



REPUBLIC OF KENYA

High Court at Embu

Murder Case 1 of 2008

REPUBLIC..... PROSECUTOR

VERSUS

ELIUD NJERU MUGO..... ACCUSED

J U D G M E N T

MUTHAMA NDETI MWANGILI hereinafter referred to as the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code.

The particulars in the information are that the accused on 5/3/2007 at Gituanyaga village, Makima location within Mbeere District of the Eastern Province murdered **RAPHAEL NDILIVU MBUNGUYU**.

The Prosecution called a total of ten (10) witnesses. The Prosecution case is that the accused stabbed the deceased with poisoned arrows after a disagreement with P.W.2 over cattle grazing. The deceased was P.W.2's father.

P.W.1 had been employed by the community to take care of a communal dam. On 5/3/2007 he was at the dam. While there he saw the deceased pass by. The accused then came and asked the deceased why he had driven his cows into his shamba. The deceased denied the allegation. The accused ran to his home and returned carrying a bow and arrows with which he started shooting at the deceased. P.W.1 then left the scene. There were people fetching water but they all ran away when they saw what was happening. He returned to find the accused had run away while the deceased had 3 arrows lodged in his body. This witness had seen the deceased's cattle grazing in the accused's shamba. He had also heard the accused telling the deceased to take away the cattle. He denied that the deceased had a panga. These cattle were being herded by the deceased's son who is P.W.2.

In his evidence P.W.2 stated that on 5/3/2007 at 12.15pm he took their cattle to the dam for water. He found the deceased and others at the dam. After watering the cows the deceased told him not to take the cows home as there were no people there. He then took the cows to the shamba of NZIVO NDETI his friend. While there the accused approached him to inquire who had allowed him to graze there. The accused told him to remove the cattle but he refused. Accused went away and returned. He again told him to remove the cattle but P.W.1 refused. The accused went to his home and returned with a bow and arrows. On seeing the arrows he went to Nzivo Ndeti's home. Thereafter he went to a nearby market where he met one John Nduvi who asked him to go and see where his father was being killed. He ran and found the deceased on the ground with arrows in his body. The deceased asked him to remove the

arrows. He managed to remove two but one had deeply penetrated and he was unable to remove it.

The deceased told him it was the accused who had killed him. He was then taken to hospital but died on the way. This witness found his father already shot. P.W.3 heard screams from the market and the dam. He met children who told him that the accused had shot the deceased. He never mentioned the names of these children and neither did any of the children testify. P.W.3 stated that there were many people at the site though he could only recall Thomas Kilu. P.W.4 was one of those who identified the deceased's body for post mortem.

P.W.5 an officer of police received the murder report, and the name of the suspect. He stated that in January 2008 the accused started sending emissaries to him with a view of meeting the deceased's relatives for reconciliation. He then lured the accused to the nearest police station for reconciliation. He later learnt that the accused had surrendered himself to Masinga police post. This was on 5/2/2008. Arrows recovered were produced by P.W.7 as Exhibit 1a-c. This officer had visited the accused's home once and did not find him. Dr. Thuo (P.W.8) confirmed the accused to be mentally fit to plead. (EXB 4).

Dr. Gatheru Anthony found the cause of death to be cardio respiratory arrest due to left sided massive haemothorax due to arrow injury with systematic poisoning.

In his sworn statement of defence the accused denied the charges. He explained that he buys and sells goats/sheep. And that most of the time he travels. He produced receipts (DEXB1, 2, 3, 5a-c) confirming his journeys plus DEXB 8, 9, 11 and 12 showing permits for the purchases he made. He also produced copies of letters from the chief calling him for meetings (DEXB 4, 6 and 7). He stated that he continued doing his work and his only witness was his wife who had since died. He produced a burial permit and copy of identity card of his late wife (DEXB 10a and b).

In cross-examination he denied having collided with the deceased. He also denied having hidden himself. He also denied recording any statement with the police.

Mr. Ithiga for the accused filed written submissions. He stated that the defence raised by the accused was not challenged. Further no malice aforethought was proved same to the *actus reus*. He relied on the case of **ANTHONY KAHURA NDUNGU -vs- REPUBLIC NAKURU COURT OF APPEAL CRIMINAL CASE NO.87/2007**.

