



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Case 28 of 2008

REPUBLIC

VERSUS

STEPHEN MAMBILIACCUSED

JUDGMENT

1. The Accused person herein, **Stephen Mambili** was charged with the offence of murder contrary to S.203 as read with S.204 of the Penal Code. It was alleged that on 21.5.2008 at Ivonda village, Ivonda Sub-location in South Kakamega District, Western Province he murdered **Tito Mulekhwa Kutekha (Tito)**. He denied the charge and the evidence tendered was as follows:
2. PW1, **Timothy Mbaeji** recalled that on 21.5.2008 while at Ivonda Primary School, he received information that his brother had been cut and when he went to his brother's (Tito's) home he met him and his wife Carol. He had a deep cut on his stomach and right toe and he said that Stephen Mambili had cut him. PW1 then took Tito to Iguhu Hospital and they were referred to Mbale Hospital. Tito was treated at Mbale and discharged after one day but when he did not improve, he was taken to Moi Referral Hospital where he died after treatment, on 30.5.2008.
3. PW2, **Rose Kutekha**, mother of the deceased stated that on 21.5.2008 she saw the accused person attacking the deceased while armed with a panga and when she intervened, the accused pushed her away and she fell down. The deceased was allegedly cut on the stomach and leg and the accused then ran away with the panga. Later, the deceased was taken to hospital by PW1 and a few days later he died while in hospital.
4. PW3, **Carolyn Lihabi**, spouse of the deceased, recalled that on the material day, the deceased was driving cows to a nearby river when he found the accused person cutting a tree on the land belonging to the deceased. That when the deceased tried to stop him, the accused person, who had a panga, started a fight with the deceased and he cut him on the stomach and leg. PW2 and PW3 then ran to rescue the deceased and later assisted in taking him to hospital and on 30.5.2008 the deceased died.
5. PW4, **Alfred Nano Mukhiti**, Assistant Chief, Makhokho Sub-location visited the deceased two days after he was injured. The deceased told him that the accused person had cut him on the stomach and leg and the witness saw the injuries allegedly inflicted. PW4 then used the Community Policing group to trace the accused who was eventually apprehended on 30.5.2008.

6. PW5, **Peter Gakunju Kihara** re-arrested the accused after he had already been apprehended by members of the public and he took him to Kakamega Police Station.
7. PW6, **Anthony Ambehi Kutekha** and PW7, **Mathias Lijoodi** identified the deceased's body for post-mortem which was conducted on 5.6.2008 by PW10, **Dr. Nalianya Walter Wekesa**. The cause of death was found to be tetanus as a result of cut wounds to the stomach and big toe of the left leg.
8. **PW8, PC. Benson Oluoch Okiro** investigated the case together with **PW9, PC. Kipkorir Bii** and according to both of them, they recorded statements of all the witnesses but crucially, PW9 recorded the deceased's statement on 24.5.2008 and in the statement, the deceased mentioned the accused as the person who assaulted him. When the deceased died, it was decided that the accused should be charged with the offence of murder and so he was.
9. When the accused was put on his defence, he denied the charge and denied knowledge of the deceased person and could not recall where he was on the day the deceased was allegedly injured.
10. This case, in my opinion, is one that should be determined on two issues;
 - i) alleged recognition of the accused person at the scene;
 - ii) the alleged dying declaration by the deceased.

11. On the first issue, the evidence of PW2 and PW3 was unchallenged. They knew the accused person as a neighbour and at 4 p.m. they saw him and the deceased quarrelling over the accused's action of cutting a tree on the deceased's land. The deceased was then cut on the stomach and right toe and both PW2 and PW3 had no doubt that the accused person did so because they were there and PW2 who reached the deceased first actually tried to restrain the accused person who pushed her and she fell down. I believe that evidence and on the second issue, the deceased died more than a week after the incident and in the intervening period, he spoke to PW1 and PW4 and named the accused person as his attacker. More importantly, PW9 recorded the deceased's statement on 24.5.2008, three days after the incident. That statement was produced as Exh.1 and I deem it proper to reproduce that statement which reads as follows:

“I do recall very well on the 21st May 2008 at around 15.30 hrs while in my homestead when I heard someone cutting down our tree. I went and found Stephen Mabiri Lingondo cutting the tree in our fence.

I told him to stop cutting down the tree. He stopped and came direct (sic) where I was and cut me my left rib and right leg (sic). I was rescued by my relative.

I was admitted at Mbale District Hospital for one day and hence the reason of me recording my statement as per above. That is all.”

12. A week after recording the above statement, the deceased succumbed to his injuries. In **Kihara v. R [1986] KLR 473 at 476 para 40**– 477 paras 18 - 27, it was held as follows;

*“The High Court accepted and relied on the dying declaration and stated that it was amply corroborated by the evidence as a whole. Before the dying declaration is relied upon, it has to be shown that the death is eminent and directly related to the incident. This was not so in this case. There is not much stated on the contents of the dying declaration. Whilst corroboration of the dying declaration as to the cause of death by the deceased before his death is desirable, it is not always necessary in order to support a conviction. **Eligu s/o Odel v R and Epongu s/o Esunyu v R (1943) 10EACA 90.**”*

13. In this case, PW10 confirmed the deceased's injuries as detailed out in the deceased's statement. All witnesses similarly confirmed the twin injuries suffered and it cannot be in doubt that the tetanus which eventually caused his death was the catalyst

for death which had been precipitated by those injuries. The **Kihara case** is therefore distinguishable as in that case, the pathologist could not conclusively determine the cause of death. In this case the link between the injuries, the tetanus and the death was made by PW10 and there was corroboration of that evidence. Proof of the dying declaration is not in doubt in such clear circumstances.

14. Having so held, is the accused person guilty of the offence of murder or of another offence? - see **Kioko vs R. [1983] KLR 289**. I have said that it was the accused and no other person who caused the deceased's injuries and so his defence that he did not know the deceased and could not recall where he was on the material date is a mere denial of an obvious fact. What of malice aforethought? S.206 of the Penal Code provides as follows;

“S.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;***
 - 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, 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.”***
15. The circumstances of the present case would clearly show that the accused acted with malice aforethought. He went to the deceased's land armed with a panga. He cut a tree allegedly belonging to the deceased and when the deceased intervened, he attacked him. There is no evidence that the deceased attacked him and that he reacted to defend himself. All ingredients of murder have been proved beyond reasonable doubt and I shall convict him accordingly.
16. Having so done, I shall sentence the accused person to death as by law established.
17. Orders accordingly.

Delivered, dated and signed at Kakamega this 6th day of May, 2010

ISAAC LENAOLA

JUDGE