



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 36 OF 2010

REPUBLICAPPLICANT

VS

MUTHIORA THURANIRA.....RESPONDENT

JUDGMENT

Muthiora Thurania faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is alleged to have murdered **Kai Thurania** on 29/3/2010 at Mutarakwa Sub Location, Ngusishi Location of Buuri District. The prosecution called a total of 5 witnesses in support of their case and when called upon to defend himself, the accused testified on oath and the OCS Timau Police Station, was called to produce an OB report as requested by the accused. The State was represented by Mr. Mulochi while Ms. Nelima appeared for the accused.

Jane Kabiti M'Mboroti (PW1), testified that on 29/3/2010 about 8.00 p.m., she was in the kitchen with Mary Kananu and Kai Thurania (deceased) taking tea when the accused entered. The accused asked the deceased why he had not gone to sleep and deceased stood up and left; that the accused followed the deceased outside and immediately after they left, PW1 heard screams from deceased who was saying that he would die. On following them outside, she found accused hitting the deceased with a fork *jembe* and spade which had been outside the door of the kitchen. PW1 screamed but ran back into the house and locked herself there and continued to scream. She could see accused continue hitting the deceased who had fallen on the ground because there was full moon. She peeped through the gaps in the wall of the wooden house. She saw neighbours come. That is when she came out. The accused had locked himself in his house and was ordered out. She saw the deceased bleeding profusely from the head and face. The Sub Area called police and they took deceased to Hospital at Nanyuki, from where he was transferred to Nyeri General Hospital where he stayed in ICU for 21 days and later transferred to the ward and remained there till he died. PW1 said that the body was released to them for burial. PW1 told the court that accused and deceased are brothers; that accused was the older one and that they always quarreled; that deceased was scared of accused; that both accused and deceased were her sister's children and they lived together on the same land. She denied that there existed any land dispute between her and accused or deceased. She identified the fork *jembe* that accused allegedly used to assault the deceased as Ex. No. 1.

Mary Kananu, PW2, recalled that on 29/3/2010 she had visited her aunt Jane Kabiti (PW1). At about 8.00 p.m. when cooking supper while with Kai (deceased) and PW1, taking tea, the accused came, hit the door, entered and told deceased to get up and go to sleep and since deceased feared accused, he immediately stood up and left and accused followed him. After a short while (2 minutes) she heard the deceased shout that he was dead as Muthiora had stabbed him. On walking out, she saw the deceased lying on the ground groaning as accused continued to hit him with the fork *jembe* and a spade. PW2 and

PW1 started to scream and neighbours came, caught the accused and called the police. They took deceased to hospital while accused was arrested. PW2 also said that there was full moon on that night and she was able to see how accused assaulted deceased. She also attended the post mortem. PW2 further told the court that accused and deceased were her cousins. She denied that there was any dispute over the land.

PW3, Cyprian Karianki Kirongo, recalled that on 29/3/2010 about 7.30 p.m. to 8.00 p.m., he heard screams from a neighbour's home. He was with 3-4 other people – Kiboki, Kuiko and Kimathi. They went to the home of Kabiti (PW1) from where screams emanated, found other people had arrived. They found Kai (the deceased) lying on the ground outside the house bleeding; that two women had locked themselves in a house and came out when people arrived; that the women told them what happened and they went to accused's house, blew up the back of the house and removed him. He also said that there was full moon on that night and that he also had a torch and so did many other people. He said he had known accused and deceased since 1993. He denied knowing of any dispute between PW1, 2, accused or deceased.

PW4, CPL Isaiah Korir of Maritani Patrol Base in Timau told the court that on 20/3/2010 he received a call from the Area Chief of Ngusishi about a serious assault; he proceeded there, met the victim and suspect with members of public on the main road; that the victim was unconscious and in a pool of blood. He heard from PW1 and 2 that deceased was assaulted using a fork *jembe* which had been left behind. PW4 went to get the weapon next day. They reported at Timau Police Station where a report was booked before the victim was taken to Nanyuki Hospital. PW4 said that he was shown the scene of incident which was outside the house and there was blood at the scene; that the fork *jembe* was given to him from the house and had blood stains.

