



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 30 OF 2011

REPUBLIC STATE

VERSUS

STEPHEN KARANJA MUGOACCUSED

JUDGMENT

The accused **STEPHEN KARANJA MUGO** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that

“On the 15th day of March 2011 at Nyakiambi Village Olmoran in Laikipia West District within Rift Valley Province murdered PAUL MUGO KABIRO”

The accused pleaded ‘**Not guilty**’ to the charge and his trial commenced on 7/7/2014 before **Hon. Lady Justice Hellen Omondi** who heard the first three (3) prosecution witnesses. Following the transfer of the hon. Judge to the Bungoma High Court I took over the case and heard the remaining two (2) witnesses.

The deceased was a step-father to the accused. **PW1 MARY WANJIKU** who was a sister to the accused told the court that the accused was unaware that he was not the biological child of the deceased throughout his childhood **PW1** stated that the children were all raised by the deceased as his own and the fact that the accused was fathered by another man only came to light when the accused became an adult. Not surprisingly this brought about some strain between accused and his step father (the deceased). In her testimony **PW1** stated that in order to reduce the tensions in the family it was decided that accused should live with her in Uthiru in Nairobi whilst the deceased remained with the mother in the family home in Olmoran in Laikipia.

Sometime in March 2011 the accused left Nairobi and went to the family home. On 16/3/2011. **PW1** received news that her father had been killed by the accused.

PW2 KELLY NJOKI MUGO is the wife of the deceased and the mother to the accused. She told the court that on 15/3/2011 the accused who had been living with his sister (**PW1**) in Nairobi came back to the rural home in Olmoran. In the evening after taking supper accused began demanding that **PW2** show him his real biological father. Accused threatened to burn down the home if he was not shown who his father was. **PW2** tried in vain to calm the accused down. In the process of the argument the deceased hit **PW2**. On seeing this, the accused then stepped in to fight the deceased. **PW2** separated the two. Whilst **PW2** was engaged in tending to the kitchen fire the deceased picked up a metal object and went outside the house where the accused was.

The next thing **PW2** noticed was that the deceased had fallen to the ground and was bleeding from a cut to the head. **PW2** sent accused to call for help. No help was secured until the following day when the matter was reported to police who came to the scene and removed the body. The accused was then arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on to his defence. The accused gave a sworn defence in which he conceded that had been involved in an argument with the deceased on the material day but denies that he hit and killed the deceased. The court must now analyse the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code, Cap 63, Laws of Kenya defines the Offence of Murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

The prosecution must prove the following key ingredients for the Offence of Murder

- (1) The fact and cause of death of the deceased
- (2) Proof that the accused by an unlawful act or omission caused the death of the deceased
- (3) Proof that said unlawful act or omission was committed with malice aforethought

The fact of death of the deceased is not in any dispute. **PW2** who was an eyewitness to the incident told the court that the deceased died in his home due to an injury to the head.

PW3 APC JACOB KOSGEI an officer from Minjane Chiefs Camp confirms that on the morning of 16/3/2011 at 7.00 am he went to the family home where he found the deceased lying dead on a sofa set inside the house. **PW1** a daughter to the deceased also confirms that when she arrived home on 16/3/2011 she found her father dead. All the witnesses who knew the deceased well identify him as **‘Paul Mugo Kabiro’**.

Evidence regarding the cause of death was tendered by **PW4 DR. JOSEPH KARIMI KINYUA** a medical practitioner based at Nyahururu District Hospital. **PW4** produced in court the report on the autopsy conducted on the body of the deceased **P. Exb 1**. Upon examination, the body was found to have fractures of cheek bone, gaping wound on head exposing the skull and cut wounds on the face. The cause of death was opined to be **“raised intra cranial pressure due to subdural and extradural haematomas”**. This expert medical evidence was neither challenged nor controverted by the defence. I find that the deceased met his death due to multiple injuries to the head.

The next question requiring an answer is whether it was the accused who so assaulted and injured the deceased. The only eyewitness to the incident was **PW2**. She told the court that the accused and deceased were involved in an altercation on the material day. Although **PW2** does not say she saw the accused strike the deceased, she states that she did see the accused pick up a metal object and that accused and deceased were outside the house together as she tried to put out the fire arising from maize leaves which the accused had thrown on their fire. The next thing **PW2** knew was that deceased was lying on the ground bleeding from an injury to the head.

The accused does not deny that he quarrelled with the deceased on the material day. There was nobody else in the homestead apart from the accused and his parents. In his defence accused suggests that the deceased who was drunk at the time, may have lost his balance and fallen to the ground causing the fatal injuries. However, based on the autopsy findings I reject this suggestion. The post-mortem report indicates that the deceased had a fracture to the cheek as well as an injury to the front of his head. A fall would not have caused these two distinct injuries. The injuries noted are more consistent with blows to the head.

PW5 CHIEF INSPECTOR KAZUNGU the investigating officer produced in court a broken jembe which he claims to have been the murder weapon **P. Exh 2**. However the pieces of wood produced in court which allegedly came from that jembe were noted to be of a different texture. Further this jembe (stick) was never analysed by the government chemist to prove if it had any blood stains matching the deceased blood type.

