



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT CRIMINAL CASE NO. 24 OF 2015
(FORMERLY MERU-/ HCCR CASE NO. 95 OF 2010)`

REPUBLIC.....PROSECUTOR

VERSUS

PAUL KITHINJI MARIGU.....ACCUSED

J U D G M E N T

1. On 14th November, 2013, Joel Gichari Mwathi (*"the deceased"*) was having illicit liquor in the home of Michael Mukathe when a quarrel arose between him and Paul Kithinji Marigu. (*"the accused"*). As a result of the quarrel, the accused shot the deceased with an arrow as a result of which, the deceased died.
2. On 19th November, 2013, the state lodged information in court charging the accused with murder. It was alleged that on the 14th November, 2013 at Ngaani village, Ntoroni Sub-location, in Tharaka North District within Tharaka Nithi County, the accused murdered Joel Gichari Mwathi. The accused denied the charges and the prosecution presented nine (9) witnesses after whose testimonies, the accused was placed on his defence. He chose to give sworn testimony but called no witnesses.
3. Rebecca Karambu Marigu (PW1) was the wife of the deceased. On the material day at about 7 pm, the deceased called her to the homestead of Michael Mukathe (PW4) where she found the deceased selling traditional beer. While her husband was seated drinking the traditional liquor, the accused emerged from the back and shot the deceased with an arrow. Those present scattered for dear life whilst the deceased ran to the homestead of Jeremy Nyaga (PW3) with the accused in hot pursuit. She followed them to PW3's homestead but left for her home to call her mother. She left PW3 and Joseph Murige trying to remove the arrow lodged in the deceased's back. The deceased was taken to hospital but succumbed to the injury. In cross-examination PW1 denied witnessing the deceased and the accused quarreling about money.
4. PW1's narrative was largely supported by Peter Gitonga (PW2) who testified that on the material day, they had been drinking the traditional beer at Mukathe's homestead when a quarrel erupted between the accused and the deceased over refusal by the accused to pay Ksh.10/- for beer that had been sold to him by the deceased. After the quarrel, the accused left the place but returned two (2) hours later armed with a bow and arrows. That the accused demanded money from the deceased and shot him after which everyone ran away. On cross-examination, PW2 confirmed that the deceased was shot while he was sitting on a log. PW4 Michael Mukathe supported the narrative of PW3. He told the court how he had paid Kshs.10/- to the deceased on behalf of the accused. That the accused had left for sometime only to emerge later and shoot the deceased with an arrow.

5. On his part, Jeremy Nyaga (PW3) recalled how on the material day at about 7.30 p.m, the deceased stormed into his house while screaming. The deceased asked the witness to assist remove an arrow lodged in his back. With the help of one other person, they succeeded in removing the arrow. He assisted in taking the deceased to hospital who however, died on arrival. The witness identified the arrow that he had helped remove from the deceased. In cross-examination, PW3 told the court that the deceased had told him that the accused had shot him. Samuel Gitonga (PW5) told the court how he took the deceased to hospital with his vehicle but the deceased died on arrival.

6. PW6 was Edward Mwabi, the father of the deceased. He told the court that on the material day at about 7.30 pm, he received a call from David Muchiri Nyaga who told him that his son had been shot with an arrow. David Muchiri Nyaga (PW7) told the Court how he learnt of the incident from one Muchiri and telephoned his brother PW6 to tell him about it. He went to the scene and recovered the arrow that had been removed from the deceased's body. He surrendered the same to the police. On 19th November, 2013, he identified the body at the Meru General Hospital Mortuary for post mortem.

7. PW8 Chief Inspector Carlestus Orlando told the court how on the 15th November, 2013 at about 4 am, he received information from the O.C.P.D about the murder. He proceeded to Gatithini market where he found the body of the deceased with an injury on its back. He recovered from the relatives an arrow head that had been removed from the deceased body. In his investigations, PW8 established that the deceased and the accused were drinking illicit brew when they disagreed on Kshs.10/-. That after disagreement, the accused went away and came back with an arrow whereupon he shot the deceased. The accused was arrested by members of the public who handed him over to Makutano Police Station from where he re-arrested him. He produced the arrow as PExh 1. Dr. Gacheri Kathiri (PW9) informed the court how she conducted a post mortem on the body of the deceased on 19th November, 2013. She confirmed that the cause of death was haemorrhage- (loss of blood) due to decapitation of the abdominal aorta. She produced the Post Mortem Report as PExh 2.

8. In his defence the accused told the court that on the material day, he had gone poaching in the Meru National Park with a bow and arrows. He never succeeded in getting any animal and decided to return home at about 5 pm. On the way home, he passed by the homestead of Mukathe (PW4) and joined the others in taking illicit brew. He used Kshs.220/- out of sum of Kshs.500/- he had. That the deceased refused to give him back his change of Kshs.280/- but instead demanded that he be paid Kshs.10/-. That the deceased started to push him. Since he felt a little drunk and the deceased was overpowering him, the accused took his bow and an arrow and threatened to shoot the deceased. However, the arrow slipped and shot the deceased. That he run away after realizing that he had shot the deceased. The accused denied that he had gone for the arrows after quarreling with the deceased. Later that night he was informed that the deceased had succumbed to the injury. That in the morning, he was accompanied by his brother to Makutano Police Station where he was arrested and placed under custody. He insisted that he had shot the deceased by accident. He claimed to have been drunk at the time of the incident.

