



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CR 22 OF 2011

REPUBLIC..... PROSECUTION

-VRS-

FELIX KITHINJI KABURU.....ACCUSED

JUDGMENT

FELIX KITHINJI KABURU is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 10/4/2011 at Karanene Sub Location, Karanene' Location of Buuri District, murdered Karambu Muriungi.

The prosecution called a total of five witnesses while the accused testified on oath in his defence. He did not call any other witness. The prosecution was led by Mr Mulochi, learned counsel for the State while the defence was conducted by Mr Omari, Advocate.

PW1 JOHN MURIUKI KABURU is younger half brother of the accused because they share one father but have different mothers. The deceased was PW1's mother. PW1 testified that on 10/4/2011, a Sunday, he was washing his clothes at their home when he saw his elder brother, the accused, coming carrying a panga, he threw it at the deceased but it did not cut her; that accused asked the deceased why she was drawing water when it was not her turn to do so; that accused started chasing the deceased around the kitchen, threw a jerrican with water at her and also took the basin that PW1 was using to wash clothes, hit her with it, and continued to chase her; that accused picked the axe which was next to the bathroom. That the deceased fell and accused cut her twice on the head using the axe. PW1 saw that the mother was bleeding profusely and he left on a bicycle to go and call the father (PW3) who had gone to church at Kamarai. By the time he arrived back at home, PW 1 found a taxi had arrived. The deceased was put inside and she was taken to Kirua Hospital; that the next day police went to their home and arrested the accused and took possession of the axe that he had used to cut deceased. PW1 learnt that his mother had died.

PW1 further told the court that they used to live in peace there before but a year before this incident, accused left home for sometime and when he came back, he used to pick quarrels with the deceased. PW 1 also told the court that when the incident took place, he was at home with his elder sister **MERCY KINYA (PW2)**, accuseds' younger sister.

PW2 reiterated what PW 1 told the court that accused came home about 1.00 pm, found her step mother drawing water. PW2 was in the house when she heard accused and deceased quarreling over water. On coming out of the house, she saw the accused chasing the deceased with a panga which he then threw at her he then threw a Jerican at deceased as he chased her round the house; then he picked the basin which PW 1 was washing his clothes on and threw it at deceased; then he picked an axe which was next to the bathroom; that the deceased fell and accused hit her twice on the head with the axe. PW2

raised alarm and a neighbour who had a taxi came and took the deceased to Hospital while PW 1 went to call the father.

PW3 RUFFUS KABURU is the father of accused, PW 1 and PW2 and husband to the deceased. He was in church when PW1 went to inform him of how his wife had been assaulted by accused. He rushed home and confirmed that on the way to Nkubu hospital, she died. PW3 said that before this incident, accused had once chased the deceased with a bow and arrow, was arrested but he asked for forgiveness and promised not to repeat it and he was released.

According to PW3, accused did not relate well with his siblings including PW2.

PW4 PC GERALD MBICHI was the Investigating Officer in this matter. He visited the scene on 11/4/2011, recovered the axe used in the assault and arrested accused from his house. He viewed the body and observed two deep cuts on the head.

DR BELINDA NAMISI (PW 5) produced the post mortem prepared by Dr Nato who conducted the post mortem on the deceased's body. The Doctor found a deep cut wound, 7cm on the occiput and another deep cut wound 5cm on the forehead; internally the skull had a fracture with intracranial haemorrhage. The Doctor formed the opinion that the cause of death was severe head injury due to assault with a sharp object.

In his sworn testimony, the accused stated that on the material day, he went to his father's home to ask for water. The home was about 300 meters from his. His father allowed him to use the water because he was going to church. He connected the pipes to his shamba and started watering his vegetables but after a short while, the water stopped flowing.

Accused went back to the tap to find out what had happened and found the water pouring. PW1 told him that he was drawing water for the cows and forgot to reconnect; that he reconnected the water and went back to his farm only for the water to disappear again. He went back to check and found it pouring and again PW 1 said he had forgotten to reconnect it and when accused started questioning PW1 why he was doing that, is when the deceased came out of the house, with an axe with which she wanted to cut him; that he pushed her and she fell on the wood and the axe. He did not know where the deceased got injured because he left her screaming.

Accused denied having had any dispute with deceased. Accused said that there were people at their house buying further stated that he related well with his father and siblings before this incident. He tried to explain why all of them would want bad for him, because of a safaricom business they had. However he did not explain how the business affected their relationship.

