REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL CASE NO. 28 OF 2014 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

SAMMY MUTHIE GACHOKI.....ACCUSED

J U D G M E N T

INTRODUCTION

1. The accused person, Sammy Muthe Gachoki, is charged with the offence of murder of his neighbour, Joseph Wanjohi Gatimu (the deceased), contrary to **Section 203 as read with Section 204 of the** *Penal Code* **(Cap 63 Laws of Kenya**.)

2. According to the information dated 10/12/2014, the accused person committed the offence on the 1st day of December, 2014 at Kianjege Village within Kirinyaga County.

3. The accused person denied the offence and a plea of not guilty was entered on 02/02/2015. Consequently, the case was set for hearing and the prosecution availed 7 witnesses in support of their case against the accused person.

4. Brief Facts of the Case:

The accused and the deceased were immediate neighbours at Kianyege village in Kirinyaga County. On the material day, the accused was in his house with his family at about 9.00 pm when he decided to go out to answer a call of nature. He went to the latrine which was about fifteen (15) metres from his house. As he returned to the house he sensed that there was an intruder in his compound and asked who it was. He did not get an answer but the intruder suddenly hit him on the mouth with his first. A fight ensued. The accused over powered the intruder who he realized was the deceased in this case. The accused called his son CM (PW3) a minor aged seventeen (17) years, then, and asked him to give him a rope. PW3 was attracted by screams and when he went to find out he found the accused and the deceased fighting. PW3 rushed to the kitchen and got a rope which he gave to the accused. The accused tied the deceased on both hands and tied him to a mango tree. The deceased had sustained serious injuries on the head and passed away before he could get an assistance from the Assistant Chief and the police. The matter was reported to the police who visited the scene and found that the deceased had passed away. Police recovered a huge stone which they suspected that it had been used to inflict injuries on the deceased. The deceased was bleeding from an injury on his forehead. The body was removed from the scene and escorted to Mount Kenya Hospital Mortuary. A post mortem was later conducted by Doctor Jean Claude a resident Doctor in-charge at Mount Kenya ACK Hospital.

5. The Doctor found that the body of the deceased had multiple cut wounds on the scalp especially on the left side. The left side of the head had sustained a fracture of the skull with sub-dural haematoma (bleeding in the brain). The cause of death was cardio-pulmonary arrest secondary to severe head injury with skull fracture (left temporal bone) with extensive sub-dural haematoma. The post mortem form was produced as exhibit- 8.

6. It transpired that the accused and the deceased had fought previously when the accused found him in his house at night while naked. The deceased assaulted the accused and the matter was reported to the police. It was alleged by the accused that the deceased had an illicit love affair with his wife. The deceased was charged with assault causing actual bodily harm contrary to section 257 of the Penal Code in ***Criminal Case No.545/2013 at the Chief Magistrate's Court Kerugoya.*** The deceased passed away before the case was concluded and the State terminated it.

7. This matter was investigated by the police who eventually charged the accused with this offence.

Prosecution's case

8. PW1, David Njuke Kariuki, a neighbour and nephew of the accused person, testified that on the incident, date at around 9.40 p.m., he was sleeping in his house when he heard someone scream for help from his neighborhood. He went to the compound of the accused and found him fighting with the deceased. He called the chief (PW2) and informed him of the incident, PW2 advised him to take them to hospital or police. The accused person requested PW1 to take him to the police station to report the matter. PW1 used his motorbike and started heading to the police station. On the way to the police station, the chief called and talked to the accused. PW1 overheard the accused telling the chief that the deceased had passed away. Acting on the advice of the chief, PW1 then left the accused on the roadside and went back home.

9. PW2, Gilbert Karimi Mureithi and who is the assistant chief of Kianjege sublocation, testified that on the incident date, he received a call at around 10 p.m. from PW1 who informed him that the deceased and the accused person had been fighting. PW1 told him that the deceased had been beaten and was lying down and that the accused had also sustained some injuries. PW2 advised PW1 to take both the accused and the deceased to hospital since they had been injured. He later called the accused who told him that he had killed the deceased. On reaching the accused person's compound, he found the deceased lying on his stomach under a mango tree with his hands tied to the tree with a sisal rope. He identified the rope that was used to tie the deceased's hands to the tree as well as the stone that he saw beside the deceased's body. The accused person told PW2 that he had many past altercations with the deceased because the deceased was having affairs with the accused's wife.

10. PW3, CM (minor), who is 17 years old and the son to the accused person testified that he knew the deceased as their neighbour and that the deceased used to cause trouble to the accused. On the incident date, he heard screams while he was sleeping, and he rushed outside the house and found his father, the accused person, and the deceased fighting. It is his testimony that the accused was sitting on the deceased and requested him to get a rope so that the accused could tie him up and take him to the police station or to the chief. PW3 rushed to the kitchen and got a rope (which he identifies as (PMF1)) and took it to the accused person. He gave the accused the rope and then went away to his aunt's place to call Jopsy Wawira. PW3 stayed at the aunt's place and later heard a police vehicle approaching their compound and saw the police collecting the deceased's body.

11. PW4, Joseph Thuo, a psychiatrist at Embu Level 5 Hospital, testified that on 04/12/2015, the accused was brought to his hospital with two policemen with a request from the OCS Kerugoya for a mental examination as he was a murder suspect. He examined him and found that he was in good mental condition and was fit to stand trial. The report was typed and signed the same day and PW4 produced the report as exhibit 2.

12. PW5, P.C. Morris Kimotho, was the investigation officer in this case and testified that on 02/12/2014, he received call from Chief Inspector Saidi Chuma who was the OCS requesting him to accompany him to Kianjege village to visit a murder scene which was the accused's home. At the scene, they were met by the assistant chief, PW2, and members of the public. He established that the deceased was tied with a rope on his both hands against a mango tree. Besides him was a big stone. The deceased was bleeding from an injury on the forehead.

13. PW6, Jean Claude, a resident doctor in charge of Mount Kenya ACK Hospital, Kerugoya, testified that on 05/12/2014, he was requested by the OCS Kerugoya Police Station to perform post-mortem on the body of the deceased. He verified that the deceased was a male of good nutrition and that his body was well preserved as it had not decomposed. Externally, PW6 noted that there were multiple cut wounds on the scalp, especially on the left side. He did not detect any abnormality on the respiratory system and cardiovascular. PW6 further noted that the left side of the skull was fractured and there was subdural hematoma, bleeding in the brain. Also noted by PW6 was an oedema swelling in the spinal column due to severe head injury. From his examination, PW6 formed the opinion that the cause of death was cardiopulmonary arrest secondary to severe head injury. The postmortem form was produced in court as exhibit 8.

14. PW7, Said Sudi Saro, OCS Kerugoya at the time of the incident, testified that he recorded a confession statement from the accused on 05/12/2014 at Kerugoya Police Station made in the presence of the accused's brother. The statement was made by the accused on his own free will and without any coercion or threat after the accused was cautioned that he was not obligated to say anything and that if he said anything, it would be recorded and may be used against him in evidence. Both the accused and his brother signed the statement on all the pages. The accused did not object to the production of the statement in evidence.

Defence case

15. At the close of the prosecution case, the court ruled that the prosecution had established a *prima facie* case and the accused was placed on his defence. He opted to give a sworn statement without calling any witnesses. He testified that he knew the deceased as his neighbour and that on the material day, he woke up in the morning and went to work. He returned in the evening and when he was about to go to bed at around 9 p. m, he went outside for a call of nature. The accused alleges that on the way back, he realized that there was somebody behind him. He asked who it was and was allegedly hit with a fist on the mouth. The accused claims that he tried to defend himself and started fighting the person. He then realized that it was his neighbour, the deceased. The accused stated that the two had had grudges and the deceased had previously beaten him and that the matter was reported to the police. He further stated that the deceased was charged with assault and the matter was in court pending judgment (CMCC no. 545/13 - Kerugoya). The accused claims that the deceased used to come to his house to seduce his wife and start fights. At the close of the defence, the counsel for the accused filed written submissions. It was submitted that there is no dispute that the events that led to the commission of the alleged offence occurred within the accused person's homestead. That it is not in dispute that the deceased had a habit of sneaking into the accused person's homestead and attacking him without provocation. He cited criminal case No. 545/2013 which I have referred to above. It is the contention by the defence that the deceased had provoked the accused who in turn acted in self-defence. The defence urges the court to find that the prosecution did not prove the three ingredients of murder which are, the fact and cause of death, that death was as a result of unlawful act or omission on the fact of the accused, *actus reus*, malice aforethought, *mens-rea*. The accused pleads with the court to acquit him as the prosecution failed to prove the charge beyond any reasonable doubts.

16. The State did not file any submissions. They opted to rely on the evidence tendered by their witnesses.

ISSUES ARISING FOR DETERMINATION

17. This Court is called upon to decide whether the accused is guilty of the offence of murder. Section 203 of the Penal Code (Chapter 63 of the Laws of Kenya) defines the offence of murder and requires proof of the following ingredients if the offence of murder is to be established:

- malice aforethought on the part of the accused,
- death of the deceased,
- the cause of the death by an unlawful act or omission on the part of the accused.

18. These ingredients were laid down by the Court of Appeal in the case of ***Anthony Ndegwa Ngari -v- Republic (2014) eKLR*** where the court stated that the prosecution is required to prove that-

1) The death of deceased.

2) The accused committed the unlawful act which caused the death of deceased.

3) The accused had malice aforethought.

19. It is my view that the following are the main issues for determination.

1. Whether there is proof of the fact and cause of death of the deceased.

2. Whether the accused caused the death of the deceased. And if so,

3. Whether the acts of the accused, resulting in the deceased's death, qualify as murder (intentional killing) or self-defence.

ANALYSIS OF LEGAL ISSUES ARISING

A. Proof of the Fact and Cause of Death of the Deceased

20. As to whether the deceased indeed died, the prosecution availed PW2, PW5, PW6 and PW7. All these witnesses saw the lifeless body of the deceased. It is my view therefore that the deceased herein actually died. PW6 who did the postmortem confirmed that the death was caused by external force on the head resulting in external and internal injuries.

21. On the cause of death of the deceased, PW6 produced a postmortem report which he prepared after examining the dead body of the deceased. The said report gave the possible cause of death of the deceased to be **cardio pulmonary arrest secondary to severe head injury**. PW6 noted in his report that the deceased had multiple cut wounds on the scalp, especially on the left side, a fractured skull on the left side and subdural hematoma bleeding in the brain. PW6 further noted that the deceased had an oedema swelling in the spinal column due to severe head injury. The prosecution discharged the burden of proving that the deceased died.

B. Did the accused cause the death of the deceased?

i. Circumstantial evidence

22. In his defence and submissions, the accused reiterates the evidence of PW1 that on the material night, the deceased and the accused got into a physical fight. This squarely places the accused on the scene of the murder. However, it was PW1's testimony that he left the accused and the deceased fighting since he did not want to be involved. He therefore did not witness the accused inflicting fatal injuries on the deceased.

23. PW1 testified that he called PW3, the chief of the area, to report the matter and that it was PW3's advise that the accused and the deceased should be taken to the police station or to the hospital if at all they were injured. PW1 then testified that upon the accused's request, PW1 then took his motorbike and started heading to the police station with the accused person. On the way, the chief called and talked to the accused who informed him that the deceased had passed away. PW1 states that he overheard the conversation and abandoned the accused by the roadside and returned home. This means that PW1 never witnessed how the deceased died. Thus, only the accused could narrate how the deceased sustained the fatal injury.

ii. Accused's Admission/Confession

24. Apart from the admitted circumstantial evidence, the prosecution also relied on two statements that the accused is alleged to have made, the first being an alleged admission of the killing to PW2 and the second being a formal confession made to PW7.

