



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.13 OF 2009**

REPUBLIC.....PROSECUTOR

**VERSUS**

GERALD KARIUKI MURATHE.....ACCUSED

**JUDGMENT**

**GERALD KARIUKI MURATHE** hereinafter, referred to as the Accused is before this court on the information of the Honourable Attorney General dated 18th February, 2009 duly 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 24th December, 2008 at Mugecha Village in Murang'a South District within Central Province, the accused is alleged to have murdered **JOHN NJUGUNA**.

The prosecution tendered the evidence of seven witnesses in support of their case. The star witness in this case is **Peter Muchonjo Ndungu** who testified as P.W.1. It is the evidence of P.W.1 that on 24th December, 2008 he drove goats to the homestead of his cousin, David Murathe. Upon reaching that homestead, P.W.1 said, he found a huge crowd gathered outside who told him that someone had been killed inside that compound. P.W.1 said he checked and saw Gerald Kariuki Murathe (accused) cut John Njuguna (deceased) using a panga. He also claimed that he saw the accused in possession of a bow and arrows. P.W.1 further stated that for fear of his life he observed from a distance and noticed that the deceased sustained injuries on the head and in the stomach. P.W.1 said he knew the deceased had been contracted to clear and clean the compound in readiness for a family get together. In cross-examination P.W.1 said he personally witnessed the accused cut the deceased on the head and on the leg while he stood about 10 metres away. P.W.1 estimated the crowd to comprise of about 100 people. P.W.1 admitted in cross-examination that he did not record in the statement he gave to the police that he had witnessed the accused cut the deceased but instead had said he saw the accused chase people away from the homestead. The other important eye witness is **Harith Njoki Njiru** (P.W.3) who said she rushed to the house of David Murathe when she was told someone had been murdered inside the house. P.W.3 found a crowd of about 50 people gathered. P.W.3 said she saw the accused inside David Murathe's compound. The accused was said to be armed with a bow and arrows and threatening to shoot the crowd. P.W.3 clearly stated she did not see the accused with a panga. P.W.3 managed to speak to the accused and it is her evidence that the accused told her that someone had been beaten by the outlawed Mungiki Sect and his body dumped at David Murathe's compound. P.W.3 said the accused got calmed and was arrested by the crowd who tied his hands using a rope before calling in the police. Inside the compound P.W.3 said they found a badly injured person. That person and the accused were taken by the police to hospital. P.W.3 claimed she was told by the deceased that the accused was the one who cut him. She confirmed that the accused was armed with a bow and arrows. P.W.3 was categorical that she did not see the accused cut the deceased. In cross-examination P.W.3 conceded that in her statement she said she stated that the accused entered his house and came out with arrows and a panga prompting them to run away. She denied seeing a panga. **Johnson Kanyiri mwangi** (P.W.4) stated that he rushed to the scene when he received news that the accused had cut someone. P.W.4 found a crowd gathered outside that compound while P.W.3 was talking to the accused. P.W.4 said he saw the accused enter the house, came out with a bow and arrows and chased away the crowd. P.W.4 stated that the deceased told him that the accused had cut him. P.W.4 further said that it is P.W.3 who persuaded the accused to drop his bow and arrows. P.W.4 denied seeing a panga at the scene. **Sgt Ronald Mungai** (P.W.5) was instructed by his superiors to visit the scene. On his way to the scene P.W.5 met members of the public with the deceased and the accused. P.W.5 placed them on the police motor vehicle and transported the deceased who had serious injuries to Thika District Hospital where he was admitted while the accused was taken to

Kandara Dispensary where he was treated and discharged. P.W.5 took the accused and placed him in custody at Kandara Police Station and was later taken to court to face a charge of assault. The case was later withdrawn and substituted with that of murder when the deceased passed on. **Dr. Anthony Murage** (P.W.6) produced on behalf of Dr. Phylis who was not available to testify the treatment notes and discharge summary of the deceased dated 3rd February, 2009. Those medical records shows the deceased was discharged from Thika District Hospital on 15th January, 2009. It shows the patient had multiple cuts which were both soft tissue injuries and fractures. The patient (deceased) unfortunately passed away on 26th January, 2009 just 11 days after he was discharged. P.W.6 pointed out that there was some alteration and cancellation of the words “unknown assailant” from the discharge summary. **Dr. Peter Muriuki Ndegwa** (P.W.7) the pathologist who performed a postmortem on the deceased's body, produced the autopsy report in which he formed the opinion that the cause of death was complication of cut wounds. According to P.W.7, there was need to investigate further other causes.

