



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 33 OF 2012

REPUBLIC PROSECUTOR

VERSUS

M M K ACCUSED

JUDGMENT

M M K (accused) faces a charge of murder **contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on the night of 7/4/2012 [particulars withheld] village, Munithu Location of Imenti North, he murdered **S K** (deceased).

The prosecution was led by Mr. Mungai and later Mr. Mulochi, Learned Counsel for the State, while the defence Counsel is Mr. Gikunda Advocate.

The prosecution called a total of 6 witnesses while the accused testified on oath. He did not call any other witness.

PW1 R G K is the mother of the accused and wife to the deceased. Her testimony was that on 7/4/2012, she was returning home when her neighbour informed her that she was required at home. On arriving at home, she found **M** (accused) outside the house whereas **M M** and deceased came out of the house armed with *pangas*; that the accused said that he was leaving and on returning, should find his money fixed on a stick. She entered the house and her grandchild **K** gave her KShs.2000/= for the accused; that a few minutes later, the accused returned, asked for his money; that the accused told one child to go with him to Kauthene Shopping Centre but she objected because she feared the child might be killed; that just then, **M M** (**PW2**) her nephew, entered and asked if the accused would be drinking and disturbing people; a quarrel broke out between them; that the accused went to his house and came out with a *panga* and continued to quarrel; that the accused then entered the house where the deceased was. She too went to the house where deceased was and saw deceased watching the two fight, accused and **PW2**; that the deceased threatened to cut the accused but she told him not to; that both **PW2** and the accused were armed with *pangas*; that deceased went where the two were. The accused moved away, picked a piece of firewood, threw it, she bent because she was between the accused and the deceased. When she stood up, she noticed the deceased had fallen and she did not know where the firewood fell; that **PW2** continued to fight with the accused but accused got up and went to lock himself in his house. Deceased was taken to the house, became weak and **PW1** went to look for transport to take him to hospital but on return, found **PW2** and others had taken him to Hospital. She went to visit him in hospital the next day and found that he had died. She identified the deceased's body to the doctor before post mortem was done. **PW1** denied knowing how the dispute had all began but that the accused and the deceased related well save when the accused came home when drunk, they would quarrel.

PW2 M M is a cousin to the accused and a nephew to deceased. He told the court that his mother is a

sister to deceased and the deceased had brought him up; that on 7/4/2012 he was with the accused about 11.00 p.m. when they arrived home and the accused started to talk to his mother while he proceeded to his house. He heard screams, came out to find out what was happening only to find the deceased lying on the ground and M (PW3) informed him that it is the Accused who hit the deceased. Him, together with PW3 took deceased to Hospital, reported to Police Station and next day he learnt that deceased had died. He denied having quarreled with the accused on the material day nor seen the accused throw a piece of wood at deceased.

PW3 R M who was aged 14 years told the court that the accused is a brother to his mother and deceased was his grandfather; that on 7/4/2012, M M, a sister of the accused was quarrelling with the accused's wife and he went to inform the accused about it at the market; that the accused went home and warned them to stop quarreling, and left again; that the accused came back later and found the deceased waiting for him with a *panga* and that on hearing the accused talking, deceased came out, cut the accused on the forehead and told him to go home and sleep; that M and PW2 came out of the house and started beating the accused; that it is then that the accused took one firewood, threw it and it hit the deceased who fell. Deceased was taken to Hospital. PW3 said that the accused threw the piece of wood after he was beaten by M M, M and the deceased. He further said that the accused was defending himself because whereas he had nothing, the others had *panga*.

PW4 Cyrus Mwenda Marete, Assistant Chief Kirimene Sub-Location recalled that on 13/4/2012, P K, the accused's sister reported to him that the accused had fled after killing the father and that he had gone into hiding in Tigania at his in-laws place. PW4 traced the home, all the occupants of the home ran but the accused was chased and arrested while hiding in a trench.

PW5 Dr. Carol Kilach produced the post mortem report on behalf of Dr. Njuguna who performed the post mortem on the body of the deceased. Dr. Njuguna observed that the head had a bruise, and fluid was oozing from the brain through the nose and ear; internally he found that there was a depressed skull fracture which involved temporal and occipital bones with leaking brain matter. He formed the opinion that the cause of death was cardio respiratory arrest due to severe head injury.

PW6 St Naomi Nderitu of Meru Police Station filed a report in the OB on 5/4/2012 that Stanley Kirinya had been assaulted by his son. She proceeded to Meru Level 5 Hospital where he found the deceased undergoing treatment. Later that evening, he received information that he had died. Later, she visited the scene of crime on 9/4/2012. She interrogated the wife of the deceased; found a door was damaged and she learnt that there had been commotion. They did not get the suspect in his house but arrested him on 14/4/2012. PW6 also said photographs were taken of the scene but they were not produced and they could not be found in the Police file. PW6 further told the court she found out during investigations that there was a fight between the accused and the deceased; that the accused was drunk.