25. It was PW2's testimony that upon arriving at the scene of the murder and questioning the accused, the accused allegedly confessed to the killing stating that he did it because the deceased had troubled him for long by having affairs with his wife. The defence did not challenge or

object to PW2's testimony with regard to this confession and as such, it is my view that the same is a clear admission of his guilt.

26. In addition, through the evidence-in-chief of PW7 (the OCS Kerugoya), it was further the prosecution's case that on 05/11/2014, the accused freely made a confession statement in the presence of his brother.

27. Generally, confessions made by an accused person are not admissible in Kenya unless they are made in strictly compliance with the law. The law governing confessions in Kenya include **Articles 49(1) (b), (d) and 50(2) (a) and (4)** of the Constitution of Kenya 2010; **Sections 25 to 32** of the Evidence Act (Chapter 80 of the Law of Kenya); the Evidence (Out of Court Confessions) Rules, 2009; and case law.

28. Section 25 of the Evidence Act defines a confession as follows:

> **A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.**

29. **Section 25A of the Evidence Act** reads as follows:

> **25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.**

30. The accused neither repudiated the confession statement nor did he object to the production of the same in evidence. The manner in which the confession statement was extracted from the accused, in my view, conforms with the requisite law governing confessions as the accused was informed of his rights, cautioned prior to the recording of statement and the statement was made in the presence of a witness, his brother.

31. Considering the accused's admission and confession statement as well as the circumstantial evidence produced in support of the prosecution case, it is therefore my view that the accused caused the death of the deceased.

C. Was there malice aforethought?

32. The prosecution in this case had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. **Section 206 of the Penal Code defines malice aforethought 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;*
>
> **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.*

33. What can be deduced from Section 206 (a) to (e) of the Penal Code is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of **Bonaya Tutu Ipu & another v Republic [2015] eKLR** stated as follows:

> *"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of* ***CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004,*** *the* ***Court of Appeal of Uganda*** *stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in* ***REX V. TUBERE S/O OCHEN*** ***(1945) 12 EACA 63****, the former Court of Appeal for Eastern Africa stated thus on the issue:*
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> ***"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick…"*** *"*

34. In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA*** *63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.*

35. It is not in dispute that **there had been previous confrontations between the accused and the deceased**. This can be taken from PW1's and PW2's testimonies which point to the fact the deceased and the accused had gotten into several fights with each other which fights were regular. It is because of the frequent fights between the two that the neighbours (PW1 in particular) allegedly found no need to intervene on the material day. The accused also submitted to this fact by stating that "the deceased had provoked the accused into fighting him on several occasions and that those fights always ended in minor injuries to one or both of them." The bad blood between the two is also evident from the proceedings in Kerugoya CM Criminal Case No. 545 of 2013 which the accused submitted as his evidence. The said case is an assault case where the accused was the complainant against the deceased.

36. The Court of Appeal in **Morris Aluoch v Republic [1997] eKLR**, citing the TUBERE case (supra) as an authority, stated that whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. From the accused's confession statement, it is the accused's wife who called for help from the neighbours after she was unable to separate the accused and the deceased from the fight. Although there is no evidence pointing to how many times the accused hit the deceased with the identified stone, the severity of the injuries inflicted on the deceased's leave no doubt in my mind that the accused had an intention to cause death or grievous harm. It is my view therefore that the accused harbored a grudge against the deceased and on the material night, this grudge constituted the requisite *mens rea* for the commission offence of murder.

Plea of self-defense

37. In his defense, the accused pleaded self-defence. This court should thus decide whether the act committed by the accused resulting in the death of the deceased is to be qualified as murder (intentional killing) or self-defence.