When placed on his defence, the accused gave sworn statement testimony without summoning independent witnesses. He denied committing the offence. He said he did not know the deceased. He claimed that on 24/12/2008 members of the public visited his businesses premises alleging some stolen goods had been taken to his kiosk at Kandara. He said he did not meet P.W.1 and P.W.2 on that date. Those people whom he did not know arrested him.

At the close of evidence learned counsels were invited to make final submissions. Mr. Gori learned advocate for the accused and Miss. Ngalyuka learned Senior State Counsel each relied on their submissions they made at the no-case to answer stage. In order for the offence of murder to be proved, two ingredients must be established. **First**, the element of *actus resu* and **Secondly**, *meus rea*.

In the first place, there is no doubt that the deceased died. The question which must be answered is whether he died as a result of the acts or omission of the accused. According to the evidence of P.W.7, the deceased died as a result of complications of cut wounds. The postmortem report shows that the deceased suffered septic wounds bilateral ankle joints and was even dehydrated. The medical report and the discharge summary by Dr. Phylis shows that the deceased had multiple cuts on his body at the time of admission. He bled from the left ankle joint. P.W.1 said he witnessed the accused cut the deceased on the head and leg using a panga. P.W.1 was 10 metres away from the accused. The accused confirmed he knew P.W.1 though he denied having seen him on the fateful day. It is the evidence of P.W.3 that the accused was in the homestead where the deceased was assaulted and critically injured. P.W.3 managed to sweet talk the accused who thereafter calmed thus enabling members of the public to arrest and tied the accused's hands. P.W.4 confirmed having visited the scene of crime. He saw P.W.3 and the accused talk. P.W.4 said the accused went into the house and came out with a bow and arrows when he attempted to interrogate him. Members of the public fled for their dear lives when the accused threatened to shoot. The accused has denied having seen P.W.1 and P.W.3 on the fateful day. I do not believe him. I am convinced P.W.1, P.W.3 and P.W.4 told the truth. They had no reason to tell lies against the accused. The evidence of P.W.1, P.W.3 and P.W.4 placed the accused person at the scene of crime. I believe P.W.1 told the truth when he said he saw the accused cut the deceased using a panga. I do not comprehend why the police did not investigate the whereabouts of the murder weapon, the panga. I am satisfied the evidence and the postmortem report produced by P.W.6 and P.W.7 corroborated the evidence of P.W.1 that the deceased was cut using a panga which is a sharp object. In the end, I am satisfied the wrongful act of killing i.e **actus reus** was established by credible evidence.

The other question is whether **mens rea** was established! In other words, whether malice aforethought was proved. There is no direct evidence showing that the accused had quarrelled with the deceased prior to the fateful day. However, the law envisaged such a situation to arise in certain cases. Under **Section 206** of the **Penal Code**, the law gave instances when malice aforethought can be inferred. One of the instances is where there is intention to cause death or to do grievous harm to any person. I have examined the discharge summary prepared by Dr. Phylis and produced by P.W.6 and it is apparent that the deceased suffered multiple cuts to the body which can be categorized as grievous. In the circumstances, whoever inflicted the injuries can be inferred to have intended to cause death or to do grievous harm to the deceased. I have already stated that there is credible evidence placing the accused at the scene of crime and actually proving that he personally inflicted the injuries the deceased suffered. I

find the accused to possess the requisite malice aforethought. I find the offence of murder as having been proved. I hereby find the accused guilty hence he is convicted for murder. The prosecution to provide the accused past criminal record as the accused and his learned counsel makes submission in mitigation before pronouncing the sentence.

**Dated, Signed and delivered in open court this 20th day of February,2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

Mr. Ombongi for Accused

Mr. Cheboi for Director of Public Prosecution