



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL CASE NO 36 OF 2012
FORMERLY NYERI HC CR CASE NO 40 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS KIRUGU MWANGI.....ACCUSED

J U D G M E N T

1. The accused in this case, **Francis Kirugu Mwangi**, is charged with **murder** contrary to **section 203 as read with section 204** of the *Penal Code*. It is alleged in the information dated 28/10/2010 that in the night of 16th and 17/10/2010 at Nguthuru village in Murang'a county he murdered one **Stephen Maina Mwangi**. The Accused's plea was taken on the 17/11/2010 at Nyeri. He pleaded not guilty. The case was subsequently transferred to this court for disposal.

2. Trial of the Accused started before Ngaah, J on 30/09/2013. The judge took the testimonies of 5 prosecution witnesses. I took over the case from Ngaah, J and took only the testimony of PW6 before the prosecution closed their case. I also took the sworn testimony of the Accused.

3. I have read the testimonies of all the witnesses who have testified in this case. I have also considered the submissions of the learned counsels. PW1 (Penina Wambui Mwangi) was the mother of both the Deceased (who was her eldest son) and the Accused (her youngest son). Her testimony was that on 16/10/2010 at about 9.00 p.m. the Deceased went to her house, hit the door with a jembe handle and entered. He demanded for food. When PW1 told him that there was no food he started roughing her up. Her grandson (PW2) who was with her ran away through the window and went to call the Accused to come and assist PW1. PW1 further stated that when the Accused came the Deceased attacked him with the jembe handle and they both went outside the house. When she followed outside shortly, she found the Deceased lying down apparently dead. The Accused was then not there, but she shortly thereafter learnt that he had gone to report the matter to the authorities.

4. PW2 (Peter Mwangi Wanjira) was PW1's grandson by her daughter. He saw the Deceased attack his grandmother demanding for food while abusing her by calling her a dog and a harlot. As the Deceased continued to rough up PW1 while demanding for food, PW2 ran off to the house of his uncle (the Accused) to call him to come and save PW1 from the Deceased. He came back to PW1's house with the Accused who upon entering the house was immediately attacked by the Deceased with the jembe handle that he was armed with. The two then moved outside the house. There PW2 observed the two fall to the ground as they struggled over the jembe handle. The Accused was able to get hold of the jembe handle and get up before the Deceased. PW2 then observed the Accused strike the Deceased on the head three times with the stick while he was down. He (PW2) shouted to him to stop, and he stopped immediately. The Accused then went away. He then noted that the Deceased had died but he did not see any visible

injuries on the Deceased's body though he saw blood on the jembe handle. He was also categorical that there was no other weapon in the fight between the Accused and the Deceased. He did not see any knife.

5. PW3 (Gideon Gachanja Mburu) was a neighbour. He was called to PW1's home by the Accused through another person. There he found the Deceased already dead. He observed blood on the ground. There was also blood oozing from the back of the Deceased's neck. He and the Accused and others then went to the home of the local assistant chief (PW4) where they informed him of the occurrence. The assistant chief told them that he would visit the scene the following morning.

6. PW4 (Simon Muriuki Kariuki) was the assistant chief of the area. He testified that PW3, the Accused and his wife came to his house where the Accused told him what had happened. He informed the officer commanding **Kaharati Police Station** by phone of the killing. He advised them to also report the matter to the police themselves, and to guard the Deceased's body until the following morning. He visited the scene himself at about 6.30 a.m. the following morning. He observed the Deceased's body and noted injuries on the mouth.

7. PW5 (CI Judith Oyceto Otsembo) was the Investigating Officer of the case. She visited the scene at the home of PW1. She observed blood stains in the kitchen comprised of a temporary structure. She also observed the body of the Deceased and noted that it had injuries on the face and a deep cut wound on the chin. She recovered at the scene a jembe handle which she produced in evidence as Exhibit 1. She did not recover any sharp weapon. Earlier on she had arrested the Accused at Kaharati Police Station where he had taken himself. She subsequently caused him to be charged with the present offence.