The Investigation Officer in this case is **PC Victor Mwaura PW5**. He recalled that accused and deceased were taken to Station on 29/3/2010 about 11.30 p.m.; that deceased was taken to Hospital while accused was booked in cells; that he initially charged accused with assault but when deceased died, they charged him with murder. PW5 was recalled and told court that he was present when the post mortem was conducted by Dr. Githinji who has since gone into private practice. The Doctor observed that the body had a healed scar on the head, healing wound on right trochanteric area and another on anterior shin (right). Internally, the Doctor found that there was a depressed skull fracture on left parietal area near midline, like penetration of a sharp object 2.5 cm in diameter and 2" deep. In the nervous system, he found injury to superior sagittal sinus with subarachnoid haemorrhage; in spinal column, he found there to be traumatic injury on left parietal area where there was penetration by a sharp object. As a result of the examination, the Doctor was of the opinion that the cause of death was intracranial bleeding and traumatic brain injury due to severe penetrating head injury.

When called upon to defend himself, the accused stated on oath that on 29/3/2010 his cousin Mary Kajuju came from Meru with *chang'aa* which she used to deal in; that she had brought the *chang'aa* for one Michael Thimongo, who came for it; that about 4.00 p.m. Thimongo came back and called Kai the deceased and went to Kai's house; that Mururu came and also went to Kai's house as accused continued digging a trench between his land and Mururu's. He later went home at 5.00 p.m. and slept at 8.00 p.m. but was woken up about midnight by Mary Kajuju who was telling him to go and drink alcohol with other people. He declined to go since he was tired. After about 40 minutes, Mary Kananu went to his house but he sent her away because he was drunk. He peeped outside and saw Kajuju, Thimongo and Mururu. They continued to bang his door asking him to open but did not tell him why. He asked them to call for him Mwititi, a neighbor before he could open. After Mwititi came and went to Kai's house, he went out and found Kai lying on the ground and had injuries on the forehead and that Mwititi tied his hands and took him to the Police Station. Accused denied knowing what happened to Kai but that it is PW1 and 2 who brought him from where they had been drinking. He said that his family has a land dispute with Jane Kabiti (PW1) who does not want accused, Isaiah Murungi and Kai on the land because she wanted them to go to their father's land. He denied that there was any dispute between him, Kai and Isaiah Murungi. He said that Isaiah who was also his brother was killed on the same land. He denied having had any dispute with Mary or Cyprian (PW2 and 3).

DW2, Chief Inspector Joseph Nyanchoka of Timau Police Station produced the OB No. 25 of 29/3/2010 as requested by the accused. The report that was booked was that the accused was taken to the police station that evening by Mary Kananu and booked for the offence of assaulting Kai, his brother; that accused injured Kai after he intervened in a quarrel between accused and one Thimongo.

After close of the evidence case, Ms Nelima, Counsel for the accused argued that the prosecution had not proved the case to the required standard because PW1 and 2, the eye witnesses gave conflicting accounts of how the incident occurred. Counsel submitted that the investigation diary was produced in evidence which indicates that accused quarreled with Michael and that when deceased turned to intervene, the deceased was injured; that in cross examination, PW2 denied knowing Thimongo; that because of the inconsistency in the evidence, PW1 and 2 were not reliable witnesses and a doubt is raised in the prosecution case that should be resolved in favour of accused. Counsel relied on the decision of **Rep v Mukawa & 2 others (1989) KLR 281**. Counsel also argued that PW1 and 2 gave conflicting accounts on the relationship between accused and deceased; that if there was full moon as alleged by PW1 and 2, there was no need for PW2 to use a torch and further relied on the decision of **R. V. Mwenda CRA 25/2004**.

In response, Counsel for the State Mr. Mulochi submitted that there were no material contradictions in the prosecution case; that PW1 and 2, are an aunt and cousin to accused and deceased respectively; that according to the first report to police, it was booked that it is accused who had inflicted the injuries on deceased. He said that it is a non-issue if accused had a quarrel with Thimongo; that this was a case of recognition, not identification. Counsel relied on the decision of **Simon Kong'ori v Rep** and **Kambu v Rep CRA 144/08** on recognition.

