



REPUBLIC KENYA OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.44 OF 2008

REPUBLICPROSECUTOR

VERSUS

GEOFFREY MUNYAO NGUKUACCUSED

JUDGMENT

1. **Geoffrey Munyao Nguku** hereinafter "*the accused*" is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the offence are that on the 31st day of July, 2007 at **Kyaani Village Iiyani sub-location, Kola Location, of Machakos District** within the **Eastern Province**, murdered **Phillip Ngui Mwamote (deceased)**.
2. To prove the case the prosecution called eight (8) Witnesses. **PW1, Josephine Mumbua Lucas** was the interim chairperson at the Aombe clan meeting that was at the home of **Munguti Ivusu**. The chairman of the **Aombe Clan** was the deceased. A case between **Mariana Munyao** the wife to the accused and **Dorothy Musimbi** was an agenda item. The deceased arrived when the meeting was ongoing. The deceased inquired from the two (2) ladies whether their matter (dispute) was to be discussed. Dorothy answered in the affirmative. The deceased asked for tea that was served. The accused who was nearby took the cup that had been given to the deceased. He sought to be examined to confirm if he was under any influence of drugs. He became chaotic, and attempted to coerce the deceased to greet him. When the deceased declined, the accused removed the knife that he had and used it to stab the deceased at the nape of the neck. Those in attendance of the meeting rushed him to hospital. He was pronounced dead on arrival. On cross-examination, she denied an allegation that the deceased and the accused struggled and fought.
3. **PW2, Josphat Kyania Maunde** who was ten (10) metres away from the deceased and the accused had not seen the knife the accused carried because it had been concealed beneath the sweater that he wore. He saw the accused stab the deceased with a knife at the nape of the neck which he identified in court. He got a wheelbarrow and carried the deceased to the roadside. When the motor-vehicle took him to hospital, he did not accompany him as he returned the wheelbarrow home.
4. **PW3, Pauline Mune Munguti** witnessed as the accused stabbed the deceased at the nape of the neck. She was among those who scampered on seeing the act.
5. **PW4, Ndunge Musyimi Dorothy** was also a witness to the act of stabbing committed by the accused against the person of the deceased.
6. **PW5, James Mutisya Kaesa** a cousin to the accused was called by the accused to join him at **Nunguni** on the 1st August, 2007. They met at a bar and drank until 5.00pm. They went to PW5's home arriving at 6.00pm, and slept at his place of residence. At 5.00am the accused woke him up. He alleged that he was unwell. He requested him to go to his home and collect money that would enable him to pay for treatment expenses. He did so. On arrival at the accused's home he learnt that he was a fugitive wanted by the police for an offence of murder. He returned home

- whereafter the accused was arrested.
7. **PW6, No. 56837 P.C. Ambrose Kibaina** was led to where the accused was hiding at a relative's home. He arrested him. The accused led him to where he recovered the murder weapon, a knife. He investigated the case and caused the accused to be charged with the offence.
 8. **PW7, Dickson Wambua Ngui** the son of the deceased found him already dead.
 9. **PW8, Dr. John Mutunga** performed a post-mortem on the body of the deceased and formed an opinion as to the cause of his death.
 10. When put on his defence the accused stated that on the material date he was expected to attend the clan meeting. On arrival at the meeting he learnt that the agenda of the meeting was the dispute between his wife and **Mariana Munyao** and **PW4, Dorothy Musymi**. The parties to be discussed were ordered to leave the venue of the meeting. He was also ordered to leave being an interested party. He protested but PW1 declined to listen to him. Therefore he complied. They returned to the venue after the discussion. **Dorothy** and **Mariana** had discussed and reconciled. But the clan insisted that he (accused) had to give two (2) bulls that were to be eaten by those in attendance. He begged for forgiveness but they could not listen to him. He decided to leave.
 11. His action prompted PW1 to order the Clan Security Personnel to arrest him. The four (4) men seized him, tied him with ropes and smeared him with sisal fluid. His cousin, the deceased, on seeing that he was being tortured intervened in order to rescue him. The security men pushed both of them. They fell onto utensils, knives inclusive. In the process the deceased was injured. He participated in taking him to the roadside.
 12. Denying having gone onto hiding he stated that the following morning he went to **Mumbuni** with an intention of purchasing doors for his children who were constructing houses. He went to sleep at his cousin's house and was arrested the following day.

