



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE 73 OF 2004

REPUBLIC..... PROSECUTOR

VERSUS

PHARIS GITHUA MBUGUA..... ACCUSED

J U D G M E N T

The accused, **PHARIS GITHUA MBUGUA**, was charged with the offence of MURDER **contrary to section 203** as read with **section 204 of the Penal Code**. The particulars of the charge were that on 27th February 1997, the accused murdered **AMOS MBUGUA MAU**.

PW 1, RAHAB NYOKABI MBUGUA, is the mother to the accused, and the wife to the deceased.

On the material day, 27th February 1997, **PW 1** was inside her house, at her homestead in Githunguri. She was in the kitchen. Meanwhile, the accused and the deceased were also within the homestead.

The deceased instructed his son, (the accused) to go and cut nappier grass for the cows. After a little while, the accused reported back to the deceased, saying that he was unable to find any nappier grass. The deceased then offered to go and show to the accused, the nappier grass which was to be cut.

It was the evidence of **PW 1**, that the deceased walked ahead of the accused, as they were on their way out.

Without any warning, the accused suddenly struck his father with the panga which he was holding. The said panga is the one which the accused was supposed to use in cutting the grass.

After being assaulted, the deceased held onto the accused, and put him down on a seat.

PW 1 then took away the panga from the accused, and she hid it. She then sought the help of neighbours, who helped to take the deceased to hospital.

In the first instance, the deceased was taken to Thuo's Clinic. At the Clinic, Thuo advised **PW 1** that the cut on the head of the deceased was so deep that there was need to have it attended to in hospital.

PW 1, together with **PW 2**, and **PW 3**, then rushed the deceased to the Kiambu District Hospital, where the medical personnel commenced treatment.

Shortly thereafter, **PW 4, SAMUEL KAMAU MBUGUA**, arrived at the hospital. He is a son to the deceased.

And as he felt that his father could be accorded superior treatment at the Aga Khan Hospital, **PW 4** sought and was granted

permission to move his father.

The victim was moved from Kiambu District Hospital, in an ambulance. And the patient was accompanied by a nurse.

PW 2, ZACHARIA NJOROGE KAGIRI, was a neighbor to **PW 1** and the deceased. He responded to **PW 1's** request for assistance, by proceeding to the home of the deceased.

On arrival at the home of the deceased, **PW 2** asked the victim what had happened. And it was the evidence of **PW 2** that the deceased told him that the accused had cut him.

PW 2 was angry because the accused was sitting on a sofa set, close to where the father was. **PW 2** then ordered the accused to get out of his father's house.

Even though the deceased was bleeding, he said that the accused should not be beaten.

It was the testimony of **PW 3** that the deceased loved the accused very much. Indeed he described the accused and the deceased as great friends.

PW 4, SAMUEL KAMAU MBUGUA, was at his place of work when the deceased was injured. He only learnt about the incident at about 5.00p.m, when he was almost reaching home. He was told about it by some neighbours.

PW 4 immediately went to Kiambu District Hospital, where his father, (the deceased) was being given treatment. **PW 4** asked for permission to move his father to the Aga Khan Hospital, and the medical personnel at the Kiambu District Hospital, not only granted him permission, but also provided an ambulance which ferried the patient to Aga Khan Hospital.

Once the patient was at the Aga Khan Hospital, he was admitted into the Intensive Care Unit (ICU). Those who had escorted the patient to the hospital were then advised by the medical personnel, to go back home, to find some rest; and they complied.

On the next morning, when **PW 4** visited the hospital, he found that his father had passed away at about 3.00a.m.

When **PW 4** was asked about the mental abilities of the accused, he said that since childhood, the accused had been mentally retarded. He claimed that the accused had been a slow learner. Apparently, the accused was so slow a learner that by the time he attained the age of 18, he was still in Primary School.

When it became clear to the deceased that the accused had a mental incapacity, the father made a decision to remove him from school. Since then, the accused remained at home, where he assisted with work.

PW 4 also testified that the accused was not a violent person.

According to **PW 4**, the accused was very close to the deceased. Therefore, when the accused fatally injured the deceased, **PW 4** was shocked.

PW 5, CPL. JULIUS MUTUNE, was a police officer who was attached to the Githunguri Police Station at the material time. On 28th February 1997 **PW 5** received a report from **PW 1**, concerning an assault on the deceased.

PW 1 reported, at the police station, that the accused had assaulted his father, (the deceased).

PW 5, together with other police officers, proceeded to the deceased's home, where they arrested the accused. When the police officers arrived at the home of the deceased, they found the accused asleep, in his house.

A few days later, **PW 5** escorted **PW 4** to the Aga Khan Hospital Mortuary, where they removed the body of the deceased, and escorted it to the City Mortuary.

Later, **PW 5** and **PW 4** witnessed the post mortem examination on the body of the deceased. The said post mortem examination was conducted by Dr. Kiriasi Olumbe.

During cross-examination, **PW 5** said that when he recovered the panga which had been allegedly used to assault the deceased, it had no blood on it, nor was it hidden.

He said that the panga had been used subsequent to the assault.

PW 5 also said that the clothing which the accused was wearing, did not have blood stains. However, **PW 5** conceded that he did not make an effort to trace the clothes which the accused had worn on the material day.

PW 5 explained that the accused did not volunteer any information to the police. He further said that the police did not interrogate the accused, because, in his understanding, the law did not permit the police to do so.

When questioned further, **PW 5** said that both **PW 1** and **PW 4** told him that the accused sometimes used to behave almost as if he were insane, whilst at other times he could remain silent.

PW 6, DR. JANE WASIKE SIMINYU, is a medical doctor. She had worked as a pathologist at the City Mortuary from the year 2002.

When **PW 6** first joined the City Mortuary, she worked with Dr. Kiriasi Olumbe. In the process of working together, **PW 6** got to know the handwriting and the signature of Dr. Olumbe.

As at the time when this case was being heard, Dr. Olumbe had relocated to Australia. It is for that reason that the prosecution sought leave to have **PW 6** produce in evidence the post mortem report prepared by Dr. Olumbe.

The defence did not object, and the Court was satisfied that if the trial would await Dr. Olumbe, there would arise an undue delay. In the event, the prosecution was permitted to have the post mortem report prepared by Dr. Olumbe, produced in court by Dr. Siminyu.

From the post mortem report, it was evident that the deceased suffered a fracture on the right part of his skull, with haemorrhage to the brain.

The injury could have been caused by any instrument which had a sharp part, such as a knife, a panga or an axe.

It was the considered opinion of the doctor that a person who had suffered that kind of injury would almost definitely die from the said injury.

In cross-examination, **PW 6** explained that whereas the delay in taking a patient, who had injuries like those which the deceased had suffered, could contribute to the speed of death; but in this case, it was the doctor's view that even the little bleeding to the brain could cause such pressure to the brain, as to lead to death. She explained that when there is bleeding to the brain the person was not likely to live beyond three hours.

Having been put on his defence, the accused gave sworn testimony. He said that he had been brought to court because of a problem at home.

He also said that when he was at the Mathari Hospital, he was told that he had killed his father. But he was unable to recall what had happened.

In analyzing the evidence on record, I will take into account the fact that before the trial commenced, the psychiatrist who was attending to him at Mathari Hospital, stated that the accused had mental retardation. The psychiatrist expressed the view that the accused was unable to follow and to understand court proceedings.

Furthermore, the psychiatrist verified from the hospital records that the accused had previously been treated for "schizophrenia like illness."

Between 1st July 2004 and 14th January 2008, three different psychiatrists certified the accused as being unfit to plead to the charge.

But on 3rd March 2008 the accused was certified fit to plead. By that date, the accused had already been in custody for eleven years.

The issue of the mental status of the accused is central to this case, because even his brother (PW 4) and his mother (PW 1) did confirm that the accused used to suffer from mental retardation.

On 22nd June 2007, Dr. Kisavuli told the court that mental retardation;

“means that his intelligence is below average and hence that limits adaptive functions. Though he is 37 years old, he reasons like a 6 years old child. His temperament is primitive. The condition of retardation is not treatable.”

The first question that I ask myself is whether or not the accused killed his father.

From the evidence on record, I am satisfied that the accused struck his father with a panga, causing him to suffer a fracture of the skull, and a laceration of the brain.

I am also satisfied that the deceased died as a direct consequence of the accused's assault on him.

In effect, the accused killed the deceased.

The next question is whether or not the act committed by the accused constituted the offence of murder.

By virtue of the provisions of section 203 of the Penal Code;

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

In this case, the accused did cause the death of his father, through the unlawful act of striking him forcefully, on the head, using a panga.

But the question still remains whether the prosecution proved that the accused had malice aforethought.

Pursuant to the provisions of section 206 of the Penal Code;

“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 the light of the mental retardation of the accused and also the fact that he had been previously treated for a schizophrenia-like illness; and also because the accused sometimes behaved as if he were insane, this court is unable to conclude, with any degree of certainty that the accused had formulated any particular intention just before he struck his father with a panga.

All the evidence points at the fact that the accused and the deceased had a very good relationship. They were very great friends. That friendship was known to all the persons who lived with or near them.

And even after the accused had injured the deceased, the latter told PW 3 that he should not punish the accused. To my mind, that epitomizes the friendship between the father and his son. It is a reflection of a victim who appreciates that his assailant did not intend to hurt

him, or did not know that his action had injured the victim.

In effect, I do find and hold that the prosecution did not prove that the accused had the requisite malice aforethought. That implies that the accused is not guilty of the offence of murder.

Yet, it cannot be denied that it is he who killed his father.

In the circumstances, it appears to me that it would be a contradiction in itself, if I were to find the accused guilty of murder, but insane. Had I come to the conclusion that the accused was guilty but insane, I would have made a special finding, in accordance with section 166 (1) of the Criminal Procedure Code.

But because the prosecution did not prove that the accused had malice aforethought, he cannot have been guilty of murder.

Nonetheless, the evidence adduced proves that the accused caused the death of his father, through an unlawful act. Therefore, pursuant to the provisions of section 202 (1) of the Penal Code, the accused is hereby found guilty of the offence of manslaughter. Accordingly, I do now hereby convict the accused for the offence of manslaughter.

Dated, Signed and Delivered at Nairobi, this 8th day of February, 2010.

.....
FRED A. OCHIENG
JUDGE