The deceased was injured at night about 8.00 p.m. and this case therefore depends on evidence of identification or recognition. In such a case the court must proceed with caution in considering the said evidence before it can rely on it to found a conviction. In **Wamunga v Rep (1989) KLR 424** the court held:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

In this case PW1 and 2's evidence was that they were in the kitchen taking tea with the deceased when the accused arrived, demanded to know why the deceased had not gone to sleep; that the deceased rose up to leave and accused followed him only for them to hear screams a short while later and on looking out, they saw accused hitting the deceased who had fallen on the ground. Both PW1 and 2 said that there was a lantern in the house and full moon on that night and they were able to see what was happening outside. PW3 who came to the scene in response to the screams also told the court that there was full moon on that night. PW3 said that when he went to the scene he had a torch and so did the other neighbours but he never used it to see the people. In any event, PW3 came after the incident had occurred and PW1 did not tell who committed the offence. PW1 and 2 had been in the house with both accused and deceased. Both PW1 and 2 said there was a lantern in the house. They were related and I am satisfied that they did not only identify but recognized accused as the suspect. PW1 and 2 consistently described how accused was dressed in a blue T-shirt and blue jeans trouser. PW3 corroborated their evidence that accused wore a jeans trouser and grey T-shirt. Grey could be blue depending on one's appreciation of colours. In addition to the above, in his defence, accused said he peeped outside and was able to see the people who were there outside the house thus confirming that there was light enough to see those who were outside. He said that he only came out after he saw Mwititi had come. I have no doubt that there was enough moonlight outside for the witnesses to see all that was happening outside.

Ms. Nelima sought to rely in the decision of **Antony Mwenda v Rep CRA 25/2004** where the witness purported to have identified the appellant using moonlight as well as the torch; I find the circumstances of that case to have been different from the instant. In that case, the complainant purported to identify the appellant using moonlight while in the house whereas it was dark in the house. In this case however,

accused and deceased had just been in the house with PW1 and 2, where there was a lantern lamp and they went outside where the assault occurred soon thereafter in the glare of the moonlight. The facts of the cases are distinguishable.

Further to the above, PW1 and 2 said the scene was just outside PW1's house. PW3 and 5 estimated the scene to be 7 metres from PW1's house. PW4 who also visited the scene said it was only 2 metres from PW1's house. This goes to prove that the scene was just outside PW1's house and that buttresses my conviction that the witnesses did recognise the accused because they were in close proximity. The defence relied on the case of **R. V. Mukawa (Supra)** where the court held:

“A witness may be believed in one aspect and yet disbelieved in another. Though there may be contradictions in the testimony, the court may believe the witness in some other material particular”.

In this case, despite the few discrepancies in the evidence of PW1 and 2, the court does believe the evidence of PW2 as corroborated by PW1 on who injured the deceased.

In Mukawa's case, the court relied on the case of **Muhamed Bin Allui (1942) 9 EACA 72** and held:

“The report which an identifying witness first gives to the police is significant in testing the identification of the accused by the witness in subsequent legal proceedings”.

Again in the case of **Terekali & Another v Rep [1952] EACA**, the court said as follows of a first report:

“... Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

In this case PW1 and 2 reported to the first people at the scene who included PW3 that it is accused who committed the offence. That is why accused was arrested immediately after the assault. It is the same report that was replicated at the police station to PC Korir as per the OB Report; that it is accused who injured the deceased. There was no time for PW1 and 2 to be influenced to change the circumstances surrounding the commission of the offence.

During cross examination of PW2, it transpired that PW2 reported that a person by name Michael Thimongo was present when the incident occurred though PW2 denied knowing the said person. PW4 did admit to receiving a report that one Michael Thimongo had quarreled with either accused or deceased. It is not clear from the cross examination by Ms. Nelima. However, in the OB produced by DW2, it is clear that the report received by PW4 was that accused quarreled with one Michael Thimongo and when the deceased intervened is when accused injured the deceased. At no stage was it disclosed that the said Thimongo was the offender. Of course it was important that the said Thimongo be disclosed and possibly be called as a witness to state what transpired before the assault. PW4 said that he was not able to trace the said Thimongo. However, I find that failure to call Thimongo as a witness does not prejudice the defence because right from the onset, he was not the offender but accused was.

The defence Counsel also took issue with PW1 and 2's evidence on the words that the deceased's uttered upon being attacked. Whereas PW1 stated that she heard the deceased screaming and crying loudly. During cross examination, PW1 said that the deceased was saying **“I am dying”** in the *Kimeru* language. PW2 stated that she heard deceased saying **“wooi' I am dead. Muthiora has stabbed me”**. First of all, PW1 and 2 were not asked if these were the only words uttered. What is clear from PW1 and 2's evidence is that the deceased screamed and that is what attracted their attention. This case is not dependant on a dying declaration because it turns on the question of identification and recognition. The

fact that PW1 and 2's evidence differs in what the deceased purportedly said is not evidence that they did not hear him. It is not uncommon for two people at the same scene to see things differently or hear different things. The common thread in this message is that deceased was injured and screamed.

