



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL CASE NO. 2 OF 2012**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**SIMON GITONGA NGARURI..... ACCUSED**

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

1. The accused person is charged with murder contrary to Section 203 as read with 204 of the Penal Code. It was alleged that on the 25/12/2011 at Ndatu Vilage, Kithimu location in Embu County, he murdered Itila Ngaruri to which offence he pleaded not guilty.
2. The brief summary of the facts is that PW1 the daughter in-law of the deceased was in her house when she heard her husband PW3 and the accused shouting outside. She recognized her husband's voice in distress and peeped through the window. It was on 23/12/2011 at around 7.30 p.m. and she saw the two brothers holding and struggling with each other.
3. PW1 went outside the house near the gate of the home compound where she found her husband lying on the ground with serious injuries on the head. She supported her husband to the house and rested him on a seat. His two teeth had been removed and he was bleeding from the head.
4. The witness heard her mother in-law calling her from her house to go and see her husband the deceased who had already been injured by the accused. She rushed there and met the accused on the pavement carrying something in his hand which looked like a stick.
5. PW1 called the police to come to the scene and immediately procured a vehicle to take the two injured men to hospital. The deceased died the same night at around 3.00 a.m. while undergoing treatment. The accused was arrested the same morning and was later to be arraigned in court.
6. On examination, the deceased was found to have sustained brain contusion due to severe comminuted fractures with some bones depressed into the brain tissue on the right parietal region. The cause of death was cardio-pulmonary arrest due to increased intercranial pressure from the head injury caused by a blunt object.
7. The defence opted to rely on its submissions filed on 3/3/2015 for no case to answer. Similarly the state relied on its submissions for no case to answer filed on 10/2/2015.
8. In his defence the accused denied the offence. He gave an unsworn statement to the effect that at the material time, he worked as a caretaker in Nakuru and had just come home for Christmas at Ndatu village, Kithimu location. He visited his brother PW3 after finding his parents asleep on the material evening.

9. The two men enjoyed their drinks throughout the night and when PW1 woke up in the morning, she made breakfast for them. He said they spent the day indoors eating and drinking. The accused was left in the house at around 5.00 p.m. by his brother PW3 when he went to visit his in-laws. He said he was arrested the following day on allegations that he had killed his father the previous evening. He denied the offence and still maintains the same position.

10. The defence submitted that the prosecution had not proved the case against the accused person. None of the prosecution witnesses said he/she saw the accused person commit the offence. The motive of the murder was not established by the prosecution. There was evidence that the deceased and the accused were on good terms before the incident. It was further argued that the evidence of PW1 and PW2 on the relationship between the accused and the deceased was said to be contradictory.

11. The State submitted that it had been established that the accused murdered the deceased. The evidence of PW2 was that the deceased had made a dying declaration that it is the accused who had assaulted him.

12. PW2 the mother of the accused and widow of the deceased testified that she was attracted by noise outside her house near the gate. She went to the gate where she found her sons the accused and Njue PW3 there. PW3 had been injured and was bleeding on the eye. PW1 also came to the scene from her house. When PW2 inquired from her two sons what was happening, the accused protested and left the scene. He ran to her house where she lived with the deceased. While standing outside, PW2 heard a bang from her house.

13. PW2 then went towards her house and while approaching, she heard the deceased shouting "*Gitonga you have killed me*". When PW2 moved near the deceased, he said "*ooii Njura, I am dead*". (Njura is the name of PW2). On entering the house, she found the deceased lying on the floor with injuries on the head and then saw the accused carrying something in his hand as he walked out of the house.

14. From the evidence of PW3, the accused and himself started a fight at Ndato Bar which extended to their home compound where his family lived with their parents but in different houses. The accused after assaulting his brother at the gate, entered the house where he also assaulted the deceased seriously injuring him.

15. PW5 later recovered an axe buried in the soil within the compound. The government analyst found the blood stains on the axe to match the blood samples of the deceased thus confirming that the axe was the murder weapon.

16. Section 33 of the Evidence Act contains the law on dying declarations which was explained in the case of **CHOGO VS REPUBLIC [1985] KLR 1** where the case of **REPUBLIC VS JOSEPH WAMBUGU MWANGI ALIAS JUMA [2015] eKLR** was cited. It was held:-

*"the general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support the conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of the deceased person "*

17. In this case, PW2 testified that she was with the deceased in the house when she heard noise outside and went to check what was happening. The deceased was okay when his wife walked out but when she came back she found him seriously injured. The accused who had entered the house leaving his mother outside, walked out holding something which PW2 did not identify.

18. The deceased had just been injured when he exclaimed; "*Gitonga you have killed me*". The deceased as shown by the postmortem report had sustained severe injuries on the head which caused depression of the skull bones into the brain tissue.

19. When the deceased shouted that Gitonga had killed him, the deceased did so in extremity and was at the point of his death, and his mind must have been influenced by the most powerful consideration to tell his wife PW2 the truth. It was Gitonga Ngaruri and no other "Gitonga" who was at the scene at the material time. There is no doubt that the deceased was referring to the accused when he said that Gitonga had killed him.

20. The deceased knew his son the accused well and had no problem identifying him. PW2 was his wife and was also well known to him. The dying declaration was made at the scene immediately after the deceased was attacked.

