



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

MUSEE KIEMA.....ACCUSED

JUDGEMENT

1. The accused is charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars being that on 22/2/2015 at Karithile village, Mwasuma Sub-Location, Nguni Location, Mwingi East District, Kitui County murdered Faith Muyathi Nzomo.
2. The accused pleaded not guilty and matter went into full trial.
3. The prosecution called 8 witnesses and closed its case.
4. The court is called upon to determine whether the prosecution has established a prima facie case to warrant accused to put on his defence.

PROSECUTION'S CASE

5. **PW1 Kiema Ngwamba** father of the accused testified that on 22/2/2015 at 8pm, he had been told of goats from Mwiyaithi having gone to accused's land and damaged crops. The accused was told of the same thus he went to the Mwiyaithi's house.
6. The witness met accused coming from the said Mwiyaithi's house. Accused told witness that Mwiyaithi abused him and thus he is proceeding to Mwiyaithi's place with a bow and arrows. He proceeded to a house of a certain lady.
7. He tried to beat a lady using a bow but witness held his hand. Then the accused pierced the lady right side of chest with the 2 arrows he held on the left hand. She fell down and died.
8. The police came and took the body to the mortuary. There was family meeting later and he paid compensation in monies to the deceased's family. He identified the 2 arrows used as murder weapons.
9. **PW2 Lena Mawia Mbuvi** testified that accused went to her house following Faith Mwiyaithi. Faith Mwiyaithi entered her house. She saw accused come carrying bow. He told Faith Mwiyaithi ***"let me go I will come back."***
10. Then witness heard voices of accused and his father (PW1) coming to her home from the road. The witness told deceased to leave her homestead but deceased said since the accused's father (old man) was coming she would stay there.
11. The accused person arrived first and stood 7 paces away. The PW1 stood near the deceased and asked deceased what the matter was with accused as accused had told him she had insulted him (accused).
12. She denied insulting him. The accused started making noise. The witness told accused to explain the issue to his father. Accused moved towards deceased carrying bow on one hand and arrows on the other.
13. When he raised bow to hit deceased, his father (PW1) held him. Then he (accused) stabbed Faith (deceased) with arrows on the lower side of chest. He pulled them and went away. Faith fell down. PW1 tried to help her. Witness screamed and police were called. They came to the scene, photographed and took away the body.
14. **PW3** watchman one **Moses Muthui Nzoa** saw accused at 7.30 pm carrying something he did not know near the area of scene of crime.

Later he heard screams and proceeded to the scene. He found deceased on the ground. He got information that she was stabbed by Musee (accused). She died at the scene.

15. **PW4 Mutinda Musyoki Katuli** relative of accused testified that on material night he learned that accused killed the deceased. On 23/2/2015 next day he saw accused at 10 am who told him he had done something. The witness advised him to report to police. He took him to police station to report. People were looking for accused to kill him.

16. **PW5 Daniel Nzomo Mulyungi** was husband to deceased who witnessed postmortem of his late wife on 2/3/2015 at Migwani Mortuary. He identified the body. He observed injuries on her chest. The pathologist said the arrows injured the body vessels.

17. **PW6 Peter Nzoki Wambua**, Kapunike Sub-Location Assistant Chief on 22/2/2015 at 8.30pm he received call from Mbuvi Nzomo informing him that a woman had been killed and thus to inform police. He informed police at Nguni of the same incident.

18. He was told Musee Kiema killed the woman. He proceeded to the scene. He found many members of the public. Police arrived and collected the body. Accused was arrested later as he had escaped.

19. **PW7 Corporal Geoffrey Limo** got information from Assistant Chief PW6 of the murder and proceeded to the scene with other officers. They found body at the scene. He observed 2 stab wounds on the body. Photographs were taken. They collected the body and took it to the mortuary. On 23/2/2015 the accused surrendered himself to the police.

20. He said he killed Faith Nzomo. He volunteered to show police where he hid the murder weapons. The 2 arrows which were recovered and taken to the Government Chemist as they were blood stained. The accused was later charged with this offence.

21. **PW8** produced postmortem report by consent of both sides. The prosecution closed their case and accused was found to have a case to answer.

22. He gave unsworn evidence and called no witness. He denied killing but said he was told by his wife the deceased was attacked and killed by people. He was arrested later and charged with current offence.

DUTY OF THE TRIAL COURT

23. The court's duty is to scrutinize the evidence tendered to establish whether the prosecution's case was proved beyond reasonable doubt.

24. The singular issue is that; ***whether the prosecution proved ingredients of murder beyond reasonable doubt?***

25. The ingredients of murder are that: the fact of occurrence of death has to be established. The cause of death must be established to be an illegal act by the accused; and finally the malice aforethought must be established.

26. See **Section 203 of the Penal Code** provides: -

27. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

28. Section 204 provide that:-

“Any person convicted of murder shall be sentenced to death.”

29. Section 206 on Malice aforethought states: -

“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.”

30. In the case of **ROBA GALMA WARIO v 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.”

31. Malice aforethought was defined in the following cases;

32. (a) **NZUKI VS REPUBLIC [1993] KLR 171** where 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. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused 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.

33. (b) 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.**, while considering what constitutes malice aforethought observed as follows:

“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.”

34. The evidence on record especially of pw1, and pw2 saw the accused pierce deceased with 2 arrows and then he escaped. She died on the spot. The postmortem report produced by pw8 confirmed the death was caused by the injuries inflicted by the piercing with the arrows. The defence does not contest the fact that the deceased died.

35. As to whether the death was caused by the unlawful act were committed by the accused, pw1 and 2 witnessed the quarrel between accused and deceased before the accused pierced the deceased with 2 arrows in their presence. The accused was alleging that the deceased had insulted him and the deceased was disputing it.

36. The accused defence is that the deceased was killed by other people. Of course, that is mere denial. The PW1 was accused father and it was not shown why he would lie against his son and so is the pw2 a neighbor who was an eye witness. No grudge was demonstrated as against accused nor reason to lie to court on oath.

37. Thus, the court holds that, the unlawful act of piercing the deceased with the arrows perpetrated by the accused caused the death of the deceased.

38. As to whether there was malice aforethought in causing the death of the deceased, the court observes that, the piercing of the deceased with 2 arrows at the lower part of the chest then pulling them out was so brutal, vicious and very painful and caused death within a short span of time at the scene of crime. The injuries inflicted were grievous harm.

39. Pw 1 tried to stop the accused from inflicting the injuries but in vain. The accused failed to justify the act by either self defence or provocation. He merely denied the killing her and alleged that she was killed by other people without giving any details.

40. The court finds that the death was caused with malice aforethought, thus the prosecution has proved its case beyond reasonable doubt and thus accused is found guilty and convicted of offence of murder.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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JUDGE

C. KARIUKI