



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL CASE (MURDER) NO. 4 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**JULIUS MUTHOI KENGA.....ACCUSED**

**J U D G M E N T**

1. The Accused herein, **Julius Muthoi Kenga**, faces a charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 3<sup>rd</sup> day of April, 2014 at Olkinyei area in Narok North District within Narok County, he murdered **Tajeu Ikayo**. He denied the charge and was represented by Mr. Yienko
2. Through six witnesses the prosecution presented the following case. The Accused was a resident of Entonton, while the deceased resided at Karampini both, in Olkinyei location, where **Samson Ntayia** (PW4) presided as the Assistant Chief.
3. In January 2014, a report of defilement had been made against the Accused, subsequent to which a baraza was convened. Among those present were the deceased who was a local elder, and **PW4**. It would appear that the Accused's family wanted the defilement matter settled by the elders. But **PW4** and the deceased opposed the proposal and the baraza broke up.
4. It is the prosecution contention that the Accused did not take the result kindly. Early on the afternoon of 29/1/2014, the deceased and his adopted son **John Kamau** (PW1) were driving their cattle to the river. At the river, the deceased was preparing to water the cattle when suddenly, the Accused appeared. He slashed the deceased on the head before fleeing. **PW1** raised an alarm, and villagers, including **Margaret Sururu** (PW2) rushed to the scene where they found the injured deceased on the ground. **PW1** reported what had occurred.
5. A report was made to police. The deceased was taken to Kijabe hospital and admitted. He succumbed to the injuries on 3<sup>rd</sup> April 2014. Meanwhile, a search commenced for the Accused, who had gone into hiding. He was traced in Nanyuki after the death and arrested. He was subsequently charged.
6. When he was placed on his defence, the Accused elected to make a sworn defence statement. To the effect that he was a farmer at Entonton. That on 29/1/2014 he was grazing his cattle close to his home. He drove them out later and cut fodder for them, before he eventually took them to the river. While there, he met the deceased who accused him of muddying the waters. His explanation was met with insults, the deceased threatening to kill him for raping his daughter, and escaping by bribing the police.
7. As he said so the deceased allegedly crossed the river to confront the Accused, while armed with a *simi*

and *rungu*. He struck the Accused who resisted him. The deceased then aimed a *simi* blow towards the Accused who then struck the former with his panga and he fell. People came to the scene and took the Accused home for fear of a revenge attack, and later he moved to Laikipia. He was arrested in Naromoru after the death. He said he also sustained injury during the attack.

8. No submissions were filed by the defence. The main facts of this case are not disputed. The deceased and the Accused were fellow villagers who knew each other well. Seemingly, prior to the material date there was some tension between them as an allegation of defilement had been made against the Accused. Apparently the deceased was on the accusing side.

9. There is no dispute further, that the two men met by the river on the material date. The Accused had a panga. The Accused struck the deceased with his panga. But the circumstances of assault are disputed. That the deceased sustained severe injuries and succumbed thereto on 3<sup>rd</sup> April 2014. That the Accused who had fled to Naromoru since the incident at the river was arrested after the death.

10. The court must determine whether the Accused, of malice aforethought inflicted the fatal injuries on the deceased. **PW1**, the sole eye witness to the attack incident said that the Accused emerged from a bush and attacked the deceased who fell down. And that the Accused fled the scene immediately. He also stated that neither the Accused nor the deceased uttered a word in the incident which took about 2 minutes. The incident occurred in broad daylight and **PW1** had opportunity to see what was happening, at 20 metres behind the deceased who was already at the river.

**11. PW1** was not shaken in cross-examination and the defence never suggested to him that an altercation and a fight preceded the attack, despite his evidence to the contrary. Further, the defence did not ask **PW1** to confirm that he Accused was at the river to water his herd despite **PW1** stating that he emerged out of a bush.

12. Another witness who saw the Accused moments before the incident, and headed to the river while armed with a panga, was **PW2**. She too did not mention that the Accused was driving cattle there. She was the first person to arrive at the scene after the attack. She said she met only the deceased who lay injured on the ground and **PW1** who was screaming for help. She estimated that she got there about 5 minutes since the Accused had passed her heading for the river. But she did not find him at the scene and she said that other people came to the scene after she raised an alarm.

13. Considering this lapse of time, if there was any altercation and a fight between the Accused and the deceased, **PW2** would have found it ongoing. The defence did not canvass the matter of an altercation or fight with **PW2** at all. Similarly, the Accused admitted that there was some outstanding matter between him and the deceased regarding an allegation of defilement against him.

14. And although the Accused claimed to **PW6** and this court that he was injured in the alleged fight with the deceased, the Accused did not disclose the nature of injury or tender medical evidence. In the circumstances, it is difficult to believe that the Accused was confronted by the deceased, insulted and that the latter crossed the river and engaged him in combat before he struck the deceased with the panga.

15. It appears to me more plausible that in fact the Accused's mission as he walked to the river was to way lay and pounce on the deceased. The Accused appears a fairly young and stocky man, compared to the deceased who was 50 years old at death. It seems unlikely that the Accused could have been out run by the deceased, and not fled the scene as deceased crossed the river to attack him. It is not believable that despite threats uttered prior to the crossing of the river by the armed deceased that he would '**finish**' the Accused, the latter seemingly waited by the riverside.

16. On the available evidence, I am satisfied that the Accused armed himself and deliberately set out to attack the deceased at the river, arising from the matter of the accusations of defilement made against him. I reject his defence that his presence at the river was to water his cows and that the deceased was the aggressor. That defence has been displaced by the prosecution evidence.

17. The deceased sustained a fracture to the skull and injury to the meninges and brain, following the attack. He collapsed immediately and died after about one month in hospital. No doubt the injuries were severe. By inflicting such injuries on the head with a panga with force that fractured the skull, the Accused's clear intention was to kill or maim the deceased. The date of the death in the charge was 3/4/2014 even though the offence occurred on 29/1/2014 per the prosecution witnesses. There was no prejudice occasioned on the Accused as he clearly understood the charge facing him. (See Section 214 (2) of the Criminal Procedure Code).

18. Malice aforethought is defined in Section 206 of the Penal Code as:-

**“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.”**

19. Malice aforethought can be inferred from the severity of the injuries and the Accused's action of sneaking upon the deceased at the river. In all probability the Accused was exacting revenge over the aborted elders' baraza. He thereafter fled his home for three (3) months.

20. Reviewing the evidence before me, I am satisfied beyond reasonable doubt that the Accused, with malice aforethought attacked the deceased and that he caused his death. I do find the Accused guilty as charged and will convict him accordingly.

Delivered and signed in Narok this **28<sup>th</sup>** day of **September, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Accused : Mr. Yienko

Accused : Present

CC : Barasa

**C. MEOLI**

**JUGDE**