8. PW6 (Dr. Gachiri Raphael) performed the post mortem examination upon the body of the Deceased. He produced the post mortem report as Exhibit 4. In the course of examination of the body he observed three cut wounds on the head; a fractured dislocation of the mandible (lower jaw); and a cut wound on the neck extending to the throat and to the major blood vessels. The blood vessels were dissected on the lateral side. The Doctor formed the opinion that the cause of death was **head injury secondary to assault and internal bleeding**.

9. The Accused gave a sworn statement in his own defence. He basically agreed with the testimonies of PW1 and PW2 regarding his altercation with the Deceased, except that he stated that he struck the Deceased only once with the jembe handle, and that because it was dark and was raining, he did not see exactly where he had struck the Deceased. He denied that he struck the Deceased while he was down. He stated that he was not armed with any weapon at all, and that there was no other weapon involved in his fight with the Deceased except the jembe handle which the Deceased himself had.

10. That is the summary of the evidence placed before this court. The fact of the death of the Deceased is not in dispute. It is also not in dispute that the Deceased's own aggression was what triggered the events that led to his death. That aggression was initially directed to his own mother (PW1) whom he was physically harassing and verbally abusing while demanding for food. The Accused came on to the scene only because PW2 called him to come to the aid of the PW1. Immediately the Deceased saw the Accused he turned his ire on him and attacked him with the jembe handle that he was armed with. The Deceased's rage appeared exacerbated by the fact that he appeared drunk.

11. When the Deceased attacked him the Accused rushed out but the Deceased followed him there. The Accused engaged him apparently in an effort to disarm him. As they struggled over the jembe handle both fell down. The Accused who was much younger and probably stronger, was able to get back up first and pick the jembe handle. PW2 then saw him strike the Deceased three times on the head with the handle while the Deceased was down. I do not believe the Accused's story that he struck the Deceased only once. PW2 had no reason to lie either against or for one or the other of his two uncles. The Accused's blows to the head of Deceased were powerful. Even though administered with a blunt object they split the skin and drew blood. One of the blows fractured and dislocated the Deceased's jaw.

12. What cannot be explained is the cut wound on the neck of the Deceased extending to the throat and dissecting the major blood vessels. The doctor stated that this injury was caused by a knife. There is no

evidence of the presence of a knife in the fight between the Accused and the Deceased. PW2, the only eye-witness, was categorical that there was no knife at all involved. So, what caused this massive injury to the Deceased's neck? It could not have been caused by the blows administered with the jembe handle by the Accused! This is very baffling because from the testimonies of PW1, PW2 and the Accused himself the Deceased appeared to have died more or less immediately after the Accused administered the head blows to him. Or, could it be that PW1, PW2 and the Accused were simply not being forthright regarding the injuries that the Accused inflicted upon his brother the Deceased?

13. It is not the court's function to speculate. The fact of the matter is that from the evidence placed before this court, the Accused cannot have inflicted upon the Deceased the injury that must have caused his death, that is, the cut wound to the neck extending all the way to the throat and cutting through the major blood vessels in the neck. The doctor's opinion that the Deceased's death was caused by **head injury secondary to assault and internal bleeding**, completely ignoring the vicious cut wound to the neck, is simply weird and untenable. I reject that opinion. The Deceased's death was no doubt caused by that injury to the neck. But there is no evidence that the injury was caused by the Accused. I must therefore acquit the Accused of the charge of murder.

14. There is ample evidence however that the Accused administered at least three vicious blows to the Deceased's head while he was down. He was a much younger man than the Deceased and in all likelihood stronger. He had already wrested the jembe handle from him, and had gotten up, leaving the Deceased down. Why did he not simply go away? The Deceased was still down yet he proceeded to administer those three blows to his head. One of those blows fractured and dislocated the Deceased's lower jaw. That of itself was a grievous injury and went far beyond the bounds of self-defense in the circumstances.

15. Grievous bodily harm is defined in the *Oxford Advanced Learners Dictionary, 5th Edition* as **serious injury done to somebody in a criminal attack**. A fractured and dislocated mandible is no doubt a serious injury. While acquitting the Accused of the murder of the Deceased, and acting under **section 179** of the *Criminal Procedure Code*, I will convict the Accused of the minor but cognate offence of **unlawfully causing grievous harm** to the Deceased contrary to **section 234** of the **Penal Code**. It is so ordered. The court can now be addressed on sentence.

DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 18TH DAY OF NOVEMBER 2016