



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 16 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MURIAN KENGANYA MAKURI.....ACCUSED**

**JUDGEMENT**

**Introduction**

Murian Kenganya Makuri, the accused, is facing a murder charge contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge state that on 22<sup>nd</sup> January 2011 at Babadogo Estate in Nairobi he murdered Chacha Marwa. The accused is represented by Mr. Anambo, Advocate. The prosecution called evidence of nine witnesses in support of its case. The accused was the only witness for the defence.

**Facts of the case**

The accused and the deceased were cousins. On 22<sup>nd</sup> January 2011 at about 1.00pm, the deceased sought to know from the accused as the accused was passing by the deceased's house why the accused had assaulted the deceased's wife. An altercation ensued with the accused threatening to beat both the deceased and his wife. The accused is said to have gone into his house within the same compound, armed himself with a knife, 'rungu' and a stool and went to the house of the deceased. In the meantime, the deceased and his wife had been advised by neighbours to lock themselves inside their house to avoid an attack by the accused. The accused is said to have hit the door of deceased's house using the knife and his body until the door opened. He stabbed the deceased on the stomach and on the hand. The deceased is said to have run out of his house with the accused in hot pursuit. When the accused realized that he had seriously wounded the deceased after seeing deceased's bowels hanging outside his abdomen, the accused went to Ruaraka Police Station still carrying the blood stained knife and 'rungu'. He surrendered to the police and reported that he had stabbed someone.

The deceased who was seriously injured was taken to Kiambu District Hospital where he succumbed to the injuries while undergoing treatment.

**The law**

Murder is an offence created by section 203 of the Penal Code. It is committed when any person with malice aforethought causes the death of another by an unlawful act or omission. The penalty for murder is death as prescribed under section 204 of the Penal Code. The burden of proving murder lies with the prosecution. There must be proof of the unlawful act or omission causing the death; there must be proof

that the act or omission was perpetrated by the accused before the court and there must be proof that in causing that death, the accused possessed malice aforethought. The standard of proof must be beyond reasonable doubt.

### Analysis of evidence

In every dispute before the court there are always two sides of the story. From the prosecution side, there is the evidence of Julius Mwita Munijo, PW1, a neighbour of both accused and deceased; Susan Gati Mwita, PW2, wife to PW1; Susan Gati Nyamasa, PW3, sister to deceased's wife Christine Marwa, PW4. Other than PW3 who had gone to Babadogo to visit her sister PW4, the other three witnesses lived in the same compound with the deceased and the accused. The four witnesses testified that on 22<sup>nd</sup> January 2011 at about 1.00pm, the deceased asked the accused why he (accused) had beaten deceased's wife (PW4). The witnesses said that the accused told the deceased that he did not have a wife but a prostitute. He then threatened to beat both the deceased and the wife. He went into his house, picked a knife and a 'rungu' and went to deceased's house. At this time the deceased and his wife had locked themselves inside their house. The accused hit the door of deceased's house until it opened. He attacked the deceased and stabbed him using the knife causing severe abdominal wound with protruding bowels. The accused then went to Ruaraka Police Station where he surrendered to the police.

On the other side is the accused person who testified that he stabbed the deceased. He however told the court the stabbing was done in totally different circumstances than those explained by the four prosecution witnesses. He said he came home for lunch and found the deceased in bed with his (accused's) wife. He said the deceased attacked him with a knife and cut him on the face and stabbed him on the left shoulder and on the finger of the right hand. He said he defended himself with a stool and picked the knife after it fell down. He said they struggled and the knife cut the deceased on the hand. He said he stabbed the deceased on the stomach. He said he did not know how serious the deceased's wound was and that he went to report the matter to the police. He said Mwita (perhaps referring to PW1) threw a club at him which he picked and went with it to the police station.

I have carefully considered all the evidence tendered in this case. I find no dispute that the deceased died as a result of the fatal wounds inflicted on him by the accused. There is evidence of four prosecution witnesses, PW1, PW2, PW3 and PW4, attesting to this fact. There is also the evidence of Dr. Dorothy Njeru, PW9 confirming the death of the deceased. The doctor told the court that the deceased had a penetrating abdominal injury above the umbilicus measuring 10cm long with intestines hanging out; a sharp wound on the left hand around the elbow measuring 8cm long and a third wound on the left hand to the back of the forearm measuring 6cm long and 2 litres of blood accumulated at the abdominal cavity. She said the large and small intestines were perforated and there were injuries to the blood vessels in the abdominal cavity. She confirmed that death was caused by haemorrhage due to penetrating trauma.

I find no dispute as to who caused those injuries. The evidence on this issue is water tight. The accused has also admitted stabbing his cousin the deceased. The accused kept on repeating in his evidence in defence how he loved his cousin the deceased and how sorry he was for having caused the death of his cousin. This evidence from both the prosecution and the accused prove beyond reasonable doubt that the accused caused the death of the deceased by stabbing. This evidence settles the ingredient of *actus reus* the unlawful act causing the death of the deceased.