PW1 and 2 told the court that the accused used a fork *jembe* to injure the deceased. It is noteworthy that the police did not reach the scene that night but went there next day and found it in the kitchen. The defence took issue with the ownership of the *jembe*. In her evidence in chief, PW1 denied that the fork *jembe* was hers but later in cross examination, she said that she knew the fork *jembe* because it is her who gave accused the fork *jembe* that morning and that it had a crack on the handle. Earlier, she had claimed that she could not have been able to use such a *jembe* because of its size. It was not clearly stated whether it was PW1's *jembe* or not. PW2 however, specifically said the *jembe* belonged to PW1 and corroborated PW1's evidence that it is PW1 who gave the fork *jembe* to accused that morning. Further to the above, the finding of the Doctor that one of the injuries found on the deceased was a deep penetrating head injury and that it was by a sharp object – the injury was about 2.5 cm in diameter and 2 inches deep. These injuries that caused the deceased's death are likely to have been inflicted by the fork *jembe*. I do agree with defence Counsel that the police mishandled the exhibit by their failure to take the fork *jembe* for analysis of the blood that was said to have been on it. Despite that omission, I am satisfied that the fork *jembe* was ably identified as the murder weapon.

According to PW1, the accused and deceased always quarreled and that when accused entered the house, he asked why deceased has not gone to sleep and deceased left. PW2 corroborated PW1's evidence that when accused entered the kitchen, he questioned why deceased had not gone to sleep and deceased left but was followed by accused. PW2 also stated that deceased feared the accused though she later denied that she knew of any disagreement between accused and deceased. PW4 said that from investigations, he learnt of jealousy feelings existing between accused and deceased from PW1. It is PW1 who lived with accused and deceased and was likely to know much more than PW2 or the neighbours. The fact that PW2 knew that deceased feared accused was telling, why would deceased fear his brother? As regards accused's allegation that there existed a grudge between him and PW1 over land, the same was denied by PW1, 2 and even PW3, the neighbour. The accused and deceased, PW1 and 2 are all said to till the said land which belonged to accused's grandmother and there are succession proceedings pending in court and accused, PW1 and 2 are all beneficiaries. Accused denied that he had any grudge with PW2 or 3 who also testified against him. In fact, he told court that he refused to get out of the house till Mwititi came. Mwititi did come and he was still arrested.

I do not believe that any grudge existed between accused and PW1 over land. Had there been a land dispute, PW2 and 3 who had no grudge with accused would have alluded to it. I find that defence to be untrue.

For the prosecution to establish an offence of murder, they have to prove:

- 1. That the accused committed the act that led to the death (*actus reus*).**
- 2. That the accused had the intention to cause death or grievous harm (*mens rea*) or otherwise known as malice aforethought.**

Under **Section 206 of the PC** malice aforethought is defined as an intention to cause grievous harm or cause death. In this case, I am satisfied that it is accused who inflicted the fatal injuries on the deceased. The Doctor did not find one injury but multiple injuries i.e. healing scar on head parietal area near midline, healing wound on trochanteric area, wound on anterior shine, depressed skull and a penetrating wound that was cause of death. The injuries were all over the body which tallied with PW1 and 2's evidence that they saw deceased had fallen and accused was assaulting him all over the body. From the injuries found on deceased's body, it is unlikely that accused meant to assault a 3rd party by name of Thimongo and instead assaulted the brother. The multiple injuries found on the deceased are evidence of malice aforethought as the most serious when were inflicted on the head. I am satisfied beyond any doubt that it is the accused who inflicted the injuries on the deceased and his intention clearly flows from the multiple injuries inflicted on the deceased.

I find him guilty of the offence of murder as charged and convict him accordingly under Section 322 of CPC.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER, 2015.

R.P.V. WENDOH

JUDGE

23/10/2015

PRESENT:

Mr. Mulochi for State

Ms. Nelima for Accused

Peninah, Court Assistant

Present, Accused