



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 29 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**MARTIN KIRORA MURIUNGI.....ACCUSED**

**JUDGMENT**

**Murder**

1. The accused person, namely **Martin Kirora Muriungi** was charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on the 1<sup>st</sup> April 2014 at Ndamere location in South Imenti District within Meru County murdered **Meshack Muriungi**.

**Elements of Murder.**

2. According to section 203 of the Penal Code: -

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

3. Thus, to secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following;

**1. The death of the deceased and the cause of death;**

**2. That the accused caused the unlawful act or omission which caused the death; and**

**3. That the accused had malice aforethought as defined under section 206 of the Penal Code.**

**The death of the deceased and cause of death**

4. **Pw3 Dr. Simon Munyoki** produced the post-mortem report dated 9/4/2014 on examination carried out by **Dr. Kihamba** on the body of the deceased as **Pexh1**. He testified that he is familiar with the handwriting of Dr. Kihamba having worked with him at Meru Level 5 hospital. From the report, the deceased had 3 deep cut wounds on the right parietal region with skull fractures. One cut wound on vertex region with fracture of skull. There was bleeding in the brain. According to the report, the doctor formed the opinion that the cause of death was severe head injury due to sharp trauma (cut wounds). This medical evidence proves beyond doubt the death and the cause of death of the deceased.

**Who caused the unlawful act which caused the death?**

5. **PW1 BENSON KARANI**, a son to the deceased and brother to the accused person testified that he was at home sleeping when at around 10:00 p.m. the accused person came by and borrowed a newspaper. That in the morning he woke up and left for work only to be called back and informed that her father (the deceased herein) had been found dead.

6. It was his testimony that he went back and found that his father had been cut on the head and legs. He, however, did not see the murder weapon. He told the court that the accused person never informed him the purpose of the newspaper he had borrowed. That the accused person and the deceased had a cordial relation and on the material day there was no commotion.

7. It was his testimony that when he was recording his statement he only gave particulars that are on the first part. He denied recording the last part of the paragraph and stated that it was recorded by the police in order to jail the accused person.

8. Pw1 declared to be a hostile witness and was cross-examined by the prosecution under section 153 and 154 of the Evidence Act. He denied that they had sat down as a family to assist their brother. He claimed to being illiterate and stated that the police officer recording his statement never read it back to him. He however confirmed that he signed in every page of his statement. He also denied hearing the accused person arguing with the deceased on the material date.

**9. PW2 C.I. PETER OKELO** testified that on the material date he received a call from the area chief Ndamene location informing him of the demise of the deceased herein. He went to the scene together with P.C. Ibrahim Kithinji and PC Elias Mwnaiki and found the body of the deceased outside the main house with injuries on the head. The body was covered with blood. That the compound had three houses, the house of the deceased which was the focal point, completed house belonging to Pw1 about 15 metres apart and an incomplete house belonging to the accused 10 metres apart.

10. It was his opinion that one would hear whatever was happening in the compound from any of the houses including that of Pw1. He stated that he interviewed the Area chief, members of the public as well as Pw1. That he recorded the evidence of Pw1 on 4/5/2014 at 2:30 pm who informed him that it is the accused who had killed the deceased. That he stated to him that it was the accused who was outside complaining of mistreatment by his father. According to him PW1 stated that the accused had requested an old newspaper to wrap tobacco but Pw1 refused to open his door.

11. That he cautions a witness that he must give the truth and any falsehoods may be liable to prosecution. That in this case he had explained to Pw1 in both Kiswahili and English and given him a chance for clarification, after recording the statement he read it back to him before signing.

12. He told the court that Pw1 had equally informed him that the accused person had sworn to kill his father and they should arrange for a funeral.

