



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO.13 OF 2009

REPUBLIC

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PROSECUTOR

VERSUS

GERALD KARIUKI MURATHE

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ACCUSED

J U D G M E N T

The accused person, Gerald Kariuki Murathe, underwent a full trial for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code as set out in the information of the Honourable Attorney General dated 18<sup>th</sup> February 2009. The particulars of the offence are that on the 24<sup>th</sup> day of December 2008 at Mugecha village in Muranga South District within Central Province it is alleged that the accused murdered John Njuguna.

The prosecution summoned the evidence of seven witnesses in support of the charge. Peter Muchonjo Ndungu (PW1) knew Gerald Kariuki Murathe (*accused*) as a brother to David Murathe. The duo were both employed as farm labourers by David Murathe. On 24<sup>th</sup> day of December 2008 PW1 took some goats to David Murathe's farm in Ngarua. On arrival at that farm, he found a huge crowd gathered at the homestead of David Murathe. PW1 moved closer and said he saw the accused cut the deceased on the head and leg using a panga. He also said that the accused was armed with a bow and arrows hence no one could go nearer to where he was. PW1 stated that he knew the accused had been hired by David Murathe to clear the compound in readiness for the reception of a get together of David Murathe's family. Harith Njoki Njiru (PW3) went to the homestead of David Murathe when she learnt that someone had been assaulted and injured therein. PW3 said that on arrival she found a huge crowd gathered outside that homestead. She moved nearer and talked to the accused who informed her that someone had been killed by members of the outlawed Mungiki Sect elsewhere and the body dumped in that homestead. In the process, members of the public then moved in and had the accused arrested. The badly injured person was found inside the compound. The police were informed and came to take the deceased to hospital and re-arrested the accused. Fridah Muthoni (PW2), Johnson Kanyiri (PW4) and PW3 claimed they were informed by the deceased that he was cut by the accused using a panga. PW3 also stated that the accused was armed with a bow and arrows which the police took. Johnston Kanyiri (PW4) said that on the material day he rushed to the homestead of David Murathe when news reached him that the accused had assaulted someone using a panga. On arrival, PW4 said he found PW3 questioning the accused as to why he cut the deceased. PW4 further claimed he saw the accused go inside the house and come out armed with a bow and arrows and started to chase people away. People, in turn, ran away for their dear lives. The accused was only arrested after he was persuaded by PW3 to drop down the weapons he had. PW4 said that when he entered the compound, he found that the deceased was badly injured on the head and leg. Sgt. Ronald Mungai (PW5) visited the scene on the instructions of his OCS where he re-arrested the accused who was on top of a Pick-up having already been arrested by members of the public and tied with ropes. PW5 said he took the deceased to Thika District Hospital where he was admitted. The accused was taken to Kandara Dispensary for treatment and thereafter he was placed in police custody as a suspect for assault. The charge was later withdrawn and substituted with that of murder when the deceased passed away while undergoing treatment. PW5 produced the bow and arrows which he had taken possession from the Pick-up he found the deceased and the accused were on board. Dr. Anthony Murage (PW6) produced the deceased's treatment notes and the discharge summary in respect of the deceased prepared by Dr. Phylis an in-tern attached to Thika District Hospital. It is apparent that the deceased was discharged on 15<sup>th</sup> January 2009. The treatment notes shows that the deceased suffered multiple cut wounds inflicted by a known assailant and that he was admitted on 24<sup>th</sup> December 2008. In the discharge

summary produced by PW6, the word 'unknown' is said to have been altered to read 'known' assailant. In the same discharge summary, it is noted that the deceased was discharged on 15<sup>th</sup> January 2009 while he was in a stable condition. It is also indicated that later and after consuming food on 15<sup>th</sup> January 2009 the deceased started vomiting and diarrhoeing. On 26<sup>th</sup> January 2009, his condition changed for worst and died. Dr. Peter Muriuki Ndegwa (PW7) produced the post-mortem report in which he formed the opinion that the deceased died as a result of complications of cut wounds. In cross-examination, PW7 admitted, that the wound infections could not have caused vomiting and diarrhoeing. He further admitted that there was need for further investigations on the cause of the infections and dehydration.

When placed on his defense, the accused gave sworn testimony and denied committing the offence. He stated that on 24<sup>th</sup> December 2008 he was at home operating his kiosk when people unknown to him came to his business premise claiming he had stocked stolen goods in his shop. He opened the kiosk to allow them check for the alleged stolen goods. The accused denied seeing PW1 on the aforesaid date. The accused, however, admitted that he knew PW3 as his sister in-law but denied having seen her on the fateful day. The accused further admitted that he was arrested by members of the public and later charged with the offence of assault.

At the close of evidence learned counsels from both sides were invited to make their final submissions. They however opted to rely on the submissions they made at the stage of no case to answer. I have considered the aforesaid submissions together with the evidence. Two ingredients must be established in order for the offence of murder to be proved. First, there must be proof that death occurred as a result of the accused's act. In the case before this court, the evidence of PW1, PW3, PW4 and PW5 place the accused at the scene of crime. It is the evidence of PW1 that he saw the accused cut the deceased using a panga thus inflicting head and leg injuries. PW3 confirmed that she saw the deceased who was badly injured at the accused's homestead though she did not witness the accused assaulting the deceased. It is the submission of Mr. Gori, learned advocate for the accused that the prosecution did not establish the element of actus reus. There is no doubt that the deceased passed away while undergoing treatment at Thika Level 5 hospital. The question which must be answered is whether or not the deceased died as a result of the injuries inflicted by the accused? In this regard, the evidence of PW6 and PW7 are critical. According to the treatment notes and the discharge summary prepared by Dr. Phylis, a Clinical Officer and produced by PW6, the deceased was admitted on 24<sup>th</sup> December 2008 and discharged on 15<sup>th</sup> January 2009 in a stable condition. It is said that on the same date the deceased ate some food and immediately started vomiting and to diarrhea making his condition to worsen. On 26<sup>th</sup> January 2009, the deceased passed on. According to PW7, the deceased passed away as a result of complications of cut wounds. PW7, admitted, that the aforesaid complications could not cause vomiting and diarrhoeing. He further stated that there was need to carry out further investigations as to what caused the deceased to vomit, diarrhea and dehydrate. In my humble view, the cause of death given by the Pathologist is not conclusive. Dr. Peter Muriuki Ndegwa did not seriously carry out a thorough autopsy to rule out the fact that the deceased's death may have been caused by food poisoning. The cause of death cannot therefore be solely assigned to the injuries inflicted by the accused. The cause of death was therefore not proved beyond reasonable doubt.

The second element which must be proved is the element of malice aforethought. I have looked at the post-mortem report and it is shown that the deceased suffered septic wounds bilateral ankle joints. The discharge summary indicates that the deceased suffered multiple cuts on the body. It is not clear from the medical reports tendered whether those injuries were grievous. It is therefore not possible for this court to state categorically that the person who inflicted the injuries intended to cause grievous harm or death so that inference of malice aforethought could be made and assigned to the accused.

In the end I find that the ingredients of the offence of murder have not been established. The prosecution has therefore failed to prove the case against the accused beyond reasonable doubt. I find the accused not guilty. Consequently, Gerald Kariuki Murathe is hereby acquitted. He should therefore be set free forthwith unless lawfully held.

Dated and signed this 20th day of February 2014

J. K. SERGON

JUDGE

Delivered in open court this 20th day of February 2014

.....for Director of Public Prosecutions

.....for Accused