13. According to **Section 203** of the **Penal Code**:

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

Issues to be determined therefore are:-

- i. ***Whether the accused caused the death of the deceased?***
- ii. ***Whether the unlawful act or omission was with malice aforethought?***

14. Per the evidence adduced by both the prosecution and the defence it is not in doubt that the deceased was injured. He sustained a stab wound on the nape of the neck and was pronounced dead on arrival at the hospital. The fact of death was proved by the report made by the Pathologist, Doctor **John Mutunga, PW8**. On examination of the body of the deceased, he found it having a gaping cut wound at the nape of the neck. He formed an opinion that the cause of death was cardiopulmonary arrest secondary to haemorrhagic shock/spinal shock secondary to an assault.
15. In their testimony, prosecution witnesses who testified stated that the accused acted by using a knife that he had concealed beneath his clothing by stabbing the deceased. In his defence however, the accused stated that he was being assaulted by four (4) other persons and the deceased being sympathetic following the way he was being tortured intervened in an endeavour to assist him. They fell on utensils in the process whereby the deceased got injured.
16. In her testimony, PW1 stated that the accused removed a knife from the pocket of his pair of trousers. He moved to where the deceased was, held his neck and stabbed him on the nape of the neck. It was suggested to her on cross-examination that the deceased and accused had a duel but it was not indicated that they fell on utensils.
17. PW2 testified that when the accused, an interested party, was asked to leave in order for the matter involving him and his spouse to be discussed, he left and returned with a knife but it was concealed beneath his sweater. After the altercation caused by the accused he saw him move to where the chairman sat, hold his neck and stab him at the nape.
18. PW3 and PW4's evidence confirmed in material particular the act of the accused stabbing the deceased as stated by PW1 and PW2.

19. The allegation that the accused and the deceased fell on utensils that was introduced by the defence, was not established. I say so because the pathologist was the person who was capable of confirming whether or not the injury sustained was consistent with falling on a knife. On cross-examination he was not challenged to make a clarification. I therefore dismiss the defence of the accused that the injury was sustained as a result of a fall on the utensils and uphold what the prosecution witnesses stated to be true. In the premises, I find and hold that indeed it is the accused who stabbed the deceased at the nape of his neck and caused his death.
20. Malice aforethought is defined by **Section 206** of the **Penal Code** as:-

“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 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.”***

(Also see *Nanyonjo Harriet and Another–versus- Uganda Criminal Appeal No. 24 of 2002*)

21. Evidence adduced establishes the fact that when the accused went to the meeting he was chaotic. He seemed to have had a score to settle with the deceased. He hurled all sorts of accusations at him. Per what was divulged as a result of the cross-examination conducted, the agenda item concerning PW4 and the accused person’s wife was a complaint raised by the accused person’s wife that PW4 was having an illicit affair with the accused. This was the grievance the clan was to address and resolve on the fateful date.
22. On being told to leave the meeting as an interested party who was to be discussed, the accused left but later returned with a knife. He came with the knife concealed. This was evidence that he intended to use the knife. He did not allege that he had carried it for defence purposes. Considering the accused person’s demeanour, according to PW4 he accused the deceased of being fond of benefiting from money raised at funerals. He used threats – that he would kill himself so as to enable the deceased benefit from the money that would be collected.
23. PW3 also heard him declare that he would kill himself as he moved towards the deceased. Her evidence is corroborated by that of PW1 and PW2. This was evidence proving the fact that by the time the accused was returning to the rendezvous, he had formed the intention to use the knife on the person of another. In acting by declaring that he would even kill himself, he had knowledge that the act would result into death or grievous harm. However, the knowledge he had was accompanied by an attitude of indifference. It was not within his interest whether someone else died or if he died himself. This was indeed evidence of malice aforethought.
24. From the foregoing it is apparent that the accused acted with malice aforethought. For that reason, I find him guilty and convict him of the murder of the deceased.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE