



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 66 OF 2008

REPUBLIC

VERSUS

JOSEPH MUSYOKA KITHEKA ACCUSED

J U D G M E N T

1. The Accused, **Joseph Musyoka Kitheka**, is charged with the offence of murder contrary to **section 203 and 204** of the **Penal Code**.

The particulars of the charge were that on the 5th day of July 2008 at about 2.00 p.m. at **Thua Location, Ngungi Sub-location, Nguuni village**, in **Kitui District** of the **Eastern Province** murdered **James Kitheka**.

2. The prosecution called six witnesses in support of their case. The prosecution case is that on the material day at about 2.00 p.m. PW1 **Peter Muthoka** was at home when he heard some screams. He rushed to the scene where he found his uncles the accused and the deceased at a footpath. PW1 found a badly injured deceased lying on the ground with the accused standing there with a stick in his hands. PW2 **Eunice Maria Kitheka** who had also heard the screams arrived at the scene. PW2 who is a sister to both the accused and to the deceased started screaming. The screams attracted other people to the scene. The sister (PW2) assisted in having the deceased taken to the hospital. The deceased however passed away during treatment. The sister (PW2) took the stick from the scene but later handed it over to the police officers who visited the scene.
3. According to the sister, the scene was at a footpath that passed between the two parcels of land occupied by the accused and the deceased but a land dispute had arisen between them and the deceased had fenced off the footpath as part of his land. Following the death of the deceased the area chief, PW5 **Gitongu Mulandi** who had earlier received a report of the incident from the accused and from other people from the scene had the accused arrested and handed over to the police. A postmortem was carried out on the body of the deceased by PW3 **Dr. Leonard Kioko** following the identification of the body of the deceased to the doctor by the uncle to the deceased, PW4 **Cosmus Muoki**. The accused was subsequently charged with the offence herein.
4. In his defence, the accused gave sworn evidence. No witnesses were called. The accused stated that he was at a clan meeting on the material day from 7.00 a.m. to 5.30 p.m. That after the meeting the accused went home then went to bed. However the following day at about 5.00 a.m. he was arrested and taken to **Kitui Police Station**. It was then that he learnt about the injuries caused to the deceased. That he (accused) explained to the police that he had been at a clan meeting the previous day. The accused denied any involvement in the death of the deceased and stated that the case as a frame up.
5. Both the prosecution and the defence filed their final submissions after the close of the defence case. I have duly considered the said submissions.

6. The evidence of PW1 and PW2 places the accused at the scene of murder. It was the evidence of PW1 that he found the deceased lying on the ground having been badly injured with broken teeth, swollen eye and chest injuries and that the accused who had a stick was standing at the scene. During cross-examination and re-examination, PW1 explained that while running to the scene, he had seen the accused hit the deceased repeatedly with a stick, then the accused ran away after he asked him what was going on.
7. The sister (PW2) gave evidence that substantially corroborates that of PW1. The evidence of the sister is that she rushed to the scene where she found PW1. That the deceased was lying on the ground and the accused was nearby and that she spoke to the accused but he did not respond. The sister also saw the injuries on the deceased then started screaming.
8. The evidence of PW1 and PW2 is that of close relatives who knew the accused and the deceased. The time was in broad daylight. There is therefore no possibility of any mistaken identify. I have found no material contradictions in the evidence of PW1 and PW2. Their evidence clearly establishes that the accused was at the scene and was armed with a stick and the badly injured deceased was down on the ground. PW1 and PW2 arrived at the scene separately and what they witnessed is therefore at different stages of the incident.
9. The evidence of the doctor further corroborates the evidence of PW1 and PW2 on the cause of death. The doctor's opinion is that the cause of death was asphyxia due to severe head and brain injury probably caused by a blunt injury.
10. The evidence of the area chief (PW5) further corroborates the evidence of PW1 and PW2. It was the chief's evidence that the accused had made a report to him on the material day at about 2.30 p.m. that he had been attacked by his brother the deceased with a *panga*. The chief's evidence is that he saw a swelling on the accused's forehead and he directed him to the police station only for the chief to later receive a report that the accused had injured the deceased who was lying unconscious at the **Kitui District Hospital**. The deceased thereafter passed on. The report by the accused to the chief though not amounting to a confession thus places the accused at the crime scene.
11. The evidence of the Investigating Officer (PW2) also confirms that the matter was investigated and the scene visited and the *rungu* like stick that was used to inflict the injuries collected from the scene. The stick was produced in court as an exhibit. The evidence of the Investigating Officer agrees with that of PW2 (the sister) whose evidence is that she collected the stick from the scene and handed it over to the police who came to the scene. The evidence of the investigations carried by the police also confirmed that the deceased and the accused had a boundary dispute. The Investigating Officer also confirmed that when the accused was arrested he saw a bruise on the accused's forehead.
12. The alibi defence by the accused that he was at a clan meeting on the material day is not convincing. I say so because of the strong prosecution evidence from PW1 and PW2 which places the accused at the scene. The evidence of the chief (PW5) and the Investigating Officer (PW6) also places the accused at the scene. Although the accused in his evidence stated that he had a grudge with PW1 (the eye witness), no issues of the existence of any grudge have been raised regarding PW2 (the sister), the chief (PW5) and the Investigating Officer (PW6). The issue of the existence of any grudge did not arise during PW1's testimony. Although during the cross-examination of PW1 the issue of the discussions relating to the case and testifying in court to ensure a conviction was achieved arose, I do not think death can occur in the village and people who live next door to each other fail to discuss the same. Such discussions cannot be termed as a plot to fix the accused. From the evidence of PW1 and PW2 and the rest of the evidence in its entirety, I am satisfied that PW1 and PW2 and the rest of the prosecution witnesses were credible witnesses with no grand plan to frame up the accused.
13. Having analyzed the evidence from both the prosecution side and from the defence, I am satisfied that the accused inflicted the injuries on the deceased that lead to the death of the deceased. Was there malice aforethought? **Section 206** of the **Penal Code** provides as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. **An intention to cause to death of or to do grievous harm to any person, whether that person**

- is the person actually killed or not;
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - c. An intent to commit a felony;
 - d. An intention by the act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony.”

14. I agree with the submissions by the prosecution that the injuries inflicted on the deceased person clearly demonstrate an intention to kill or to cause grievous harm.

15. With the foregoing, I find the accused guilty of the offence of murder contrary to **section 203** and **204** of the **Penal Code** and convict him accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of May 2014.

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JUDGE