



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 6 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

WILSON NJERU JONAH.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused person faces the charge of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the offence are that on the 4/03/2012 at Njukiri village location of Embu County, the accused murdered one Michael Muchangi Kinyua. He pleaded not guilty to the charge.
3. The prosecution called five witnesses in support of their case which is summarised herein below.

B. Prosecution Case

4. The evidence of Dr. Joseph Thuo PW1, was that he examined the accused person and found him mentally fit to stand trial.
5. PW3, a brother to the deceased testified that on the 4/03/2012, whilst at their home washing clothes with the deceased, they were accosted by the accused who proceeded to cut the deceased with a panga at the back of his head and that the deceased later succumbed to the injuries.
6. PW4 testified that on the material day he received a call from one Patrick Muchangi, the area councillor, who told him to take his vehicle and ferry an injured man to hospital whom PW4 later found was the deceased. He said that he proceeded to the deceased's home where he found the deceased at his home lying outside the house with a bleeding injury on the head.
7. PW2, Dr. Godfrey Njuki Njiru carried out the post-mortem on the deceased and concluded that the deceased's death was caused by cardiopulmonary arrest from head injury due to cut wound from a sharp object.

C. Defence Case

8. The accused gave a sworn statement as DW1 and testified that on the material date when he went home he found the deceased in his shamba armed with a panga, picking the mangoes and macadamia nuts of the accused in his shamba and upon confronting him, the deceased attempted to cut him with the panga. The deceased missed the accused and fell down. The accused attempted to use the panga as a shield but it fell down and cut the deceased. The accused testified that he reported the matter at Kangaru Police Post. DW2, a neighbour to the accused, corroborated the accused's case.

D. Accused's Submissions

9. It is submitted that there is no evidence, forensic or otherwise that connects the accused to the injuries that caused the death of the deceased as the elements of the offence of murder as set out in section 203 as read with section 204 of the Penal Code have not been proved.
10. It was also submitted that there was no proof of motive or ill intention on the part of the accused as he found an attacker on his land who charged at him with a panga and a rungu and in twist of fate, the panga swerved and cut the aggressor.

E. Analysis of the Law

11. It is trite law for Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

12. The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The prosecution must prove death of the deceased occurred, the act or omission causing that death and the unlawfulness of that act or omission, the person that unlawfully acted or omitted to act and the intention (malice aforethought) of the person who so acted or omitted to act.

13. The defence of the accused was that the alleged offence took place in his mango and macadamia farm at Njukiri where he found the deceased stealing and stashing the fruits and nuts in sacks. The deceased armed with a rungu and a panga then attacked him but the panga fell down as he was shielding himself with it and injured the deceased. The accused called one witness DW2 who supported his defence.

14. The defence of the accused differed from that of the prosecution as to the scene of crime. PW3 who testified that he was with the deceased when he was attacked by the accused for no apparent reason said the scene of crime was at the home of the deceased where PW1 and the deceased were washing clothes.

15. PW4 who was sent by the area councillor to take the deceased to hospital corroborated PW3's evidence. He said that he was sent to the deceased's home where he found him lying down with a bleeding head injury. This evidence confirms that the effect that the scene of crime was at the home of the deceased and not at the farm of the accused. The report made to the area councillor was that the scene of crime was at the home of the deceased which led him to send PW4 there. Sure enough PW4 proceeded to the deceased's home and found him there with fresh injury.

16. In my view, there is no possibility that the deceased was injured elsewhere and then went or was taken to his home where PW4 found him. This court found PW3 and PW4 credible and reliable witnesses. It follows that the accused person's defence was therefore untruthful. His intention was to make the deceased the aggressor as he played the victim by lying about the scene of crime.

17. Regarding how the deceased was injured, the accused in his defence said he took the panga from the deceased and it fell from his hand and injured the deceased. If the panga just fell on the deceased, its impact on the body of the deceased would have been probably just a bruise. PW2 who performed the post mortem found that the deceased suffered a deep cut wound on the left scalp with a fracture of the skull that exposed the brain. This was not an injury caused by a falling panga as the accused wanted this court to believe but by a panga thrust with excessive force.

18. PW2 the doctor confirmed that the cause of death was cardio-pulmonary arrest from the head injury being a cut wound caused by a sharp object.

19. Having analysed the prosecution's evidence alongside the defence, I am of the considered opinion that the defence was not plausible. It was indeed designed to put the blame on the deceased that he was the one who attacked the accused after being caught red-handed stealing mangoes.

20. From the evidence of PW2, PW3 and PW4, I find that the prosecution have proved that the accused inflicted the injury that caused the death of the deceased. *Actus rea* has therefore been established on part of the accused.

21. In regard to malice aforethought, **Section 206 of the Penal Code** describes it as follows: -

“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.”

22. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** it was held: -

an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body

targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

23. The manner of the attack on the deceased as well as the nature of injuries sustained by him as a result of the panga attack leads to the conclusion that the accused intended to cause grievous harm or to kill the deceased. It is my considered opinion thus that the prosecution has proved malice aforethought on the part of the accused.

24. It is my considered opinion that the prosecution have proved beyond reasonable doubt that the accused intentionally caused the death of the deceased. I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. Muriuki for Accused

Accused present