

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 5 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK MBITHI KALOKI.....ACCUSED

J U D G M E N T

1). The accused, Fredrick Mbithi Kaloki was charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence are that on the 31st day of Decembe 2009 at 7.30 pm at Kathyoli village in Mbiuni location of Mwala district of the eastern province murdered Benson Ngwae Kaloki.

2). The prosecution called six witnesses in support of their case. The prosecution case was that on the material day at about 7.30 pm, PW1 Mary Ngoreti Ngiwa was at home. Her husband the deceased had gone to church. The accused who is an elder brother to the deceased went to where PW1 was and inquired about some stones that had been removed from their late mother's granary. The deceased had removed three stones from the granary. The accused looked for a wheelbarrow and removed two of the remaining stones.

3). When the deceased returned home, he asked his wife about the stones and said he had met the accused taking away some stones. The wife (PW1) explained that the accused had taken the stones from the granary. Later the accused came and the deceased asked him about the stones. The accused threatened to kill the deceased. A quarrel ensued between them and they started fighting. The accused ran away and came back with a stick and hit the deceased with the same twice on the head. PW1 separated them. The two brothers continued quarreling with the accused once again threatening to kill the deceased.

4). The accused then went away but returned after a short while and started hurling insults at the deceased. The deceased and the accused started chasing each other. The accused ran towards his house which was within the same compound. The deceased then fell down on his back. PW1 rushed to where the deceased and the accused were. The deceased's stomach was open and the intestines were out. PW1 started screaming. Other family members and neighbours came to the scene. The deceased was bandaged with a 'leso' and placed on a wheelbarrow and rushed to hospital where he was declared dead. Members of public arrested the accused and administered mob justice on him. The accused led the mob and the brother of the deceased, PW2 Patrick Mutisya Ngowe to some nearby bushes where a knife was recovered.

5). The accused was escorted to the police station where he was handed over together with the knife. Investigations commenced. The scene was visited and a postmortem was later carried out on the body of the deceased. The accused was subsequently charged.

6). The accused in his defence gave unsworn evidence. No witnesses were called. The accused stated that a quarrel ensued between him and his younger brother (the deceased) over the stones for building a granary. That their father had divided the six granary stores among the two of them. That the deceased later carried away his three stones. Later when the accused carried away his stones to build his granary, the deceased started a quarrel with him. That the deceased threatened

him and entered his house and started beating him. They then went outside quarrelling. The wife to the deceased intervened and pulled away the deceased and pushed the accused down. The deceased pulled away from the wife and followed the accused who then ran to a nearby farm. The deceased then used a gas lighter to look for the accused in the farm but did not get him and went back to his house.

7). The accused further stated that he stayed in the farm for about 40 minutes then returned to his house to sleep. That the deceased started a quarrel again. When the accused saw the deceased with his wife heading towards his house carrying some implements he ran away. The deceased then started chasing the accused around the compound. It was then that the accused saw that the implement the deceased was carrying was a knife. The deceased caught up with the deceased and lifted the knife to strike him with same. The accused lifted his hands and held the hand with the knife and they started struggling with each other. That the deceased hit the accused with the knee at the stomach then pulled him and pushed him and tripped him down. It was then that the accused heard the deceased screaming in pain and both of them fell down. The accused then got up and ran away.

8). Neighbours were attracted to the scene by the screams. The neighbours went back with the accused to the scene. The accused found the deceased undressed with a stab wound on the ribs. The deceased was taken to the hospital. The accused escorted to the police station where he was charged with the offence herein.

9). It is clear from the evidence of PW1 that there was a quarrel between the deceased and the accused over the granary stones. The quarrel degenerated to fight. PW1 knew both the deceased and the accused as family members and interacted with them closely during the altercation and even tried to separate them. Indeed the evidence given by the accused in his defence case agrees with the evidence of PW1. The point of divergence comes in on the details regarding the stabbing of the deceased.

10). PW1 saw the injured deceased falling down. Only the accused and the deceased were at the scene of death. The accused has explained that they were struggling over the knife when the deceased fell down. The accused gave unsworn evidence. The same fails to explain how the knife left the scene. According to the evidence of PW2 Patrick Mutisya Ngwae, the accused is the one who led him and some neighbours to the bushes where the knife was recovered. This was immediately after the commission of the offence. The circumstantial evidence points at the accused as the one who stabbed the deceased.

11). The doctor who carried out the postmortem, PW5 Dr. Simon Kioko Mule confirmed that the cause of death was “cardio pulmonary arrest due to massive haemorrhage secondary to penetrating abdominal stab injury”.

0. It is evident that there was a quarrel and a fight between the two brothers. It is also clear from the evidence of PW1 that the death occurred when the deceased was following the accused to the house of the accused. The evidence presented by the prosecution shows no malice aforethought. Consequently, I find the accused guilty of the lesser charge of manslaughter contrary to section 202 Penal Code and convict him accordingly.

Dated signed and delivered at Machakos this 15th day of December 2015.

B. THURANIRA JADEN

JUDGE