21. It was held in the case of **STEPHEN MUTURIA KINGANGA VS REPUBLIC [2013] eKLR** while citing the case of **PIUS JASUNGA S/O AKUMU – V – R, (1954) 21 EACA 333** as follows:-

*"We have evaluated the evidence on record and taken caution that the statement by the deceased to PW1, PW 2 and PW 6 amounted to a dying declaration. We are satisfied that there is no question of mistaken identity since the deceased and PW 1, PW 2, PW 5 and PW 6 all knew the appellant as they were neighbours. The statement of the deceased to PW1, PW 2 and PW 6 is consistent and corroborated with the eye witnesses' account of PW 5 (Esther Muthoni). We find that the statement by the deceased is admissible under Section 33 (a) of the Evidence Act and the learned judge did not err in admitting the same in evidence."*

23. The evidence of PW1 who also met the accused at the doorstep of his parents house as the deceased lay on the floor bleeding profusely corroborates that of PW2. The evidence of PW1 and PW2 sufficiently corroborates the dying declaration.

24. PW2 identified the axe as her property and said that the accused was not carrying any weapon when he entered her house. The axe was most probably picked by the accused from his mother's house as soon as he entered. PW2 recalls seeing blood stains on the axe when it was recovered and shown to her. The doctor confirmed that the injuries were caused by a blunt object. This court takes judicial notice that an axe has a blunt end and also a sharp one. The accused person must have used the blunt end of the axe to hit the deceased on the head.

25. It is clear from the evidence that no one saw the accused hit the deceased. However, there is circumstantial evidence from PW1, PW2, PW3 and PW9 which points the guilt at no other person but the accused. The evidence brings out the following circumstances:-

*(a) That the deceased was in good health when PW2 left him in the house.*

*(b) That after PW2 went outside, its only the accused who entered that house.*

*(c) That PW2 heard a bang from her house as soon as the accused entered.*

*(d) That as he came out shortly afterwards, the deceased had already been critically injured as witnessed by PW1 and PW2.*

*(e) That the accused was positively identified by PW1 and PW2 as he went in and out of the house at the material time.*

26. The argument of the defence that the deceased was injured elsewhere is not supported by any evidence. PW2's evidence was credible and reliable. She testified that she was at home with the deceased when the accused and PW3 were involved in a fracas outside the house. The deceased remained in his house as PW2 went to check on what was happening. The deceased was later to be assaulted in the house as PW2 was standing outside the house.

27. In the Court of Appeal case of **NDURYA VS REPUBLIC KLR [2008] 135** the test to be applied by a court relying on circumstantial evidence was explained as follows:-

*Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.*

28. In the same case, the court cited the case of **REPUBLIC VS KIPKERING ARAP KOSKEI 1949 16 EACA 135** where in regard to circumstantial evidence the court held:-

*There is no direct evidence to the effect that those wounds were inflicted on her body by the accused person. The case must therefore be decided purely on circumstantial evidence.*

*It is now settled that for a Court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factor or circumstances which may weaken or destroy the inference of the guilt of the accused person.”*

29. In his defence, the accused merely denied the offence. He did not explain his whereabouts at the material time. However, PW1 explained that her house and that of the deceased are close to each other in that both of them heard the noises of the accused and PW3 around the same time. Both went to the gate of the common compound where they found the accused and PW3 fighting.

30. The evidence of PW1, PW2 and PW3 puts the accused at the scene of the crime. He had the opportunity to commit the crime and was indeed seen entering and leaving the house of the deceased by PW2 at the material time. PW2 heard a bang from her house which most probably was the hitting of the deceased on the head by the accused.

31. The cause of death was as a result of the head injuries which led to cardio-respiratory failure. The prosecution have established that the injuries on the deceased were inflicted by none other but the accused using a blunt object. The same resulted in the death of the deceased within less than ten (10) hours. The circumstantial evidence irresistibly to the accused person in exclusion of any other person as the person who did the act that caused the death of the deceased. I find that the prosecution have established *actus reus* on the part of the accused to the standards required in criminal law.

32. Section 206 defines malice aforethought as follows:-

*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.*

33. The defence argued that no motive was established. The Court of Appeal in the case of **OGETO VS REPUBLIC 2004(2) KLR 14** held that the prosecution does not have to prove motive in the commission

of a crime and “*that evidence of motive is not sufficient by itself to prove the commission of a crime by the person who possesses the motive*”. The proof of motive is therefore not a legal requirement.

34. The injuries inflicted on the deceased's head were so grave that the accused did not expect a different outcome other than the death of his victim. The accused therefore had knowledge that his act of grievous harm would result in the death of the deceased in tandem with Section 206(b).

35. In the case of **OGETO (supra)** the Court of Appeal observed that malice aforethought is proved by evidence showing that the accused intended to cause death or do grievous harm. It was held that:-

*“By Section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm.”*

The accused in the **OGETO** case had stabbed the deceased with a knife on the chest causing his death. The court found that he had malice aforethought as described in Section 206(a) of the Penal Code.

36. In view of the finding in the **OGETO** case and considering the circumstances of this case and the evidence adduced, I am of the considered opinion that malice aforethought has been proved on the part of the accused.

37. Consequently, I find that the prosecution has proved the offence of murder against the accused person. I find him guilty of the offence and convict him accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The accused**

**Ms. R. Njeru for accused**

**Ms. Nandwa for State**