Finally he submitted that the prosecution case was not proved to the required standard. The learned State Counsel filed written submissions which I will not consider as the accused person did not call any witness besides himself to testify. This is in line with the Provisions of section 161 Criminal Penal Code, which states that the Prosecution has no right of reply where the defence has called no witness.

This is now the case before Court for determination. The accused is charged with the offence of Murder contrary to section 203 of the Penal Code.

The fact of death is not disputed. P.W.4 Identified the body to the doctor for Post Mortem. P.W.6 of scenes of crime took and produced photographs of the body of the deceased. The Doctor (PW 10) found the cause of death to be cardio respiratory arrest due to left sided massive haemothorax due to arrow injury and possibly systematic poisoning.

It is therefore clear that the deceased did not die from a natural cause.

The first issue for this Court to determine is whether it is the accused person who killed the deceased.

P.W.1 was at the dam as a caretaker on 5/3/2007 when the deceased (Chairman) came there. It was broad daylight. The accused then came and addressed the deceased about cows in his shamba. The deceased denied knowledge. However P.W.2 a son of the deceased admitted that their cows were at the dam and he took them to graze in the shamba of **NZIVO NDETI**. He admits that indeed it was the deceased who asked

him not to take the cows home as there was no one at home. He also admits that during this time the accused came to him twice asking him to remove the cows from the shamba but P.W.2 **refused**. P.W.1 states that after the deceased denied knowledge of the presence of the cows in his shamba the accused ran to his home which was not far from the dam and appeared with a bow and arrows. The accused started shooting the deceased with the arrows and those nearby took off including P.W.1. P.W.2 took off before the shooting started. They returned to find the deceased on the ground with 3 arrows in his body. And the accused was nowhere to be seen. Besides these two witnesses there is no other eye-witness. P.W.2 is categorical that he ran away and went to a nearby market when he saw the accused come with a bow and arrows. And indeed it has been established that the deceased had been shot at with arrows. The doctor (PW 10) confirmed that he found an arrow head (12cm) hooked in one of the 3 deep cuts. There was another arrow head in the deceased's head. It is true there were other people at the scene who took off together with P.W.1. They did not record statements and were hence not called to testify.

P.W.1 and P.W.2 state that the accused was at the scene and he had a bow and arrows. There had been an issue about the deceased's cows. P.W.1 stated that he witnessed the actual shooting of the arrows by the accused. The accused in his defence has denied being at the scene. He stated that on the day in issue he was at Masinga market selling goats which he had bought on 2/3/2007 at Kiritiri. He had left his home on 4/3/2007 on foot and slept at Masinga. After selling the goats/sheep he was called to Mwala over a land case and he stayed in Mwala for seven days. He has therefore denied being at the scene or near the scene on 5/3/2007. He has produced some permits which allowed him to transport goats. The relevant one for now is DEXB1 which was issued on 2/3/2007. This allowed him to transport 30 goats from Makima (Mbeere) to Matuu (Yatta).

The other documents confirm the approval to transport and the said goats on other occasions besides the date in issue. He states that he was in Masinga from 4th March 2007 and when he finished he went to Mwala. The issue arising from this is the credibility of the evidence of P.W.1 and P.W.2.

In cross-examination the accused admitted knowing the deceased as they were both members of the community water project and the deceased was its chairman. He further said P.W.1's mother comes from the deceased's family.

And this being the case its clear the accused and witnesses knew each other well. This incident took place in broad day light and the evidence of the two witnesses is that the accused was at the scene. He was furious about the deceased's cows presence on his shamba. Why would the two witnesses lie against the accused? The accused in cross-examination by the Prosecution stated that these witnesses were jealous of his business. He did not substantiate this and there is no evidence on record showing any wrangles between the families or jealousy and/or grudges.

The evidence of P.W.5 would only have been of value to this Court if he availed the names and evidence of the emissaries sent to him by the accused. His evidence was therefore hearsay.