9. I have carefully considered the evidence on record. Section 203 that creates the offence of murder provides that the offence is committed when a person with malice aforethought causes the death of another person by an unlawful act or omission. In this regard, the prosecution is required to prove the death of the deceased and the cause of such death, that the death was caused by an unlawful act and that the person causing the death was of malice aforethought.

10. On the first issue of the death and the cause thereof, the testimonies of PW1, PW2 and PW4 were that on 14th November, 2013, the deceased and the accused were engaged in drinking illicit brew in the homestead of PW4. That a dispute arose between the two regarding Kshs.10/- for a cup of alcohol that the deceased had sold to the accused. That the accused thereupon shot the deceased with an arrow whereby the deceased died on arriving at the hospital. Pw9 Dr. Gacheri Kathiri conducted the postmortem on the body of the deceased. She produced the Post Mortem Report (PExh 1) which concluded that the cause of death of the deceased was a result of Hemoperitonoum being excessive loss of blood in the abdomen caused by the penetrative wound at the back. That wound was caused by the arrow that the accused shot the deceased with. This court therefore makes a finding that Joel Gichari Mwathi, the deceased, died from the unlawful act committed by the accused of shooting with an arrow.

11. The question that follows is, was the accused of malice aforethought? Malice aforethought is the mens rea or intention to kill another person. Section 306 of the Penal Code defines it as follows:-

“206. 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 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.”***

12. The question therefore is, whether the accused intended to kill the deceased or knew that his act will cause the death of or grievous harm to the deceased PW2 and PW4 told the court that they were present at the drinking den when the incident took place. They recalled that after the deceased and the accused had quarreled over Kshs.10/-, the accused left the drinking den went away but returned later armed with a bow and arrows. That he then shot the deceased on his back with an arrow. On his part, the accused denied that version of the story. He told the court that he was coming from poaching when he passed by PW4's homestead for a drink. That he had his bow and arrows with which he had gone to poach with in the park earlier on. That he placed the said bow and arrows under the log they were sitting on. That a quarrel arose between him and the deceased because the deceased was demanding for money from him yet he had retained his change of Kshs. 280/-. That a scuffle ensued between them and that it is when the deceased seemed to overpower him that the accused took the bow and arrow to threaten the deceased. That because he was drunk, the arrow slipped and accidentally shot the deceased. To the accused, he never intended to kill the deceased but it was a pure accident.

13. From the evidence on record, there is no dispute that the deceased and the accused quarrelled over some money. Whilst the prosecution maintained that it was Kshs.10/-, the accused contended that it was Kshs280/- that was due to him. The amount indispute is not important, what is in issue is whether the accused went for his bow and arrows after the quarrel or the bow and arrows were readily available and the accused just picked the same and accidentally shot the deceased.

14. Dr. Gacheri (PW9) who produced the postmortem report (PEXh 2), told the court that the body of the deceased only had a single penetrative wound at the back. PW3 told the court that the arrow that killed the deceased was lodged at the deceased back. The testimonies of PW1, PW2 and PW4 was that the accused came from the back and shot the deceased whilst he was seated. On the other hand, the accused maintained that he was only threatening the deceased with the arrow because the deceased had shoved him and was about to overpower him. If it were only a threat to scare the deceased, it is more likely than not that the deceased would have been standing and facing the accused. That means that, the deceased would have been shot from the front. It was not the accused's testimony that the deceased turned his back on him after his threat so that the accused accidentally released the arrow and shot him at the back. Since the deceased was shot from the back, he must have been facing away from the accused when he was shot. That is consistent with the testimony of PW2 and PW4 that the accused went away after his quarrel with the deceased and later returned with a bow and arrows and shot the deceased on his back. I find the testimonies of PW2 and PW4 to be firm and consistent and I believe it.

15. The accused knew that the arrow was a dangerous weapon. Even if he was just threatening the deceased with it, he must have known that if the arrow hit the deceased, as it actually did, the same would be fatal. There was no evidence that he was drunk at the time. This court finds that the accused intended

to cause the death of the deceased. He went back to his home to procure the murder weapon with which he executed his unlawful act. The allegation that he was too drunk is but a self-induced intoxication which cannot afford a defence. PW8 confirmed that the accused was of sound mind.

16. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that the accused, of malice aforethought, caused the death of Joel Gichari Mwathi by an unlawful act. The accused is culpable of murder and I find him guilty and convict him accordingly.

DATED and DELIVERED at Chuka this 23rd day of June 2016.

A.MABEYA

JUDGE