



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 35 OF 2008

REPUBLIC PROSECUTION
=VERSUS=
MORRIS MULI MANDI ACCUSED

JUDGEMENT

The accused herein **MORRIS MULI MANDI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 17th day of December, 2008 at Mangwaru village of Lukove Location in Msambweni District within the Coast Province, murdered THOMAS KUMBU MANDI”

The accused was first arraigned before the High Court in Mombasa on 30th December 2008 when he entered a plea of **‘not guilty’** to the charge. His trial commenced before me on 31st March 2010. The prosecution led by **MR. MONDA** learned State Counsel called a total of seven (7) witnesses in support of their case. **MR. GICHANA** Advocate acted for the accused.

The brief facts were that the accused and the deceased **THOMAS KUMBU MANDI** were brothers. The deceased had his own homestead whilst the accused lived in the same compound as their mother **JOYCE MUMBE MANDI PW5**. On the material date of 17th December 2008 **PW5** told the court that at 2.00 p.m. she was out at her farm. She had left the deceased in her compound drinking palm wine, whilst the accused had gone out to do casual work for a certain **‘mama Monica’**. **PW5** said she suddenly heard shouting from her homestead. She ran back home where she found the deceased bleeding heavily from deep cuts on his head and hands. The accused was also there wielding a bloodstained panga. **PW5** intervened and separated the two. She took the deceased to the roadside in the hopes of getting a vehicle to take him to hospital. The deceased was first taken to a clinic in Lukore but was thereafter transferred to Msambweni District Hospital where he unfortunately died whilst undergoing treatment. The matter was reported to Shimba Hills Police Station. The accused was arrested by police and was later charged with this offence of Murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied any and all involvement in the death of his brother. It now behoves this court to determine whether the prosecution have established the charge of Murder as against the accused beyond all reasonable doubt.

The definition of the offence of Murder is found in S. 203 of the Penal Code which provides as follows:

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

Having perused the evidence on record I am satisfied that the fact as well as the cause of the deceased’s death have both been sufficiently proven. **PW5** who was the mother of the deceased told the court that her son met his death whilst undergoing treatment at Msambweni Hospital. The body was moved to the mortuary where an autopsy was conducted. **PW5** as well as the other eye witnesses to the attack on the deceased all testify that the deceased sustained severe injuries from deep cuts to his head and body. The panga believed to have been used to inflict these fatal injuries on the deceased was produced in court as an exhibit **Pexb1**.

PW7 DR. KEVIN KINYUA, the District Medical Officer at Msambweni Hospital told the court that it was he who performed the autopsy upon the body of the deceased. He confirms having seen a deep cut to the head of the deceased. **PW7** gave his medical opinion that the cause of the deceased’s death was **“severe head injury due to several cut wounds to the head”**. He filled and signed the post-mortem form which he produced as an exhibit in court **Pexb3**. This is expert medical testimony which has not been challenged nor controverted in any way. There can be no doubt that the deceased met his untimely death as a result of a vicious attack to his person by a sharp object like a panga.

The next question to be answered is whether there is sufficient evidence to prove that it was the accused who perpetrated this attack on the deceased. **PW3 ALICE KALOMBI MUTHOKA**, told the court that she is a neighbour to the deceased’s family. On the material date at about 3.00 p.m. she was preparing to go to her shamba when she heard commotion and shouts from the accused’s home. She ran to the scene. She saw the deceased leaning against a wall bleeding heavily. She saw another neighbour taking away a stick from the accused to prevent him from hitting the deceased further. **PW3** told the court that she heard the deceased ask the accused why he had cut him. The deceased then staggered to his veranda and fell down.

The evidence of **PW3** is corroborated in all material respects by the testimony of **PW2 GEORGE MUTHOKA**. He told the court that he too heard the commotion from the homestead of the deceased at about 3.00 p.m. He went and found the deceased bleeding heavily from cuts on his body staggering on the path. He saw the accused coming behind the deceased hitting him with a stick. **PW2** and **PW3** helped to take the deceased to the clinic at Lukore. I was able to observe the demeanour of these two witnesses as they testified. They struck me as honest people who told the court the truth of what they had witnessed. The incident occurred at 3.00 p.m. It was broad daylight and visibility was good. Both witnesses knew the accused very well as he was their neighbour. I find no possibility of a mistaken identity.

The evidence of these two is further buttressed by the testimony of **PW5** the mother to the accused. She told the court that she rushed home to find the deceased having been cut up and bleeding heavily. She found the accused at the scene holding a blood-stained panga **Pexb1**, **PW5** was able to positively identify the panga as hers by a plastic paper tied round the handle. She told the court that she often left this panga within her homestead where the incident occurred. **PW1 JOSPHAT SAIDI MZALA** the Assistant Chief of Lukore Location told the court that he received a report about the incident and rushed to the scene. He too identifies the panga produced in court **Pexb1** as the blood-stained panga which he saw on the material day. **PW5** was the biological mother of the accused. She certainly had no reason nor motive to lie against him. From the evidence on record it is clear that the accused was found bleeding heavily from cuts all over his body and the accused was found with him wielding a blood-stained panga. Only one logical conclusion can be drawn from that scenario. That it was the accused who attacked and fatally wounded the deceased. Indeed both **PW2** and **PW3** told court that they heard the deceased ask the accused why he had cut him thereby identifying the accused as his attacker. These words of the deceased can be termed as a **‘dying declaration’** as he gives a statement relating to the cause of his death and identifying his attacker [see **DZOMBO CHAI –VS- REPUBLIC [2006]KLR**]. This coupled with the evidence of the eye witness convinces this court that it was actually the accused who cut up and killed the deceased. In other words the actus reus of the offence of murder has been proved against the accused.

Finally the prosecution must prove the existence of '**malice aforethought**' on the part of the accused. Malice aforethought is defined in S. 206 of the Penal Code as follows:

"206. 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"

Clearly by launching such a vicious attack against the deceased the accused knew that serious grievous harm or even the death of the deceased would result. Further both **PW2** and **PW3** told the court that when the deceased asked accused why he was cutting him the accused replied that the deceased had bewitched him causing him (accused) to fall ill. Under re-examination **PW2** stated:

"Accused said the deceased had bewitched him and that is why he was sick"

Likewise **PW3** in his evidence stated:

"I asked accused why he was beating the deceased. He said it was because the deceased is bewitching him"

It is clear that the accused harboured ill-will against the deceased due to the mistaken belief that the deceased had bewitched him. This provided the motive for his murderous attack on his brother. Once again I find that the element of malice aforethought has been proved to have existed.

Based on the foregoing I find that the State have proved this charge beyond all reasonable doubt. Accordingly I do convict the accused of the charge of Murder under S. 203 of the Penal Code.

Dated and Delivered in Mombasa this 16th day of November 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Gichana for Accused
Mr. Onserio for State

MR. ONSERIO: Treat as 1st offender

MR. GICHANA: Accused is a 1st offender. Accused and deceased were brothers. We ask court to temper justice with mercy. The family have lost one brother. Accused is very remorseful. He seeks a lenient sentence.

COURT: Sentencing on 17th November 2011.

M. ODERO

JUDGE

COURT

I have considered the mitigation pleaded on behalf of the accused. The accused launched a vicious unprovoked attack on his own brother who was unarmed at the time. The culture of killings on the pretext of fighting witchcraft must come to an end. The accused committed a heinous act and does not deserve the Mercy of this court. The maximum penalty is called for. I therefore sentence the accused to death.

M. ODERO
JUDGE

16/11/2011