The accused was arrested on 28/2/2008 in Masinga. He says he was arrested by Cpl Mogaka who was living with the deceased's daughter. The reason for his arrest he says was transporting cattle at night. There is evidence that this Murder report had been made at Kiritiri Police Station to P.W.5 who was given the name of the suspect the same day. And he had not been arrested upto 28/2/2008. He was therefore a wanted man. The accused himself has explained his movements by virtue of the nature of the business he is involved in. Therefore his not being at home when looked for at his home could be looked at from that angle also. The delay by the police to arrest him would not in the circumstances be used as an excuse to set him free. The evidence must be analysed. In as much as he had a permit issued on 2/3/2007 for transporting goats to Matuu there is no evidence showing that he was in Matuu selling goats on 5/3/2007. Secondly there is no evidence that he was in Mwala solving a land case on 5/3/2007.

I have keenly looked at the receipts produced herein as DEXB 5a-b & c. Receipt D EXB 5a shows that accused travelled from Masinga to Matuu on 5/3/2007. It is receipt No. **33736**. There is an over writing on the date with 2 different inks. The amount of fare is in different ink and so is the destination. D. EXB 5b is a receipt dated 5/3/2007. The date is clearly overwritten. It shows the passenger travelled from Matuu to

Mwala. The same has been written by three different inks. It is receipt No.20044. If its true he travelled from Masinga – Matuu – Mwala, then receipt No.20044 ought to have been issued earlier than No.33736. Even EXB 5c exhibits the same features explained above. My finding is that the receipts are not genuine. They were tailor made to suit the accused's defence. If indeed the accused was selling goats at the Matuu market on 5/3/2007 the market record would confirm that. The seller is usually supplied with a receipt which shows the buyer and seller. The market is left with a copy of the receipt. In this case though there are copies of permits to transport the goats there is no evidence of the sale of these goats.

And after doing the above analysis I do find that indeed the accused was at the communal dam at Gatuanayaga village Mbeere on 5/3/2007. And that he had a confrontation with the deceased whom he shot at with arrows. I find the evidence of P.W.1 and P.W.2 to be credible. The Doctor (P.W.10) confirmed that these arrows had systematic poisoning. And the arrow injury led to the deceased's death. I therefore find the *actus reus* to have been proved. And the evidence further confirms that it is the accused who did it.

The next issue to determine is the *mens rea*. Has malice aforethought been established? Malice aforethought has been defined under section 206 of Penal Code to mean;

a) An intention to cause the 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 has committed or attempted to commit a felony.

The circumstances of this case do not show that this killing was pre-meditated. The accused came to the scene to find the deceased's cattle grazing in his shamba. He asked P.W.2 twice to remove them and he refused. He then approached the deceased and asked him about it and the deceased denied any knowledge of their presence on his shamba. It's then that he went to his home just a few metres from the water point and emerged with a bow and arrows which he unleashed on the deceased. There is no evidence that the deceased was armed. The accused was obviously angered by the casual manner the deceased and his son (P.W.2) treated him as he complained about their cattle grazing on his shamba. Their actions and attitude amounted to provocation in the circumstances. P.W.1 who is like a son to the accused defied his requests *twice* to remove the cattle. P.W.2 knew well the shamba he was grazing his cattle in did not belong to his father (deceased). His insistence that the shamba belonged to one Ndeti Nzivo was not true. This is because P.W.2 confirmed he had seen the deceased's cattle grazing on the accused's shamba.

Secondly the deceased himself had asked his son (P.W.2) not to take the cattle home after being watered as there was no one at home. He therefore knew that the cattle were around and could have been in someone else's shamba. He need not have dismissed the accused before confirming where his cattle were.

The term Reasonable/Adequate Provocation is defined by Black/s Law Dictionary at page 1262 as;

“Something that would cause a reasonable person to act without self control and lose premeditated state of mind”.

And this definition is in line with the definition in section 208(1) of the Penal Code which provides;

The term “provocation” means and includes, except Provocation defined as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom

he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

And where provocation has been proved as the case here the provoked person can only be guilty of manslaughter.

Section 207 provides that;

When a person who unlawfully kills another under Killing on circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

Having so found I will under the Provisions of section 179(2) Criminal Procedure Code reduce the charge of Murder to Manslaughter contrary to section 202 as read with section 205 of the Penal Code.

I proceed to convict the accused of the said offence of manslaughter under section 322 (2) Criminal Procedure Code.

DATED AND DELIVERED AT EMBU THIS 14TH DAY OF MARCH 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Ms Macharia for State

Mr. Ithiga for accused

Njue – C/c

Accused