



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Case 31 of 2008

REPUBLIC PROSECUTION

=VERSUS=

DECEMBER MUDAMU MTIGHO ACCUSED

JUDGEMENT

The accused herein **DECEMBER MUDAMU MTIGHO** faces a charge of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. The particulars of the offence are that:

“On the 1st day of December 2008 at Kaya Kombolio Village, Kishamba Location in Taita-Taveta District within Coast Province, murdered MWAMBEO MTIGHO”

The accused was arraigned in court on 16th February 2009 when he entered a plea of **‘Not Guilty’** to the charge. His trial commenced before the High Court in Mombasa on 16th December 2009. The prosecution led by **MR. MONDA** learned State Counsel called a total of nine (9) witnesses in support of their case. **MR. MUSHELLE** Advocate appeared for the accused.

The brief facts of the case were as follows. The deceased was the biological father to the accused. On 1st December 2008 the accused returned home having just been released from Wundanyi Prison. When accused arrived home he found his two younger brothers **CHRISTOPHER MTIGHO PW1** and **RONALD MTIGHO PW2** in the homestead. Both **PW1** and **PW2** told the court that there existed bad blood between the accused and his father the deceased. Indeed the evidence on record which evidence was not challenged by the defence was that the jail term which the accused had just completed was imposed for having assaulted his father (the deceased). Therefore fully aware of the bad relations between the two **PW1** sent his brother **PW2** to the nearby shops to warn the deceased not to come home in view of the arrival of the accused. **PW1** in the meantime went to buy salt having been sent by the accused.

PW2 told the court that he did go and warn his father not to come home but his father insisted that he had a right to enter his own homestead. The two went home together. The deceased greeted the accused who did not respond. **PW2** then went out to play leaving the deceased and the accused alone together in the homestead. The mother of the family was also away from home at the time.

When **PW1** returned from his errand to purchase salt, he found the deceased lying dead in his kitchen with a gaping wound to the back of his head and the accused was nowhere to be seen. **PW1** raised the alarm. **JAFFER KEKE MWIKAMBA PW3** a neighbour and **OMAR ASMANI PW4** both rushed to the scene. The two witnesses confirm that they found the deceased lying dead in his kitchen with a deep wound on the back of his head. They also saw a blood-stained jembe lying near the scene. Police were called in and removed the body to the mortuary. The accused was arrested the next day brought to court and charged with the murder of his father.

At the close of the prosecution case this court did find that the accused had a case to answer and he was placed onto his defence. The accused gave an unsworn defence in which he denied any involvement at all in the murder of the deceased. It is now the duty of this court to determine whether the evidence adduced before it is sufficient to prove this charge of Murder to the standard required in law – beyond a reasonable doubt.

The offence of Murder is defined by Section 203 of the Penal Code as follows:

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

This definition gives rise to three essential ingredients that must be shown to exist in order to sustain a charge of Murder. These are –

- 1) Proof of the fact of the death of the deceased and the cause of that death.
- 2) Proof that the accused caused the death of the deceased by way of some unlawful act or omission – this constitutes the **‘actus reus’** of the offence and lastly
- 3) Proof that said unlawful act or omission was committed with malice aforethought – this constitutes the **‘mens rea’** of the offence.

On the first ingredient that is the fact and cause of death of the deceased there can be no controversy. **PW1, PW2, PW3** and **PW4** all of whom knew the deceased person very well testify that they saw the body of the deceased lying dead in his kitchen with a gaping wound on the back of the head. This fact is also quite evident from a look at the photographs taken at the scene by **PW8 SERGEANT DAVID CHEGE** of Voi Scenes of Crime office. The said photographs were produced before this court as exhibits **Pexb3**. All the witnesses name the deceased as **‘Mwambeo Mtigho’** a fellow villager.

PW7 DR. CHARO WILSON a medical officer from Voi District Hospital conducted the autopsy examination on the body of the deceased. He confirmed having noted the following injuries on the body:

- ***“ deep penetrating wound on back of head 10 cm long with exposed skull bone***
- ***Compound fracture to back of head”***

In his expert medical opinion the cause of death was ***“cardiopulmonary arrest due to head injury”***. **PW7** filled and signed the post-mortem form which he produces as an exhibit in this case. The jembe was positively identified by **PW1, PW2, PW3** and **PW4 Pexb2**. This evidence on the fact and cause of death was not challenged at all by the defence.

The witnesses who saw the body at the scene all told the court that they noticed a bloodstained jembe lying just outside the kitchen where the body was found. **PW9 SNR. SERGEANT DUNCAN WAWERU**, the investigating officer told the court that he visited the scene and retrieved the jembe which was produced in court as an exhibit **Pexb1**. **PW9** did also produce as an exhibit a sketch plan which he drew at the scene **Pexb5**, which showed the exact position where this blood stained jembe was found. **PW9** did inform the court that he did obtain blood samples from the deceased’s body which

sample was to take to the Government chemist for testing and analysis. Unfortunately no results were able to be availed due to the fact that the lab at Wesu Hospital burnt down, in the process destroying all the samples he had collected. This was a factor totally outside the control of the investigating officer. Be that as it may in view of the fact that the death of the deceased is shown to have resulted from a head injury and in view of the fact that the recovered jembe was stained with blood it is not farfetched to conclude that this must have been the murder weapon. It is quite obvious to this court that the unlawful act which led to the death of the deceased was the blow to the back of his head using this jembe as a weapon.

The next crucial question to be determined is whether it was the accused who so unlawfully hit the deceased on the back of the head leading to his untimely death. There was no eyewitness to the murder. Neither **PW1** nor **PW2** who were at the homestead during that period saw the accused commit this unlawful act. **PW1** told the court that he had been sent to the shops by the accused to buy salt and **PW2** as young boys are wont to do had drifted off to play with his agemates. However one thing both boys declare with certainty is that the accused and the deceased were left alone in the homestead together. Nobody else was present in the homestead. **PW1** told the court that he was hardly out of the home for 15 minutes. He merely rushed to the shops and upon his return found his father dead in the kitchen. On his part **PW2** tells the court that although he did warn his father not to go back home the old man insisted that he had a right to go to his own home. **PW2** states that he and the deceased went home together and they found deceased there. **PW2** then drifted off to play leaving the deceased and the accused alone.

I am mindful of the fact that both **PW1** and **PW2** who were key witnesses were minors. However **PW1** at age 16 was able to comprehend the nature of an oath and he gave sworn evidence. I was able to observe his demeanour as he testified and in my view he was mature and truthful. Similarly **PW2** though much younger also struck me as earnest and honest. Both remained unshaken under cross-examination by defence counsel. The accused was their elder brother and neither boy had any reason to come to court to lie against the accused.

Given then that the accused and the deceased were left in the home together the circumstantial evidence would appear to point squarely at the accused. In the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 327** the Court of Appeal in discussing circumstantial evidence held that:

“In order to draw the inference of the accuseds guilt from circumstantial evidence, there must be no other co existing circumstances which would weaken or destroy the inference ...”

The facts are that the deceased was alone in the home with the accused. The deceased is found dead from a blow to the head, leading to a fractured skull and the accused has inexplicably vanished from the home. The only logical conclusion that can be drawn from this set of facts is that it was the accused who killed the deceased. In his defence the accused merely gave a blanket denial. He did not deny having been alone in the home with the deceased, nor does he give any explanation as to why he went away or where he left to. At no time did the accused claim that a third party came into the home and attacked the deceased, no alarm was raised by accused and neither did accused make a report to any authority about what had befallen his father – he merely walked away leaving the deceased dead.

The conclusion that the accused is the one who hit and killed the deceased is strengthened by evidence of his probable motive. All the witnesses testify that there existed bad blood between the deceased and the accused – this appears to have been common knowledge so much so that **PW1** and **PW2** thought it best to beseech the deceased to stay away from the home in order to avoid a fight. **PW4** a village elder told court that:

“The deceased was often beaten by the accused. At no time did I ever hear that the accused had been beaten by the deceased”

PW4 goes on to state that:

“The accused had been released from jail that very day. He had been jailed for beating his father”

This fact of having been jailed for an assault on his father has not been denied by the accused. I have no doubt that the accused probably blamed the deceased for his incarceration. He then decided to exact revenge as soon as he was released from prison. This provided clear evidence of malice aforethought on the part of the accused; which constitutes the mens rea for this particular offence.

At this point I wish to address the issue of the accused's mental state and whether it ought to have any bearing on the decision of this court. Immediately after his arrest the accused was examined by DR. C.M. Mwangombe, a consultant Psychiatrist on 9th December 2008. The psychiatrist's findings are indicated in his report of the same date which report was produced as exhibit **Pexb4** by **PW9**. The findings were that the accused denied any history of mental illness and was found fit to plead. The trial progressed without incident until the prosecution closed their case and the accused was found to have a case to answer.

On 18th December 2011 when accused was to give his defence (and a full four (4) years **after** the first psychiatric evaluation) the accused began to exhibit signs of mental disturbance. The court ordered a follow-up evaluation. By a report dated 30th January 2012 the same Dr. Mwangombe found the accused to be **'deluded'** and recommended that he put be put on treatment. Treatment was indeed commenced. A further report dated 11th April 2012 however did indicate that the accused was now fit to plead. I did interview the accused and found him to be lucid and able to answer questions. Thus on 9th May 2012 the accused proceeded to give his defence to the charge.

From the chronology of events it is clear that although at the time of his arrest the accused was of sound mind and fit to plead, four (4) years down the line he appears to have become mentally disturbed and required treatment. There was no evidence much less an allegation that the accused had any history of mental illness **prior** to his arrest. As such this court can safely conclude that at the time of this incident the accused was possessed of sufficient soundness of mind to formulate the mens rea required for this offence. As such the defence of insanity would not arise and can be ruled out.

Taken in its totality I am convinced that the circumstantial evidence available sufficiently proves the guilt of the accused. The facts as presented to this court cannot be explained in any other way. As such I find that the prosecution have proved their case beyond a reasonable doubt. I therefore convict the accused on this charge of Murder.

Dated and Delivered in Mombasa this 15th day of June 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Mushelle for Accused

Mr. Gioche holding brief for Mr. Onserio for State

MR. GIOCHE: Accused may be treated as a 1st offender.

MR. MUSHELLE IN MITIGATION: Accused is a fairly young man. He has been in custody since 2008. He still maintains his innocence. He humbly requests that court consider the sanctity of life and impose a sentence other than death.

COURT: The offence of murder is a serious crime. As a result of the accused's actions a human life was lost, his two younger brothers have been left fatherless and the family left without a bread-winner. In my view a deterrent sentence is appropriate. I hereby sentence the accused to serve forty (40) years

imprisonment. He has a right to appeal.

M. ODERO
JUDGE
15.6.2012