



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Murder Case 25 of 2011

REPUBLIC.....PROSECUTION

VERSUS

PHYLES MUENI ANTHONY.....ACCUSED

J U D G M E N T

PHYLES MUENI ANTHONY 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 are:-

On the 13th day of September 2011 at Gatwanyaga Village Makima Location of Mbeere South District within Embu County murdered STEPHEN KASALOI KIKUVI.

The prosecution case is that on the night of 13/9/2011 3 a.m. the accused who lives with two school going female children was asleep in her house when she heard a person knocking on her door. She called PW1 her neighbor on phone and he advised her to start screaming which she did. PW1 left followed by his son PW2 for the accused’s house. There was moon light and PW1 saw a person at the accused’s house and he shouted at the person wanting to know who it was. It was then that the accused came out with a panga and started cutting the person. The person ran and fell down somewhere. Meanwhile villagers had responded to the screams and wanted to lynch the person. The administration was notified in the morning and the deceased was latter taken to hospital. He died on the way. The post mortem report (EXB1) shows that the cause was cardio respiratory arrest secondary to subdural haemotoma.

The accused person made a sworn statement in her defence and called no witness. She denied the charge against her. She explained how she spent the day of 12/9/2011 until she and her children went to sleep at 9 p.m. at around 2.30 a.m. She heard a dog barking. She woke up and on checking she realized there was a male person outside who wanted to forcefully enter into her house, claiming there was a job inside her house she wanted to do.

They started screaming as they held on to the door. Villagers responded to her screams. They chased the person. She never opened the door at the time. She later opened and called the Chief and his assistant. In the morning PW3 and PW4 went to school as she remained behind seeing the damage on her wall and door. Later a motor vehicle was brought and she accompanied them to the DO’s office. She leant he had died and she reported the matter. She was arrested on 30/9/2011 when she reported to the CID office

Siakago.

Both counsels filed written submissions. Ms. Njeru while highlighting her submissions she stated that the Prosecution had not proved malice afore thought as is required under Section 203 of the Penal Code. The evidence of PW1 and PW2 was contradictory on exactly what happened. She submitted that the deceased was a victim of mob justice, and the accused was not part of this crowd that beat him.

It was the submission of the learned State Counsel that the Prosecution had proved its case. That the accused had cut the deceased severally with a panga. This is the case before the Court for determination. From the post mortem report produced herein as EXB1 there is no dispute that the deceased suffered multiple cut wounds on the head with fractures of the skull. He had cuts and fractures all over his body.

PW1 who is a neighbor says he responded to the accused's distress call. Even as he arrived the accused was still screaming and there was a person pushing the accused's door. When he asked who the person was the person turned towards him. That is when the accused opened the door and started cutting the intruder with a panga. She stooped cutting him when he screamed for her to stop. The person then ran away. By then neighbours had started appearing. They followed and found the person to have fallen.

PW2 who had followed his father (PW1) to the accused's compound had this to say at page 12-13

“This person who was cut was carrying some stick. The man jumped over the fence. People followed him beating him. They hit him with stones”.

PW1 denied seeing anybody hit the deceased person. The evidence of PLW1 and PW2 is very crucial in this case because they are the first people who responded to the accused's distress call. The time was about 3 a.m. They found the deceased pushing the accused's door. This was not the deceased's house. It is also true that the deceased had been there from the time the accused started screaming up to the time PW1 and PW2 arrived. PW8 is the father of the deceased and he said they are from Masinga. The scene of incident was in Makima Location of Mbeere South District.

Besides PW1 and saying they saw the accused cutting the deceased these two witnesses did nothing. They were not even able to say how many times they saw the accused cut the deceased person. PW4 and PW5 who are children of the accused said their mother never got out of the house during the time of the attack. The door was opened after the village elder and people came.

The two children were Prosecution witnesses and they were not declared hostile witnesses. This means what they told the court was the truth. They explained to the Court how the whole episode had started. This is confirmed by the evidence of a police officer (PW6) who visited the scene on 14/9/2011. These were his findings:

- ***A loose main door***
- ***Torn nylon paper in one window***
- ***Broken bricks protruding on the sides of the loose door.***
- ***Latch to the door had been pulled from outside with 2 loose nails.***
- ***Door had loose nails from the inside.***
- ***Marks of a rod removed from the back of the door from the inside***
- ***Blood at the place where the deceased had been removed from.***

These were clear signs that the deceased had wanted to forcefully enter into the accused's house. He was

found red handed by the PW1 and PW2 at the scene. In cross exam PW2 told the Court that the deceased had a heavy stick which he aimed at PW1 and PW2. He then turned against the accused with it.

The accused has explained that she lives alone with her two daughters. (PW4 and PW5) aged 16 years and 12 years. And on this night (3 a.m.) there was a man who was trying to forcefully enter into her house insisting that there was a job he had come to do in that house. Even after he was told to go and sleep in the kitchen he refused saying the job had to be done in the house where the accused and two DAUGHTERS were! This was not a person who was out for anything good. What was this job he wanted to do in the acused's house and which had to be done at that time? He was not a person known to the accused and her children.

Indeed there were screams and neighbours responded. The accused may have cut him but there is clear evidence from PW2 that those who came beat him and threw stones at him. He suffered multiple cuts and fractures. It is not clear who caused the injuries that killed him. Had the deceased taken off when he was first spotted by PW1 and PW2 he would not have been fatally injured. Had he been fatally wounded at the accused's house he could never have managed to run away and even jump over the fence as stated by PW1 and PW2. The time of offence being what it was it may not have been clear to see who beat the deceased and where.

After analyzing all the evidence on record including that of the accused I am not satisfied that the accused is the person who caused the injury/injuries that led to the deceased's death and that she had any malice afore thought to make her do so.

Maybe if the Police had stretched their investigation they may have netted those who beat up and threw stones at the deceased. For my part I find the Prosecution case not proved beyond reasonable doubt and hereby acquit the accused person under Section 322(1) of the Criminal Procedure Code.

DELIVERED, SIGNED AND DATED AT EMBU THIS 13TH DAY OF JUNE 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Matiru for State

Ms. Njeru for Accused

Accused present

Njue CC