



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 80 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL MUIA MUTUA.....ACCUSED

J U D G M E N T

1. **Raphael Muia Mutua**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on **21st November, 2015** at **Katilini Sub-Location, Kalivu Location, Ikithua Sub-County** within **Kitui County** murdered **Joseph Mutua** (Deceased).

2. Facts of the case are that on the **21st** day of **November, 2015**, the Deceased and PW1 **Patricia Mwikali Kyalo** were planting on their farm when donkeys alleged to belong to the Accused trespassed thereon. The Deceased drove them out of the farm towards the boundary. All over a sudden he was hit by an arrow. The Accused struggled to remove the arrow from the Deceased but was restrained by those who were present. The police who were notified of the occurrence visited the scene and arrested the Accused. The mortal remains of the Deceased who had succumbed to injuries sustained were removed and taken to the mortuary.

3. Upon being put on his defence the Accused denied having been at the scene of the incident at the outset. He alluded to having heard noise which prompted him to go to the scene where he found **Kyalo David** holding the Deceased attempting to remove the arrow that was embedded in his chest. He saw two (2) arrows on the ground and **David Ndolo** the husband of PW1 holding a panga who was asking **Mutua** what he had done. He noted that all witnesses who testified who were family members were present. When he (Accused) sought to know what **Mutua** had done, he ordered him to sit down and remain silent. He was tied up and handed over to the police when they arrived. He denied having committed the offence and alleged that he was framed up.

4. Being a case of murder, the Prosecution was duty bound to prove:

(i) The fact of death.

(ii) That the unlawful act/omission that caused the death was perpetrated by Accused; and that:

(iii) He acted with malice aforethought.

5. In his defence the Accused did not dispute the fact of the Deceased having sustained an injury. After the body was taken to the mortuary a postmortem was conducted and the Doctor who did the autopsy opined that the cause of death was cardiorespiratory arrest secondary to a ruptured/punctured heart. A certificate of death was issued thereto. This was proof of the fact of death.

6. It is admitted by the Accused that all witnesses were at the scene of the incident. He argues that he went to the scene after the act and found witnesses who were family members present.

7. PW1 was on the farm with the Deceased, her brother-in-law. They ploughed at a different place from where PW2 **Kyalo David**, her husband was ploughing. PW1 saw donkeys that entered their farm. The Deceased drove them out until he reached the boundary. She identified the donkeys as having belonged to the Accused. It was her testimony that as the deceased pushed the donkeys towards the boundary, she heard screams and reacted by running to the place where she found the Deceased having fallen down, bleeding with an arrow embedded on the left side of his chest. At the scene were the Accused and his wife. The Accused was attempting to remove the arrow from the chest of the Deceased. She saw a bow that had arrows having fallen down. It was at that point in time that she called out for her husband.

8. PW2 ran to the scene and also found the Accused struggling to remove the arrow from the body of the Deceased.

9. On cross examination PW1 stated that she did not see the Accused hit the Deceased but as he drove the donkeys away she heard a person

ask why he was hitting his donkeys. She identified the voice to be that of the Accused as she was familiar with it.

10. This was therefore a case of circumstantial evidence. Principles of circumstantial evidence were enunciated by the Court of Appeal in the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused,

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

11. The incident happened in broad daylight. The Accused was well known to PW1. He did not deny having been the owner of the donkeys that the Deceased was driving out of the land that PW1, PW2 and the Deceased were ploughing. Circumstances that existed unerringly point at him as the person who was angered by the act of the Deceased of chasing away his animals and hence shot the arrow that caused a fatal blow to the Deceased.

12. The postmortem done established that the heart of the Deceased was punctured by the arrowhead. The bow and arrows were found at the scene and the Accused struggled to remove the arrowhead from the Deceased. This was evidence of the Accused having perpetrated the act that caused the death of the Deceased. In the case **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 one of the following intentions, the test of which is always subjective to the actual accused:

i) The intention to cause death;

ii) The intention to cause grievous bodily harm.

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.

13. **Section 206** of the **Penal Code** states thus:

“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.”

14. When the Accused struck the arrow on the left side of the chest of the Deceased that punctured his heart he knew that the act would result into death or at least grievous harm. It was an act aimed at the deceased which was perpetrated with an intent to cause atleast grievous harm.

15. The Prosecution, therefore, proved beyond reasonable doubt that the Accused committed the offence of murder. He is guilty and I convict him as charged.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE