



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSOLIDATED CRIMINAL CASES NOS. 13 & 41 OF 2012

[FORMERLY NYERI HCCR CASES NOS. 14 & 15 OF 2012]

REPUBLIC.....PROSECUTOR

VERSUS

HUMPHREY WAITHAKA MACHARIA.....1ST ACCUSED

JOHN KAMAU MACHARIA.....2ND ACCUSED

JUDGMENT

1. Esbon Macharia Gichuhi (hereafter *the deceased*) succumbed to grave injuries inflicted by three persons on the morning of on the 3rd of November 2010.
2. His widow, PW3, was emphatic that *both* accused and their elder brother (who are all her sons) were the persons who assaulted the deceased with thick pieces of wood.
3. The Republic brought *Information* to the High Court charging the three brothers for *murder* contrary to section 203 as read with section 204 of the **Penal Code**. However, one of the accused persons, *Duncan Gichuhi*, died in prison custody.
4. The particulars are that on the 3rd of November 2010 at Kiguru village, Kaganda Sub-Location within Murang'a County, they murdered the deceased.
5. They pleaded not guilty. For various reasons, including the passage of time, the prosecution only managed to call only three witnesses.
6. The key witness was Jane Gachambi (PW1). Like I have said, she is the mother of the two accused persons. She testified that on the material day, at about 6:00 in the morning, she was milking cows in the company of the deceased. She then heard "*the sound of someone being assaulted*".
7. When she turned around, she saw both accused and their elder brother Duncan Gichuhi assaulting the deceased. They were using thick planks of wood to hit him on the head and hands. She said that the first blows knocked the deceased to the ground; but the assailants continued to beat him.
8. PW1 said she dropped the milk can, moved away to a safe distance and started screaming. She testified that some neighbours responded but were afraid to enter the homestead. PW1 informed the village elder, Stanley Njoroge (PW2), who led her and a group of people back into the homestead. They found the dead body of the deceased. His hands were broken; and, he had suffered serious injuries on the head, face and mouth.
9. The witness said that by the time she returned to the compound, the accused persons had disappeared. In cross examination, she said the two accused persons had assaulted her and the deceased on a previous occasion; six months before the murder. On that occasion they cut her on the mouth and left eye. She said that the attack was so serious "*that the deceased and [her] had to run away from the home for about one year*".
10. She said the accused were disrespectful to the deceased and called him "uncircumcised". The accused were demanding a share of the deceased's six acre farm. She said that they had reported the earlier assault to the police.
11. Stanley Njoroge (PW2) was the village elder. He said that the body of the deceased was lying on the ground. Blood was oozing from the head. He did not see any weapons near the body. He preserved the scene until the police arrived and removed the body to Muriranjias District

Hospital Mortuary.

12. The last witness was Joseph Gacheru (PW3). He is also a son of the deceased. On 11th November 2010, he identified the body at Muriranjas District Hospital Mortuary for post-mortem purposes. He said the body was later interred.

13. When the accused persons were placed on their defence, they protested their innocence. The 1st accused (DW1) said that on the material day, he was away at Kigumo, Kangari. He said that his mother was lying or framing him up. Under pressure from the prosecution counsel, he said that he was picking tea at Githumu on the material day in the company of workers from Kisii; and, who were not available to testify.

14. The 2nd accused (DW2) also claimed he was away in Maragua on the day the deceased was attacked. He said that PW1 was misled by his brothers to blame him for the murder. He said that she was not telling the truth. DW2 did not also have a witness to back up his *alibi*, saying that the prospective witness fell ill and “was admitted to Kenyatta Hospital” on the day of the trial.

15. Learned counsel for the accused, Mr. Mwaniki, filed final submissions on 18th December 2020.

16. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

17. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

18. The legal and evidential burden rests squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **R v Kipkering arap Koske & another** 16 EACA 135 (1949), **Bhatt v Republic** [1957] E.A. 332.

19. There is *no* doubt about the *death* of the deceased. PW1 and PW2 saw the remains immediately after the attack at the homestead of the deceased. PW3, a son of the deceased, identified the body to the pathologist at Muriranjas District Hospital Mortuary on 11th November 2010 and confirmed it was interred.

