



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 43 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL NTHENGE KISINA.....ACCUSED

RULING ON CASE TO ANSWER

1. The accused has been charged with the offence of Murder contrary to **Section 203** as read with **204** of the **Penal Code**. The particulars of the Charge Sheet are that on the 22nd of January, 2014 at Githumba Sub location in Nzau within Makeni County, with others not before the court murdered **Musau Kangau**. The prosecution called seven (7) witnesses to prove their case.

2. The Defence has submitted that the prosecution has not made out a case against the accused person. The defence relied on the definition of offence of Murder under **Section 203** of the **Penal Code**, as **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”**

3. The Defence submitted that this gives rise to four (4) crucial ingredients of the offence of murder, all of which the prosecution must prove beyond reasonable doubt in order to prove the charge. These are;

- The fact of the death of the deceased
- The cause of such death
- Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person
- Proof that the said act was committed with malice aforethought.

4. The defence agreed that there is no dispute on the fact of death. All the prosecution witnesses confirmed that the deceased met his death on the 22nd January, 2016. The prosecution called **PW4 Mbengwa Musau**, the wife of the deceased who identified the deceased at Kilome Mortuary. This is therefore an issue that is not disputed.

5. The prosecution called **PW7 Dr. Kibwana**, who gave evidence as to the cause of death. PW7 told the court that on the 29th of January, 2014, he was working with the Department of Health at Makeni County. On the said date he was called to perform an autopsy examination on the body of **Musau**

Kangau, who was identified by his wife **Mbegwa Kingoo PW4**. Upon examination, he found deep cut wounds on the scalp of the deceased. The deceased had sustained a fracture of the scalp extending to the right side approximately 10cm. The body also had bruises on the knees and on the shoulders. PW7 formed the opinion that the cause of death was cardiopulmonary arrest due to severe head injury. The body muscles were pale during examination, this being a sign of heavy bleeding. Citing **Websters New World Law Dictionary** which defines *actus reus* as; “**the voluntary and wrongful act or omission that constitutes the physical component of the crime**”, the defence submitted that the prosecution has duty to bring evidence beyond reasonable doubt to show that the accused person was guilty of a wrongful act/omission.

6. The defence also attacked the prosecution witness PW1’s evidence. It was the evidence of PW1 that on the material day, he was at home sleeping during the day when he heard screams. He went outside and saw the accused person in the company of other people (**namely Musembi, Nzomo, Peter and Musau**) not before the court, fighting his father. He testified that the said people who were the accused person’s cousins were fighting using sticks. There was a group of other people who were around them watching the fight.

7. On cross-examination, **PW1** said that the accused and his cousins were screaming calling for their parents and that it was not his father calling for help. In addition PW1 who is the only eye witness in this case said that he witnessed the incidence from a distance of approximately 100 meters but he could see clearly. He said that he did not get a chance to go close. He saw his father fall down and rushed to go tell his brother. He was categorical that it was the accused person who struck the lethal blow on the deceased using a stick. The defence counsel submitted that PW1 never mentioned seeing the accused person holding a panga or any sharp object when he was giving his evidence. PW1, also says that all the accomplices of the accused used sticks to hit his father.

8. The Defence submitted that the evidence of PW1 contradicts the evidence of **PW7 the doctor**, who said that these injuries would not have been caused by sticks. This raises the question, did PW1 really witnessed the fight? Submitting to the definition of term *mens rea*, as “**The state of mind indicating culpability which is required by statute as an element of a crime**”, the Defence submitted that the prosecution evidence does not prove beyond reasonable doubt that the accused person was of the mind to kill the deceased person. The evidence brought to court of the cause of death was a fight.

9. On their part, the prosecution submitted that the issue in question is who caused the death of the deceased and whether he had the requisite intention/malice aforethought. According to the evidence of PW1 he testified that on the 22nd day of January, 2014 around 10.00a.m he saw the accused person with others not before court assault the deceased, as a result of the assault the deceased person died. He was able to identify him since it was during the day and the accused person was a person well known to him.

10. The prosecution referred to **Section 203** of the **Penal Code** which provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. The punishment of such an offence is prescribed under **Section 204** of the **Penal Code**. In essence therefore, the prosecution must prove the fact of death and also the fact that the person who caused the death of the deceased had malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought in terms of anyone of the following circumstances on the part of the accused:-

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. (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;

11. The prosecution submitted that there is credible evidence to put the accused person on his defence. I have carefully considered these submissions. It is to be noted that once the prosecution proves one or a

combination of the above circumstances, malice aforethought, will be deemed to have been established; and in such a situation, there would be no escape route for the accused person.

12. The evidence on record indicate that the deceased had multiple injuries on the head, his legs and had internal bleeding thus the assailant had intention of inflicting injuries or grievous harm on him which lead to his death. The head and limb injuries were inflicted with such viciousness and force that they caused transverse fracture to the head, and other injuries on the limbs leading to his death. It is clear that the multiple head wounds demonstrate, at this stage, a presumption of malice aforethought as do the number of injuries. However, this malice aforethought presumption can only be rebutted by the evidence of the accused, not in a way to discharge a burden of proof, but merely to show in his evidence whether or not there was intention to kill the deceased. Without such a testimony, these injuries could only have been intended to cause the death of or do grievous harm to the deceased. This court finds that there was malice aforethought within the meaning of **Section 206(A)** of the **Penal Code**.

13. In light of the foregoing, it is the finding of this court that the prosecution has placed before this court evidence that is credible, consistent and well corroborated to require the accused person to be put in his defence to answer to the charge of murder.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Accused present

Counsel absent

Court Assistant – Mr. Munyao