Lastly a jembe is a very common farming implement and I have no doubt every rural home in Kenya would have at least one.

Be that as it may the failure to recover and exhibit a murder weapon does not negate a charge of murder. There is clear evidence of a long standing bad relationship between accused and the deceased. Indeed **PW1** in her evidence, stated

“Accused and our father had long standing problems because he used to claim that our father was not his biological father, yet I know our father brought us up since being young. It was a long standing problem between them”

There is evidence that accused and deceased were involved in an altercation on the material day. **PW2** the only eyewitness saw accused pick up a metal object. **PW2** was the mother of the accused and it is highly unlikely that she would tender false evidence against her own son. The injuries which led to the death of the deceased were consistent with his having been hit about the head and face by the heavy/sharp object. There was no other person in the homestead at the time. All these factors combined lead me to find that it was the accused who fatally assaulted the deceased. The circumstantial evidence points squarely at the accused and nobody else. I am satisfied that the ‘*actus reus*’ for the offence of murder has been proved as required in law.

The third ingredient requiring proof is the element of ‘**malice aforethought**’ which forms the ‘**men rea**’ for the offence of murder. It must be shown that the accused in committing the act which led to the death of the deceased acted with a pre conceived intention either to kill or to cause grievous harm.

As stated earlier this was a situation where there existed serious differences between the accused and his stepfather. Both **PW1** and **PW2** have testified to this. It appears that when upon reaching adulthood, the accused learnt that the deceased was not as he had believed his biological father he became angry and bitter. This could have been due to a feeling of rejection or displacement. The deceased on his part also appeared to reject the accused as a son. **PW1** even told the court that in order to keep the two away from each other it was decided that accused move away from the rural home to live with her in Nairobi.

In her testimony **PW2** who was caught in the middle of the fight between the two, being the wife to the deceased and the mother to the accused gave a moving account of the lengths to which she had gone to try and resolve the problem. When deceased chased accused out of the rural home **PW2** purchased land in Molo and set up a home for accused there. Later her other son ‘**Simon**’ went to Molo and chased accused out of that land with the tacit support of the deceased. **PW2** acted and purchased another plot of land for accused elsewhere. Whilst being cross-examined by defence counsel **PW2** stated

“I indeed organized for purchase of another parcel and we bought land for the accused. At one time deceased wanted to stab me and I got between them and got stabbed instead. Many times accused and the deceased would fight and at one time they were both arrested and taken to the police station and I had to intervene. You see that scar on accused’s head, they we inflicted by the deceased using a panga. When accused and deceased would be drunk, it was guaranteed they would fight”

These are the words of a mother, weary tired and distressed by the discord and animosity in her home between her husband and her son. The evidence of **PW1** and **PW2** demonstrates clearly that the bad blood between accused and deceased was a boiling cauldron just waiting to bubble over.

This is precisely what happened on the night of 15/3/2011. Matters came to a head when the deceased

came home and found that **PW2** had given her son food to eat. He threw a tantrum and ordered his wife not to give accused any food from his home. A quarrel ensued which degenerated into an altercation between the two. Accused collected maize leaves and threw them onto the fire in an attempt to burn down the home.

It is clear that the accused did not just launch an unprovoked attack on the deceased. From the evidence of **PW2** the deceased was taunting accused and armed himself ready to fight his step-son. In her evidence **PW2** says

“Accused then ran into his house. I turned and I saw my husband had raised his hand ready to strike. I separated him asking him why he wanted to fight yet he was the older person, the deceased hit me.....”

Further **PW2** states

“Yes my husband picked a metal object and announced that he would kill the deceased that night. The metal object was heavy and he used it to strike me on the head and my hair fell off. While I was putting out the fire deceased still had the metal object and he went outside.....”

All in all the picture clearly emerges of an all out fight between two combatants – the accused and the deceased. I find the accused did not strike the deceased due to a preconceived plan to maim or kill him. The accused acted in self defence due to the provocation by the deceased. Section 208(1) of the Penal code defines provocation thus

“208(1) The term ‘provocation’ means and includes except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”.

Not only was the accused threatened in his person – his mother with whom he had a close relationship was hit by deceased in his presence. In the words of **PW2**.

“..... the deceased hit me. On seeing this accused came out.....”

Clearly the accused was incensed when the deceased hit his mother and came out to fight deceased in an attempt to protect his mother. I find that the accused assaulted the deceased in the course of a fight and due to provocation by the deceased. The element of *men rea* is negated by this provocation. I find there was no malice aforethought on the part of the accused. Section 207 of the Penal Code provides

“207 when a person who unlawfully kills another under circumstances which, but for the provisions of this Section, would constitute murder, does not act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only”

I am satisfied that the accused acted ‘**in the heat of passion**’ before his temper had time to cool. I therefore acquit the accused of the charge of murder and instead I convict him of the offence of Manslaughter only.

Dated in Nakuru this 9th day of December, 2016

Ms Chemngetich holding brief for Mr Wambeyi

Maureen A. Odero

Judge