



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE 8 OF 2008

REPUBLIC.....PROSECUTION

VERSUS

ROBERT MUGENDI MUTURI.....ACCUSED

J U D G M E N T

ROBERT MUGENDI MUTURI hereinafter referred to as the accused is charged with the offence of Murder Contrary to Section 203 as read with section 204 of the Penal Code. The particulars as per the information by the Attorney General were as follows:-

ROBERT MUGENDI MUTURI: *On the 13th day of September, 2008 at 7.15 p.m. at Gutumbi Village, Kangungi Sub-location, Kyeni North East location in Embu District within Eastern Province murdered one JOSEPH GITONGA MUTHANJE.*

The prosecution case is that on 13/9/2008 about 4.30 p.m. the deceased went to the home of one Muturi who is the accused's father. He found the accused and his father (PW2) seated outside. A quarrel ensued between accused and deceased. And the accused cut the deceased with a panga on the head. The deceased ran to his house and returned with a metal pipe swearing to kill the accused. He however found the accused locked up in the house and he went back home. He left later in the evening to buy medicine. Shortly thereafter his wife (PW1) saw him running back and was followed by PW2 and PW7 who were running. PW7 was armed. PW2 pulled out the deceased and held his hand at the back. Accused kicked PW7 and then started crying and dropped his jacket on the floor. He had a knife. The deceased kicked him and that is when the accused stabbed the deceased near the ear. The deceased started vomiting blood and thereafter died. The accused and PW2 went to the police station to report. The Doctor (PW8) who did the post mortem found the cause of death to have been Asphyxia due to the transection trachea and damage to the blood vessels (PEXB2). The injuries were caused by a sharp object probably a knife.

The accused in his unsworn statement of defence denied the charge. He said on 13/9/2008 he was with his father at home at about 5 p.m. when Judy (PW3) came. Thereafter the deceased WHO came while drunk and had an injury jumped on him. PW2 and PW3 separated them. The deceased went away and returned with a metal bar, so the accused ran away. Later he went to buy credit for his phone. On his way back he met the deceased who drew a knife to stab him. They struggled as he tried to get the knife from him. The deceased fell down and was stabbed by the knife. People came and they told him to leave the scene. The next day he went with PW2 to the police station to report and he was arrested.

In his submissions Mr. Momanyi stated that there was no proof of malice aforethought. Secondly there is no witness who saw the accused kill the deceased. There was a contradiction between the evidence of PW1 and PW2. And Njiru (PW7) could be the culprit.

The post mortem by PW8 confirms that the deceased had a penetrating deep cut on the neck. The trachea had been completely cut into 2 – (cut blood vessels and nerves that serve the head and the brain). PW1 indicated clearly that she saw the accused stab the deceased near the ear. The ear and neck are not far from each other.

It is not disputed that there had been an encounter between the deceased and accused on 13/9/2008 at about 5 p.m. This is confirmed by PW1, PW2 and PW3. PW5 had seen the deceased running and he showed her an injury on the head and said it was caused by the accused. PW2 is the father of PW7 and the accused. PW1 who is the wife of the deceased saw them (PW2 and PW7) come running after the deceased. She has explained that it is the accused who stabbed the deceased. She never said it was PW2 or PW7 who did so. She said there was moonlight and she was able to see what was happening.

Mr. Momanyi's submissions that the deceased may have been killed by PW7 is neither here nor there. He never put this to PW7 during cross examination. PW2 being the father would really wish to protect his sons (Accused and PW7). He denies having been at the scene that night. The accused person in his own defence admits that on 13/9/2008 5 p.m. the deceased had come to their home while drunk. He attacked him and they were separated by PW2 and PW3. The deceased was escorted away and he returned with a metal bar. The accused ran away. Later the accused went to buy credit for his phone when he met the deceased who drew a knife to stab him. They struggled and the deceased injured himself. And that people came and told him to go away. This cannot be true because people could not come and ask him to leave when somebody was lying there dead ! However, his evidence confirms there was an encounter between him and the deceased that night. The next day PW2 and the accused took themselves to the police station to plead their innocence over the death of the deceased. This is what they told PW10 and I find it to be very strange.

The deceased was killed at his house as that is where his body was found bleeding by those who responded to the screams of PW1. By then the accused was on the road screaming. When one keenly follows the evidence of PW2 he says when he came from making his first report of the fight to PW4 he found a lot of commotion at home and he returned with PW4 and they came to the scene. They found the deceased bleeding from near his left ear and he was already dead. He was not keen to explain what the commotion was all about. He did this to shield his sons.

When all these pieces of evidence are put together with the evidence of PW1 the conclusion is that the day time fracas between the deceased and accused had not ended by the time the deceased was escorted to the gate by PW2. Secondly the deceased was killed at his home meaning he was attacked at home as is confirmed by PW1. He was not stabbed by falling on a knife on the road as alleged by the accused. Indeed it is the accused who stabbed him. This was as a result of what had happened during the day. The accused had no reason to attack the deceased. Even when the deceased had fought with him during the day the deceased was not armed. But the accused was armed and even cut him on the head. The accused had no injury on him. This confirms that the deceased never injured him.

Was this a pre-meditated killing? 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 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.

In spite of what had happened during the day no evidence has actually been laid by the Prosecution to prove that the killing was intentional so as to establish malice aforethought. There is evidence by PW1 that when this happened the accused was seen crying. Secondly he only stabbed the deceased once. The deceased and accused had been good friends from the evidence on record.

When all these facts are put together I come to the conclusion that it is the accused who killed the deceased person. Hence the *actus reus* has been proved. However, the *mens rea* has not been established. There was no justification for the killing. It was unlawful.

I therefore under the provisions of Section 179(1) and (2) of the Criminal Procedure Code reduce the charge of Murder to Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict the accused of the same.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JUNE 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Macharia for State

Mr. Momanyi for the accused

Njue CC

Accused present

COURT

I do note that the accused first appeared in Court on 25/9/2008. He has been in custody for close to 4 years.

However, a life was lost because of his acts. The sentence for Manslaughter is Life Imprisonment. I however consider the period he has been in custody and his age. He will serve 3 years imprisonment.

Rights of Appeal explained.

H.I. ONG'UDI

JUDGE

26/6/2012