In his closing submissions, Mr Omari argued that there were no independent witnesses to the incident as PW 1-3 were all family members; that the most important ingredient of a charge of murder was not proved; that it is the deceased who had the murder weapon, and that the dispute over water, is not denied.

On the other hand, Mr Mulochi submitted that PW1 and PW2 were eye witnesses to the offence; that there had been no bad blood between them and there was no reason for them to frame the accused. Counsel submitted that malice aforethought was proved as post mortem proved that injury was to the head, a sensitive part of the body.

There is no doubt that there was a dispute between accused and the deceased over use of water on the fateful day. Although accused claimed that somebody had been disconnecting the water when he was using it, I did not believe the accused's explanation. PW 1 testified before this court and no such allegations were put to him, that he had disconnected the water when accused was using it. I prefer the testimony of PW1 who testified that the dispute between accused and deceased arose when accused came and found her using the water. PW2 confirmed that she heard deceased ask whether or not she could use the water. Accused's explanation as to how the dispute over water arose is an afterthought and

untrue.

To establish a charge of murder, the prosecution has to prove beyond any reasonable doubt the following ingredients;

- 1. The death of deceased;**
- 2. That accused caused the death through an unlawful act or omission;**
- 3. That the accused had the intention or malice aforethought;**

The death of the deceased is not in doubt. The postmortem was performed on the body of the deceased by Doctor Nato who found that she had sustained two deep cut wounds, one on the forehead and another on occiput and skull was fractured with internal bleeding. The said finding was corroborated by the evidence of PW 1 and PW2 who witnessed the incident and told the court that they saw accused hit the deceased with the axe on the head twice. The two cut wounds that the Doctor found on the occiput and forehead were the cause of death.

Whether the accused inflicted the injuries that caused the death; PW1 and PW2's evidence was consistent in all material particulars. Both of them stated that at first, accused had a panga, threw it at the deceased but it missed her. He then picked a Jerican with water threw it at deceased, then the basin on which PW 1 was washing. Lastly, he picked the axe with which he cut the deceased twice on the head after she fell. The accused's version of how the deceased sustained injuries is not believable. If accused merely pushed the deceased, and she fell, then how did she receive two deep cuts on two different parts of her head, the forehead and occiput? It is true that the accused did not come to the scene with the axe but he picked it from where firewood had been hued. He continued to chase the deceased while armed with the axe till she fell and he went ahead to cut her.

It is the defence counsel's submission that accused did not possess any malice aforethought. PW 1 and PW2, the eye witnesses are accused's siblings. PW2 is his real sister and she told the court that they had no reason to frame him. However, belatedly in cross-examination, accused seemed to allege that there was a safaricom business which they had a dispute over, but he did not expound on it. In my view, that was but an afterthought. He did not allude to any such dispute when PW1, 2 and PW3 testified. Further, accused claimed that, there were people at his home buying potatoes who witnessed what occurred. He alleged this in his defence but did not name anybody. His defence is not believable.

First, the accused was armed with a panga, a deadly weapon which he threw at deceased but it missed her. PW1 and PW2's evidence was that accused chased the deceased round the house several times until she fell then he descended on her with an axe. He was determined to do harm to her. Further to that, after he picked the axe, despite the fact that he had managed to subdue the deceased as she had fallen, he cut her twice on the head, and not on the leg or hand. On this day, it had all started with a disagreement over water, but PW1 and PW3 said that prior to this incident, there had been some disagreement between accused and deceased. PW3 specifically stated that accused had chased the deceased with a bow and arrow, was arrested but was released after he sought for forgiveness. This evidence was never challenged by the defence. It is apparent from accused's actions on this fateful day that he was just waiting for an opportunity and this incident provided the perfect chance for accused to vent out what was in his heart. Malice aforethought which is defined in section 206 Penal Code as an intention to do grievous harm or kill, clearly flows from the accused's actions of the fateful day.

In the end, I am satisfied that the accused's defence is a mere sham and an afterthought. I dismiss it, instead I find that the prosecution has proved beyond all reasonable doubt that accused with intention to kill, attacked and killed his step-mother. I find him guilty as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE, 2016.

R.V.P. WENDOH

JUDGE

30/6/2016

Present

Mr. Mulochi for State

Ms. Nelima for Accused

Ibrahim/Penina, Court Assistants

Accused, Present