordingly convicted.

Signed, dated and delivered this 15<sup>th</sup> day of March, 2016.

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**H. I. ONG'UDI**

**JUDGE**

In the presence of:

M/s Keli for State

Mr. Maengwe for accused

Accused person and Mr. Kenei Court Assistant.