13. In cross-examination he admitted that he did not capture the fact the Pw1 claimed that the accused was complaining about mistreatment by his father, the deceased herein. He confirmed that Pw1 did not tell him where the accused person was on the material night. That when Pw1 told him the accused person had been killed by the deceased he was not expressing an opinion. That on the material night only three people were present, the deceased, Pw1 and the accused. That the character of the accused (running away after the death) was also an indication of guilt. He was arrested by the assistant chief one month later (in May) at Imenti Central. His home was South Imenti.

**14. Dw1, the accused person** testified that on the night of 1/4/2014 he arrived home at 7:00 p.m. and met his brothers and others. He took a bath and slept. That, the next day, he woke up and left for work only to be called by his cousin Carolyne Kaimenyi and informed of the demise of his father. That he went back home where he met his brother, Pw1 and other members of the public. The deceased was lying near his house dead, with a cut on his head. The police took the body in his presence and Pw1. That they buried the deceased one week later. He was later on arrested by the Assistant Chief two weeks after the burial of the deceased.

15. He denied quarrelling with the deceased and/or killing him. In cross- examination he told the court that he had borrowed a newspaper from Pw1 but Pw1 had informed him that he was ill. That he had also attended to burial of the deceased. He denied escaping as had been alleged.

16. I have considered the evidence on record and the submissions made by the accused person. Now that PW1 has recanted or disowned his statement, the prosecution's case is left solely upon circumstantial evidence narrated by PW2. On circumstantial evidence, it will profit this court to cite **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the Court of Appeal that:

**“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.”**

17. The prosecution's case rested on the evidence of Pw1 but as I have stated, he recanted or disowned his statement. The prosecution during cross-examination of PW1 put to him that they sat down as a family and agreed to assist the accused get off the hook. This is sad and if that be the case, who shall stand for the deceased if family members could pervert justice in that manner? The prosecution as a defender of public interest should have caused urgent investigation into the allegation of perversion of justice. I am not aware of any efforts towards that end. In this case, as a Christian man, I can only think of eternal justice for the deceased. I leave these matters to the conscience of PW1 and the accused.

18. Be that as it may, Pw2's testimony was to the effect that it was only the accused person, Pw1 and the deceased who in the compound on the night of 1/4/2014. He however did not lead evidence that placed the accused at the centre of this incident.

19. I have taken time to read the statement that Pw2 sought to rely on to inform the charges against the accused person herein. The statement, if it was made by Pw1, merely expresses an opinion and does not bring out cogent evidence to show that the deceased met his demise through the unlawful act of the accused. In this shortage, the defence by the accused becomes quite formidable. The prosecution's inference of guilt from the fact that the accused escaped after the commission of the crime is not founded on solid evidence to support such inference. The accused refuted this assertion and claimed to even have been present on the next day after the demise of the deceased and during the burial of the deceased. This defence was not dislodged by the prosecution. Accordingly, the prosecution did not establish beyond reasonable doubt that the accused person caused the unlawful act which caused the death of the deceased.

## Malice aforethought?

20. Malice aforethought is the mental element or *mens rea* of the offence; ordinarily, it takes the form of an intention to unlawfully kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is implied malice. Section 206 of the Penal Code Provides:

**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 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.**

21. Having come to the conclusion that the prosecution had failed to prove beyond reasonable doubt that the accused person had committed the unlawful act which caused the death of the deceased, it is inconceivable to find malice aforethought in the commission of the crime. Pw1 stated that the accused person had a cordial relationship with the deceased. None of the prosecution witnesses led evidence to show or upon which malice aforethought may be implied.

22. Consequently, I find **Martin Kirora Mriungi** is not guilty of the murder of **Meshack Muriungi**. He is accordingly acquitted under **section 322(1) of the Criminal Procedure Code**. He shall be set free forthwith unless otherwise lawfully held in custody. Orders accordingly.

**Dated, signed and delivered this 7<sup>th</sup> day May 2020**

**F. GIKONYO**

**JUDGE**

**Representation: -**

**1. Igweta Murithi & Co. Advocates for the Accused person,**

**2. Director of Public Prosecution for the state**