20. The only serious gap is that the prosecution did *not* call the pathologist or produce his post mortem report. I however find that the cause of death can be clearly inferred from the following set set of circumstances: The two accused persons were positively identified by their own mother as the persons who attacked the deceased with thick pieces of wood. The impact felled the deceased but the two continued to assault him on the ground.

21. For her own safety, she took to a safe distance and screamed for help. When she returned with the village elder a short while later, the deceased was dead. Blood was oozing from the head; his hands were broken and, he had suffered other injuries on the head, face and mouth.

22. I thus entertain no doubt that the deceased succumbed to those injuries *immediately after* the attack. Any other interpretation would be a travesty of justice. The facts are clearly *distinguishable* from the two cases cited by learned counsel for the defence in **Chengo Kalama v Republic**, Malindi Court of Appeal, Criminal Appeal 33 of 2013 [2015] eKLR. There, the deceased died weeks later and the cause of death was thrown into doubt.

23. I find some support in **Ndungu v Republic** [1985] KLR 487. The Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. The Court stated at page 493-

Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.

24. From the description of injuries by PW1 and PW2, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the two accused persons, of *malice aforethought*, killed the deceased.

25. That issue is intertwined with *identification*. Like I have stated, the two accused persons were *identified* by none other than their mother. It was after 6:00 in the morning. She had sixteen children and there was no evidence that she framed up her three sons. This was evidence of *recognition*; far more reliable than simple identification. **Wamunga v Republic** [1989] KLR 424, **Maitanyi v Republic** [1986] KLR 198 at 201.

26. I will now turn to the other key elements. The prosecution is obliged to *prove* the *mens rea* for murder: that the accused was of *malice aforethought*. There is a clear *motive* in this case. The accused persons had previously beaten up the deceased and seriously injured their mother forcing them to free their homestead for nearly a year. The matter had been reported to the police. The root cause was tied to land. The accused persons had been pestering the deceased to give them a share of the land. PW1 said they had little respect for the deceased and called him by the slur *uncircumcised*. She said the deceased finally uprooted his coffee and wanted to give them some land but clearly, the accused persons had other ideas.

27. The presence of that motive and the sheer brutality and force of the attack leave me with no doubt about the *intention* of the accused. See **Nzuki v Republic** [supra]. I find that their conduct was pre-meditated and they *knew that the act would cause death; or would probably cause death; or would cause grievous harm* to the deceased. It proves *malice aforethought* as defined in section 206 (b) of the **Penal Code**.

28. In a synopsis, the two key ingredients of *actus reus* and *mens rea* are united in this case.

29. The entire defence by the two accused is hollow and unbelievable. Each of them set up an *alibi* that they were far away from the *locus in quo*. The 1st accused (DW1) said that on the material day, he was away at Kigumo, Kangari. The 2nd accused (DW2) claimed he was in Maragua.

30. The *alibis* were being set up well after the close of the prosecution's case. That did *not* shift the burden of proof to the accused. See **Republic v Johnson** [1961] 3 ALL E.R. 969, **Saidi Mwakawanga v Republic** [1963] EA 6. I have weighed them carefully against the clear eye-witness account of their mother who saw the two accused persons attacking the deceased.

31. I have reached the conclusion that the *alibis* are a sham and unardoned by any persuasive evidence. The entire corpus of direct and circumstantial evidence points *irresistibly* and *exclusively* to the guilt of the accused. The chain of events is *complete*. I find *no* hypothesis that exonerates the accused. **R v Kipkering arap Koske & another** 16 EACA 135 (1949).

32. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. Both accused persons, *of malice aforethought* caused the death of Esbon Macharia Gichuhi by an *unlawful* act.

33. I accordingly enter a finding of *guilty*. Both accused are hereby *convicted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 4th day of February 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Both accused persons.

Mr. Mwaniki Warima for the accused persons instructed by Mwaniki Warima & Company Advocates.

Mr. Sebastian Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.