



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE NO. 119 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**JULIUS KAUNYANGE.....ACCUSED**

**JUDGMENT**

1. **JULIUS KAUNYANGE (Accused)** is charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that

**On 08<sup>th</sup> September, 2018 at Kautine village, Nkanda Sub-Location, Antuambui Location, Igembe North Sub-County within Meru County, murdered KEN KOOME**

**PROSECUTION CASE**

2. The prosecution called six (6) witnesses in support of its case. **PW1 Joseph Muthee** recalled the night of 08.09.2018 when he was woken up by screams after which one Mutwiri went to his home and informed him that his son Ken Koome(Ken) had been beaten by Kaunyange and Stanley. He rushed to the scene of the incident about 25 metres from his house and he found Ken who had multiple cuts lying in a ditch with his neighbours Stanley and Kaunyange who were armed with pangas standing nearby. That he called Ken and he responded that he had been beaten by Kaunyange and Stanley. Ken later died at the scene. He identified accused, who was a neighbour and teacher as one of the persons who he found armed with a panga at the scene Ken was killed.

3. **PW2 Patrick Mutwiri Kobia** recalled the night of 08.09.2018 at about 03.30 am when he was woken up by screams and upon going out to the scene of screams found his neighbours Kaunyange and Stanley who were armed with pangas assaulting Ken for allegedly stealing miraa. He rushed and reported the matter to Ken's father PW1 and one Richard Mwirigi and then returned to his house.

4. **PW1 Joseph Muthee PW3 Richard Mwirigi** recalled on the night of 08.09.2018 when he was woken up by PW2 who informed him that Ken had been seriously assaulted and injured. He rushed to the scene armed with a torch and found by his neighbours Kaunyange and Stanley who were armed with pangas and Kaunyange's wife standing near where Ken was lying. He went away after Ken's father PW1 arrived at the scene.

5. **PW4 Ibrahim Ntongai**, sub-area (village elder) of Irindi village where the incident occurred recalled the night of 08.09.2018 at about 04.00 am, Ken's father PW1 called him on phone and reported that his son Ken had been killed. He rushed to the scene and found Ken who had multiple cut injuries lying dead. He accompanied PW1 to report the matter to police and Ken's body was later removed to the mortuary. lying and reported the matter to Ken's father PW1 and one Richard Mwirigi and then returned to his house.

6. A postmortem conducted on deceased's body which was identified by his father PW1 was conducted by Dr. Kariuki on 14<sup>th</sup> September, 2018 and he formed an opinion that the deceased died of cardiovascular arrest due to multiple body cuts caused by sharp object, skull fracture and brain odema as evidenced by the postmortem form **PEXH. 1**. Photographs of the scene were produced as **PEXH. 2** and **3**. Accused was later arrested and charged.

**DEFENCE CASE**

7. In his sworn defence, accused conceded that Ken and his family who were his neighbours were well known to him. He stated that at about 6.00 am on the material date, his wife informed him that Ken had been killed near their gate for allegedly stealing miraa. He also went to the scene and saw deceased's body and was later arrested on 08<sup>th</sup> December, 2018 and charged with the murder of Ken an offence he denied.

8. **DW2 Gerald Kithia**, senior chief Antuambui location, **DW3 Alex Koome** who is accused's neighbour, **DW4 Joseph Mithike Mungania** and **DW6 Peter Muriuki** saw Ken's body and did not know how he died. **DW5 Catherine Kathure**, accused's wife stated that she was the one that informed accused that Ken had been killed and his body was lying outside their gate

### **ANALYSIS AND FINDINGS**

9. Section 203 of the Penal Code states that “**Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**”

10. Four ingredients of murder were restated in the case of **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR** as

**a. The fact of the death of the deceased.**

**b. The cause of such death.**

**c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**

**d. Proof that the said unlawful act or omission was committed with malice aforethought.**

#### **(a) The death of the deceased**

11. That **KEN KOOME** died was confirmed by all the prosecution and defence witnesses and was corroborated by the postmortem form **PEXH. 1** which reveals that deceased died of cardiovascular arrest due to multiple body cuts with sharp object, skull fracture and brain odema.

#### **(b) Proof that accused person committed the unlawful act which caused the death of the deceased**

12. Courts have consistently stated that it is the duty of the prosecution to prove its case beyond reasonable doubt. Concerning the degree of proof, Lord Denning in **Miller V Ministry of Pensions, [1947] 2 ALL ER 372** stated:

**“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”**

13. In **Byamungu S/o Rusituba v R {1951} 18 EACA 233** the court stated that:

**“The essential question is not the truth or untruth of the defence but whether, the case for the prosecution was proved beyond reasonable doubt.....”**

14. In order to establish the accused's culpability, the prosecution relied on the evidence by **PW2 Patrick Mutwiri Kobia** who stated he saw his neighbours Kaunyangé and Stanley who were armed with pangas assaulting Ken.

15. PW2's evidence that Ken was assaulted with pangas is corroborated by the postmortem form **PEXH. 1** which reveals that deceased suffered multiple body cuts caused by a sharp object, skull fracture and brain odema.

16. Accused's defence that he was not at the scene of crime is controverted by **PW1 Joseph Muthee** and **PW3 Richard Mwirigi** who upon receiving information of the incident from PW2 rushed to the scene and true to the information relayed to them found Ken who had multiple cuts lying in a ditch with their neighbours Stanley and Kaunyangé who were armed with pangas standing nearby.

17. From the evidence on record, I am persuaded that although only PW2 witnessed the incident, the evidence by PW1 and PW3 carries a high degree of probability that accused was one of the persons that murdered Ken.

#### **(c) Proof that deceased had malice afterthought**

18. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code.

19. In the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the court held that;

**“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

19. Malice aforethought has been defined in numerous cases. In NZUKI VS REPUBLIC [1993] KLR 171, the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

**- Intention to cause death**

**- Intention to cause grievous bodily harm**

**-Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.**

20. In the case of DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., observed that:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

21. I have considered the multiple body cuts, skull fracture and brain odema to the deceased. The attack on him was so vicious and accused must have known that the act of cutting the deceased severally with a sharp object was likely to cause him grievous harm or death.

22. From the foregoing, I find the prosecution case proved beyond reasonable doubt, the defence is rejected and Accused is found **GUILTY** and is convicted accordingly. It is so ordered.

**DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF JULY 2021**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Kinoti**

**Accused - Present**

**For the Accused - Ms. Aketch Advocate**

**For the State - Ms. Mwaniki**