



**REPUBLIC OF KENYA**

**High Court at Embu**

**Murder Case 21 of 2010**

REPUBLIC.....PROSECUTION

V

JOSEPH CHOMBA NDINGA ALIAS

JOSEPHKUTHUA.....ACCUSED

**J U D G M E N T**

JOSEPH CHOMBA NDINGA ALIAS JOSEPH KUTHUA hereinafter referred to as the accused is charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars as stated in the information were as follows:-

***On the 1st day of July 2010 at Kanyei Village in Kirinyaga Central District within Central Province murdered SAMMY NDINUA KUTHUA.***

The prosecution case is premised on the evidence of nine (9) witnesses. It was the evidence of PW1 that on 1/7/2010 5 p.m. she had gone to the deceased's home to buy nappier grass. She used to buy cattle feeds from him. She was shown where to cut the nappier grass and she embarked on cutting it. Out of nowhere she saw the accused emerge. He asked the deceased (his father) "how long will you continue to disturb me?" She then heard the deceased ask the accused why he had stabbed him with a knife. She asked the accused what was wrong. He never answered. She stopped what she was doing and looked at them. The deceased fell down. She rushed to the scene and found him bleeding from the left side of the upper stomach/chest. She screamed and people came. Others were called by those who were present.

The accused had already run away. By the time a motor vehicle came the deceased had already died. The police were called and they came. PW1 was the only one in the homestead and witnessed the incident. PW2 who is the accused's brother explained that on this day he was home with the deceased

after 3 p.m. The deceased reported to him that the accused had broken into his house and taken his beans and PW2's radio. PW2 went to the accused and asked him to return his radio. He removed it from the thickets and gave it to him. He then removed a panga from the same spot. He tried to stab Richard but PW2 blocked him. The accused ran across the road into the maize plantation. PW2 and Richard went to the shops and headed back home to contain the accused who appeared very angry. As they approached home they found PW1 screaming. That is when she told PW2 that the accused had killed the deceased. He looked for accused without any trace.

PW5 came to the murder scene but did not recover the murder weapon. The accused had disappeared. He circulated his name and description to the nearby districts. He was arrested 9 days later in Kagumo area of Muranga. Dr. Stephen Wang'ombe Nderitu (PW6) confirmed the cause of death to be a deep cut wound on the chest with lobe involved. He had found him to have a stab wound penetrating into the chest wall 4 cm in length. PW8 and PW9 re-arrested the accused from members of the public. They took him to Kangima police station. Dr. Thuo (PW7) examined the accused for mental assessment. He found him fit to stand trial.

In his sworn defence the accused stated that he left Ndia – Kiamuthambe on 5/3/2009 for Kanyenyaine village in Mathira of Muranga to look for a job. He got a job. After a while he was notified of his father's death. The area assistant chief asked him to pass through his office. He was arrested when he passed there and later taken to Kangima police station. He denied the charge. He denied having been told by the assistant chief that he was a suspect of his father's death. He said it was his brother Fredrick Fundi who informed him of his father's death.

This is the case before court for determination. Section 203 of the Penal Code defines murder as

***“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

The fact of death is not in dispute. PW1 – PW6 have all confirmed that indeed the deceased lost his life. PW6 Dr. Nderitu established the cause of death as a penetrating cut wound into the chest. This cannot be a natural cause. I therefore find that the fact and cause of death have been established.

The next issue to determine is whether the accused is the person who committed this act of killing. PW2 in his evidence had stated that they had been home with the deceased who told him the accused had broken into his house and taken his beans and PW2's radio. Indeed PW2 traced him and got his radio back. PW2 further stated that the accused removed a panga from the same spot where the radio had been. He even wanted to stab his brother Richard but PW2 blocked him. The accused then ran across the road into the maize plantation. According to PW2 the accused appeared very angry.

PW1 was at the home of the deceased cutting nappier grass as the old man was mending his shoe. PW1 used to buy animal feeds from him so she was not a stranger there. She just saw the accused at the scene. The accused then asked the deceased for how long he was going to disturb him. The next thing

PW1 heard was the deceased asking the accused why he had stabbed him with a knife. The accused said nothing. That is when PW1 looked up and rushed to the scene. The deceased had fallen and he was bleeding from the left side of the upper stomach/chest. PW2 who had decided to rush back home because of the anger he had seen displayed in the accused found his dad dead. PW1 was there screaming.

PW2 had seen his brother (accused) rush across the road. He had removed a panga from the thicket. Infact PW2 feared that the accused would go to damage the iron sheets as he appeared very angry. He rushed back home thinking he would salvage the situation. PW1 did not even know from where the accused had appeared when he came to the father. There was no one else present in the homestead besides PW1, deceased and accused. The time of incident was 5 p.m. When PW1 screamed and people came he told them it was the accused who had killed the father.

In his defence the accused has denied the charge. He says he had left home on 5/3/2009 and was working in Muranga upto the time of his arrest. And that he had been notified of his father's death by PW2. In cross examination by the defence counsel this is what PW2 said;

***“I did not see Joseph thereafter. He only appeared to cause trouble at the funeral but he disappeared again”.***

It is therefore true that the accused disappeared after this incident. The police officer who sent out signals (PW4) confirmed that. PW2 also confirmed it. Had he been the one who informed him of the deceased's death it would have come out in cross examination. It did not. The defence did not even have much to ask the eye witness (PW1). The evidence of PW1 finds corroboration in PW2's evidence. The accused was angry with the deceased. When PW2 pursued him and questioned him about the radio he must have known that it was the deceased who had given this information. And the deceased had known it was him who had broken into his house and stolen his beans and his brother's radio.

The evidence of PW2 on what happened across the road and the evidence of PW1 on what occurred at the homestead of the deceased is water tight. It has not been displaced. This evidence clearly places the accused at the locus quo. The accused was arrested by members of the public who learnt of what he had done and handed him over to the police.

I am convinced beyond doubt it is the accused who killed the deceased. From the above analysis this court has established the following:-

***1. The death of the deceased***

***2. The person who caused this death was the accused.***

For such killing to be termed as murder there must be malice aforethought present. So what is malice aforethought? Was this killing per-meditated? Section 206 of the Penal Code defines malice aforethought 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 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 intention to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody by any person who has committed or attempted to commit a felony.***

The evidence before the court is that the deceased was at home mending his shoes. The accused came and attacked him. The accused was armed while the deceased was not. He stabbed him in the chest. The deceased died before he could even be taken to hospital. The accused came armed and it must have been for a purpose. His intention was not just to wound but to kill. He stabbed the old man in the chest. There was no way he could have survived.

I therefore find that malice aforethought as defined in Section 206 (a) and (b) of the Penal Code has been established. I am therefore satisfied that the Prosecution has proved its case beyond reasonable doubt.

I find the accused guilty of the offence of murder and proceed to convict him accordingly under Section 322 of the Criminal Procedure Code.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF MAY 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**Mr. Githinji Ken for accused**

**Accused**

**Njue CC**