38. Section 17 of the **Penal Code** states as follows: -

> ***"17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."***

39. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** , which decision is binding upon this Court, dealt with the aspect of self-defence in great detail. In allowing the appeal on the ground that the appellants acted in self-defence, the Court of Appeal expressed itself as follows:

> ***"The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in DPP v. MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (supra) it was held that:***
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> *".....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."*
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> ***In BECKFORD v R (supra) it was also held that if self-defense is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.***
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> ***In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane,C.J. held:***
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> *"In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."*
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> ***It is acknowledged that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.***
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> *Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.' "*

40. Although it is probable, as alleged by the accused, that at first, he did not know who was in his homestead as it was night and therefore dark, it is not in dispute that he later came to recognize the person as the deceased, his neighbour. The accused cannot therefore, in my view, purport to claim that he was defending himself against an unknown person as it was PW1's evidence that when he reached the accused's compound, PW1 did identify both the accused and the deceased and it was the two who were fighting each other.

41. There is also no evidence to prove that the accused was attacked by the deceased as alleged. Although PW2 testified in his cross-examination that the accused had a bruise on his face when he arrived at the scene of the incident. The extent, of the injury was not supported by any medical evidence to prove that he sustained injuries during the material confrontation with the deceased.

42. The accused's confession explains the exact circumstances of the offence as follows:

> *"…he[deceased] bit me on my left chest. Sensing danger I saw a stone and picked the stone and hit him on the head that is when he released me, I got a chance, a got a rope which was near the house, I tied him with the rope against a small mango tree inside my compound. Then I left him there. I called the assistant chief, Mr. Gilbert Karemi, I informed him that I caught a person in my compound, I asked him what assistance he can give me because he has injured me and I have over powered him and I have tied him with a rope against a small mango tree. Then he answered me back he is on the way coming and he has also informed police and they are on the way coming. Then the assistant chief came and saw the man and he identified him as Joseph Wanjohi Gatimu and he informed me that the suspect has already died. Then the assistant chief told me that I shouldn't leave the place as we are waiting for the police."*

43. It is my view that although the deceased might have visited the accused's homestead on the material night to start a fight as alleged to have been his habit, the accused used excessive force. The evidence adduced point to the fact that the accused used a stone to hit the deceased and tied his hands to a tree. The doctor who performed the postmortem found that the deceased had several cut wounds on the head which tend to show that the accused used a sharp object against the deceased who was unarmed. The accused tied the deceased with a rope on his hands and the position of the stone shows that the deceased was hit with a stone while he was tied to the mango tree. From the severe injuries inflicted on the deceased, this court must infer that the accused had knowledge that the injuries would cause death or grievous harm to the deceased. The testimony of PW1 attests to this as he overheard the accused telling the chief through a phone call that he had killed the deceased. The deceased was unarmed and the accused had sub-dued him and tied him with a rope. The accused had no reason to use the excessive and brutal force which he used. The defence of self-defence cannot be justified and must fail.

CONCLUSION

44. Weighing the accused's defence against the evidence provided by the prosecution, it is my view that the accused person, with malice aforethought, inflicted fatal injuries on the deceased following the fight that ensued on the material night. The prosecution has therefore proved beyond reasonable doubt, that:

1. The deceased died as a result of cardio pulmonary arrest secondary to severe head injury, which were unlawfully inflicted by the accused.

2. The death of the deceased was the direct consequence of the actions of the accused.

3. The accused had malice aforethought to cause the death of the deceased.

45. I find that the prosecution discharged the burden to prove the charge of murder against the accused beyond any reasonable doubts. I therefore find the accused person guilty as charged and I convict him under **Section 322 (2) of the Criminal Procedure Code.**

DATED, SIGNED AND DELIVERED AT CHUKA THROUGH VIRTUAL, ONLINE PROCEEDINGS THIS 13TH DAY OF MAY 2021.

L.W. GITARI

JUDGE