The only issue for determination therefore is the *mens rea*. Did the accused possess malice aforethought? The defence put in a theory that the accused did not possess malice aforethought. The prosecution thinks otherwise. All the four prosecution witnesses present at the scene when this incident occurred denied that the accused and the deceased fought that day. PW6 Police Constable Samuel Mutua testified that the accused found him at the report office at Ruaraka Police Station and that the accused arrived at the station without a shirt and was carrying a bloodstained knife and wooden rod. He reported to PW6 that he had stabbed someone without naming the person. The victim was later identified as the deceased. PW6 told the court on cross-examination that the accused did not tell him that there had been a fight between him and the deceased or that the deceased had been found in bed with accused's wife. PW6 further told the court in cross-examination as follows:

**“Accused had some bruises. I asked him how he sustained them. He said he was struggling with the deceased. I do not know if they fought. He did not say how he got injured. He did not tell me he was fighting with deceased. He did not say deceased caused the injuries as a result of which he stabbed the deceased.”**

Police Constable Gerald Kagiri, PW7, who investigated this matter told the court that he took the accused back to his house to change his blood-stained trousers (Ex. 4). He said that he recovered accused’s blood-stained shirt (Ex. 5) from accused’s house. PW7 said that the accused had bruises on his face which he said he sustained from the struggle with the deceased. PW7 told the court that the accused claimed that the deceased used to move with his (accused’s) wife.

On cross-examination, PW7 reiterated that the accused claimed that the deceased had had an affair with his (accused’s) wife but that the accused did not tell him that he had caught them red-handed on the day of this incident. PW7 further testified during cross-examination that the accused did not say the deceased was armed with a knife and that:

**“I agree the accused defended himself after he was overwhelmed. It is true the accused suspected the deceased had an affair with his wife. They fought and accused was overwhelmed. He got a knife and stabbed the deceased.”**

PW7 did not tell the court the source of that information. Although in his examination in chief he said that some witnesses testified to a love affair between the deceased and accused’s wife he did not disclose who these witnesses were given that no witness told the court this.

That the deceased had bruises on his body as testified to by PW6 and PW7 was confirmed by Dr. Zephania Kamau, PW5, who examined the accused on 25<sup>th</sup> January 2011, two days after the incident. The doctor told the court that the accused told him he had been assaulted by the deceased. The doctor found a wound above the lateral aspect of the left eyebrow and below the left nostril. The accused had a human bite anterior to the left angle of mandible (jawbone); a wound on the parma aspect of the right ring finger; bruises on the tip of the left shoulder and below the anterior and lateral aspects of the right shoulder. The doctor concluded that the bruises could have been caused by both the sharp and blunt objects.

The evidence of PW5 (doctor) and the two police officers PW6 and PW7 agree on one aspect, that the accused had bruises sustained on the day of this incident. This evidence strengthens that of the accused that the deceased and he fought or struggled on the day in question.

I have also considered the evidence of Henry Kiptoo Sang the Government Analyst, PW8. He testified on behalf of Paul Waweru his colleague who had retired. Paul Waweru had examined the accused’s pair trousers and shirt; the blood-stained knife and blood-stained wooden stick and compared them to the blood samples of the deceased and the accused. He found that the DNA profiles found on the knife and the stick matched the blood sample belonging to the deceased and the DNA generated from the bloodstains found on the shirt and trousers belonging to the accused matched the blood sample belonging to the accused. This confirms that the knife and the stick (rungu) were stained with deceased’s blood leading to the conclusion that they came into contact with the deceased. This evidence further confirms that the accused was injured and had bled onto his trousers and shirt.

This evidence has caused me some concern and made me suspect that the four prosecution witnesses may have concealed some material evidence from the court about what happened on 22<sup>nd</sup> January 2011. It has not escaped this court’s attention that the four witnesses were either related or friends with the deceased. There is no independent witness who testified as to what happened.

The law is clear that he who asserts a fact must prove it. It is also clear that the prosecution bears the heavy onus of proving this case beyond reasonable doubt. It is the prosecution to prove malice aforethought on the part of the accused. With the evidence of bruises on the body of the accused this court finds that it entertains some doubts as to whether the incident occurred as testified by PW1, PW2, PW3 and PW4 or as testified by the accused. There are some doubts lingering in my mind that perhaps due to a

dispute of a love affair between the deceased and accused's wife, either on the day in question or sometimes back, the two, accused and deceased fought or struggled that day before the fatal wounds on the deceased and the bruises on the accused were inflicted.

After carefully considering all the evidence tendered in this case, it is my finding that the prosecution has failed to prove that the accused had intended to kill his cousin. The stabbing in my view, given the evidence on record, was not intentional. With this kind of evidence therefore, I find that the charge of murder has not been proved beyond reasonable doubt. I find that all the ingredients of murder have not been proved to the required legal standards. I will and do hereby find the accused person Murian Kenganya Makuri not guilty of murder as charged and acquit him of that charge. Instead, I find the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code proved against the accused person beyond reasonable doubt. I consequently find Murian Kenganya Makuri guilty of manslaughter and convict him accordingly. It is so ordered.

**Dated, signed and delivered in open court this 18<sup>th</sup> November 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Magoma, prosecution counsel

Mr. Anambo, defence counsel,

Mr. Murian Kenganya Makuri, accused

Daniel Ngumbi, court clerk