In his sworn defence, the accused told the court that on 7/4/2012, he went back home from work, found his sister M quarreling with the wife and told them to stop and he left for Kauthene to eat *miraa* but was called by his nephew R M who informed him that his aunt M M wanted to assault the wife. He went home, talked to them and they stopped the quarrel. He went back to the market and returned home about 11.00 p.m., with M M (PW2); that M walked ahead of him; that he found M, D M and M and asked why people were fighting in the home and they could not separate them; that it is then they descended on him and started beating him while armed with sticks and a *panga*; that his father came out of the house to intervene and he was cut on the forehead. He denied having had a weapon. When the father was intervening, he got a chance to ran away. He found firewood near the house, threw it and he did not know where it fell. He locked himself in the house and neighbours came to intervene. His aunt informed him that those who beat him had injured his father and he gave money so that he could be taken to Hospital; that he left his house between 5.00 to 6.00 a.m., went to Meru Hospital where the father was admitted. He worked as a mechanic and so he went to work at Kianjai, then went to Kitui where there was a broken down vehicle. He returned home after 4 days and was arrested by the Chief. He denied having been arrested in Nchiru. He denied having disagreed with the father on that night or that the father cut him.

Mr. Gikunda in his final submissions urged that the prosecution failed to prove the ingredients that constitute an offence of murder; that the deceased was injured during a fight; that there was confrontation between the accused and deceased, and that *mens rea* was not proved; that there is no proof that it is the accused who injured deceased. He urged the court to acquit the accused.

On the other hand, Mr. Mulochi, Learned State Counsel, submitted that the prosecution had proved its case to the required standard; that PW1, and 3 were eye witnesses, they saw the accused assault deceased; that there was no reason for them to lie; that he threw a piece of wood and the *actus reus* is proved; that *mens rea* flows from the serious injury inflicted.

I have considered all the evidence on record and the submissions by Counsel. It is not in dispute that this incident occurred at night. It all happened at the home of PW1 and the deceased. It was amongst family members. It is not clear what light was available but PW1 said the accused was using the light from his mobile phone. PW1, 2 and 3 also stated that those involved were quarreling and being family members, they knew each others' voices and I am satisfied they knew what each did that night. According to PW1, when she returned home that evening, a quarrel had started. She found a lot of noise and those present were M M, her daughter, the accused and the deceased. She was not able to establish the source of the quarrel. However, later on PW2 M came and joined the fray and even started fighting with the accused and that both were armed with *pangas*. However, PW2 denied having been present at the scene but that he heard noises when in his house and found the deceased already injured. On the other hand, PW3 said that the accused's wife had been quarrelling with his aunt M M. He called the accused who intervened but went away again but upon return found the deceased waiting for him with a *panga*; that deceased cut the accused on the forehead with the *panga*; that the deceased and M started to beat the accused; that it is then that the accused picked a piece of wood and threw it at deceased.

Though it may not be clear exactly what transpired before the deceased was injured, it seems clear from PW1 and 3's evidence that there was a quarrel or fight involving M M and the accused's wife then later, there was a quarrel or fight between accused and M. PW3 alleged that the deceased cut the accused on the forehead but PW1 told the court that deceased wanted to attack the accused because he was fighting with Maurice, but she prevailed upon him not to do so. From an evaluation of the evidence of PW1, 2 and 3, I find that PW2 did not tell the court the truth. He is the one who was fighting with deceased. By his denial, he was merely trying to avoid blame. I also find that there was a fight or commotion at the time the deceased was injured. PW1 admitted that the accused threw a piece of firewood but she did not see where it fell because she was between the accused and deceased and she bent to let the firewood pass. PW3 however said that the firewood thrown by the accused hit deceased and he fell.

In his defence, the accused admits having thrown a piece of wood but denied knowing where it fell. He seemed to be blaming those who fought with him for injuring the deceased. However, PW1 saw the accused throw the firewood which she avoided because she bent but the accused was behind her and she found him injured. I find that the evidence of PW1 was corroborated by that by PW3. I am satisfied that it is the accused who hit the deceased with a piece of firewood. The evidence of PW1 and 3 is corroborated by the findings of the Doctor as to the injuries that were sustained by deceased i.e. a depressed skull fracture with intracranial haematoma. Though the Doctor did not state the nature of the probable weapon, it was an injury consistent with a blunt object. Externally, there was a bruise on the forehead.

As to PW3's allegation that the accused was cut on the forehead by the deceased, there is no evidence that the accused sustained any such injury. The accused never went to Hospital. When the accused was arraigned in court for plea, he never made such an allegation nor did he request to be taken for treatment. The accused was arraigned before the court on 23/4/2012 and there is no evidence recorded that the accused had been injured. I find it doubtful that the deceased ever injured the accused.

In a murder case, the prosecution has to prove beyond any doubt the following ingredients:

1. The death of the deceased;

2. That accused caused the death through an unlawful act or omission;

3. That accused possessed malice aforethought.

The death of deceased is not in dispute. I have found that it is the accused who threw the firewood that fatally injured the deceased. The only question left is whether the accused possessed malice aforethought. In my view, from what transpired, the accused did not intend or plan to kill the deceased. It all happened during a commotion or fight. There was no pre meditation. I find that the accused had no intention to murder the deceased. He threw the firewood to fight back or defend himself. Malice aforethought was not proved.

For the above reasons, I find that the offence of murder has not been proved. However, I find that the prosecution has proved that the accused committed the offence of manslaughter. I therefore substitute the offence of murder contrary to **Section 203 of the PC** with that of manslaughter contrary to **Section 202 of the PC**. I find the accused guilty of the substituted offence of manslaughter and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

25/10/2016

PRESENT

Mr. Mulochi for State

Mr. Muthamia Holding Brief for Mr. Gikunda for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused