



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

MURDER CASE NO. 11 OF 2009

REPUBLIC.....PROSECUTION

VERSUS

LUKAS MURIITHI

KATHURI.....RESPONDENT

J U D G M E N T

The Accused herein namely **Lukas Muriithi Kathuri** is charged with the offence of **murder contrary to Section 203 as read with Section 204 of the penal code.**

The particulars are that

“On the 4th day of May 2009 at Gachigi Sub-Location Kirima Location in Kirinyaga District within Central Province, he murdered NICHOLAS MWENDIA MURIITHI”.

He denied the charge and the matter went to full hearing with the state calling a total of eight witnesses in support of its case. On his part, the Accused testified on oath and called no witnesses. The evidence adduced appears quite clear and largely uncontested. The deceased was the son of the Accused. PW1 was the deceased’s mother while PW2 Martin Maina was the deceased’s brother and Accused’s son. On the material date, the deceased was left at home alone with the Accused. PW2 was working in the farm not very far from the homestead while his mother PW1 had gone to visit a neighbour. According to PW2, while still in the coffee plantation, he heard noise coming from the homestead. He went to check what was happening and found the Accused inside the kitchen beating the deceased. As at the time PW2 entered the kitchen where the beating was taking place, he found the Accused hitting the deceased who was already lying down on his legs. He intervened and asked the Accused to stop the beating which he did.

PW2 held his brother and took him outside the house. Some neighbours were attracted by the noise and screams coming from the homestead. They rushed to the scene where they found the deceased lying outside the house injured. Arrangements were made to take him to the hospital. PW3 and the Accused were amongst those who took him to hospital. He was admitted and taken to theatre but as the Accused and the rest of the family waited for him to be transferred to Kenyatta National Hospital, he died.

The matter was reported to some police officer who was at the hospital on another mission. Angry members of public wanted to lynch the Accused and he had to be locked up in an office at the hospital for his safety. He was eventually taken to the police station where he was charged with the offence before the court. An examination by Dr. Thuo the Provincial Psychiatrist confirmed that the Accused was of sound mental status. A post mortem was performed on the body of the deceased by Dr. Stephen Wangombe (PW8). According to the Doctor, the deceased had an injury (cut wound) on his parietal region of his head; a bruise on the forehead 3cm long and 2 bruises on his left thorax measuring 3 and 7cm respectively. The skull was fractured at the parietal region and that appeared to have been the cause his death. There was no doubt therefore that the deceased died from the injuries sustained during the said beating by his father.

The Accused on his part told the court that he disagreed with the deceased over some manure. The deceased is said to have kicked the Accused causing him to fall down. He said that the deceased then grabbed a panga and tried to hit him with it. The Accused pushed him and he fell down. It was then according to the Accused that he took a small piece of firewood and started hitting him with it. PW3 appeared at the scene at that point – and the rest is on record.

From the short submission made by his counsel, the Accused's defence appears to be that he was not responsible for the injury on the deceased's head which was found to have been the cause of death. She therefore submitted that the state had not proved its case and urged the court to acquit her client. The state counsel on the other hand submitted that it was the Accused who hit the deceased causing him to fall and hit his head which is what led to his death.

The fact and cause of death is not disputed. In my view this was a good case for plea bargaining and I cannot understand why the plea was not offered given the circumstances surrounding the matter. I will not nonetheless hold that against the Accused. The only issue for decision here is whether it was the Accused who caused the death of the deceased. He himself admitted on oath that they fought and that the deceased fell down in the course of that fighting. Indeed the Accused even continued to hit him on his legs when he was still lying down.

The assault on the deceased was in my well considered view the cause of death. The head injury was just part of the entire transaction of the assault. It was the Accused who pushed the deceased causing him to fall and to sustain the fatal injury. Even if the court was to assume that that is what happened, the fall was triggered by the pushing and that means that the proximate cause of death was the beating. The Accused cannot argue that he was only responsible for the injuries sustained from him hitting the deceased directly. The beating cannot be separated so that he can say,

***“I am responsible for the bruises on his head and thorax and other parts of the body but I cannot be held responsible for the fractured skull which he sustained after falling down after I pushed him*”**

Truly, I find such kind of argument lame and unsustainable. If the Accused had not pushed the deceased, he could not have fallen down and hit his head against whatever hit him and caused the injury on his head, and subsequent death.

My finding therefore is that *Actus reus* has been proved. The Accused is wholly responsible for the death of his son.

The other point for decision is whether *mens rea* was proved. In my view, there is some doubt as to how the said injury was inflicted. The Accused says he only pushed him. I am willing to take that as the true

account of what happened given that even PW3 did not see the accused directly hit the deceased on the head. I am also satisfied that although the Accused had no physical injuries, he and the Deceased may have fought. I also consider the Accused's statement that the deceased is the one who started the fight. All these are issues that though not exonerating the Accused of the unlawful killing, mitigate the charge of murder and reduce it to an unlawful killing.

Intent to kill or malice aforethought has therefore not been established. This does not nonetheless exonerate the Accused of the criminal culpability of killing the deceased. He did unlawfully kill the deceased but with no malice aforethought. That therefore reduces the charge of murder to that of manslaughter.

Having considered the evidence as evaluated above and the circumstances surrounding this matter, I am satisfied that the lesser but cognate charge of manslaughter has been established.

Accordingly I invoke the provisions of Section 179 of Criminal Procedure Code and find the charge of murder not proved.

The Accused is found not guilty of murder as charged but of the lesser charge of **manslaughter under Section 202 as read with**

Section 205 of the penal code and I convict him accordingly for that offence pursuant to Section 322(2) of the Criminal Procedure Code.

W. KARANJA

JUDGE

Delivered, signed & dated at Embu this **16th** day of **November 2010**.

In presence of:- Mr. Githinji for Fatuma for Accused & Ms. Matiru for the state, Accused also present.