



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CRIMINAL CASE NO. 22 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KIYACI NGUNA.....1<sup>ST</sup> ACCUSED

DAVID NJERU KIYACI.....2<sup>ND</sup> ACCUSED

MUCOKA KIYACI.....3<sup>RD</sup> ACCUSED

ALEX MUCOMBA KIYACI...4<sup>TH</sup> ACCUSED

#### J U D G M E N T

1. **Kiyaci Nguna, David Njeru Kiyaci, Mucoka Kiyaci and Alex Muomba Kiyaci** herein after the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused person respectively, are jointly charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya**. Particulars of the offence are that on the **26<sup>th</sup> day of July, 2010** at about **8.00 a.m.** at **Gatoroni Village** in **Mumoni District** within the **Eastern Province** jointly murdered **Julius Murugu Nthendu** (Deceased).

2. Facts of the case are that on the **26<sup>th</sup> day of July, 2010** the Deceased and his family members were at home when they were attacked by persons identified as the Accused persons. In the course of what transpired the deceased was fatally wounded. He died thereafter.

3. To prove the case the prosecution called seven (7) witnesses.

4. PW1, **Elizabeth Kawira** was the wife of the Deceased. She testified that when they were attacked by the Accused persons it was at **7.00 a.m.** therefore she did identify them. The Accused persons, their neighbours, threw stones at her, her, **Gacoe, Murugu** (Deceased) and **Kithuka**. They entered the house in an endeavour to hide but the Accused damaged the door to the house and set it ablaze. They ran out of the house with the Accused persons in pursuit while armed with weapons. The Deceased fell down and the 2<sup>nd</sup> Accused cut him on the side of the abdomen and neck.

5. PW3, **Gacoe Mugao** a sister of the Deceased was at their home on the fateful morning. She narrated how the Accused were armed with bows and arrows and a panga and how they also pelted stones at them. She confirmed in material particulars what was stated by PW1. She ran out of the house that was set ablaze and witnessed when the Accused persons cut the deceased. According to her each one of them used the weapons they had to assault the Deceased.

6. PW3, **Mary Muthoni Katoloni** went to the home of the Deceased on hearing screams. She found the Accused persons at the scene and heard the 1<sup>st</sup> Accused telling the 3<sup>rd</sup> Accused to get fire. The 3<sup>rd</sup> accused complied and they set the grass thatched house of the Deceased ablaze. And when the Deceased, his wife and sister ran out, the Accused chased after the Deceased who fell next to where she stood. The 2<sup>nd</sup> Accused cut him with a panga and after he was overwhelmed the 1<sup>st</sup> Accused hit him with a stone.

7. PW5, **Kithuka Alex Mugao** who was at the home of the Deceased saw the Accused set the house ablaze and the 2<sup>nd</sup> Accused cutting the deceased prior to being joined by the rest who also assaulted him.

8. By the time the police reached the home of the Deceased per the testimony of PW7 **No. 91081 PC Dennis Wafula** the body lay a few meters away from the home with several visible injuries. Ultimately a post-mortem was conducted on the body by PW6, **Dr. Balango Aron**.

9. When put on their defence the 1<sup>st</sup> Accused who testified under oath stated that he was arrested following allegations that he had killed the Deceased. He denied having caused his death. He however noted that he had a land dispute with the Deceased.

10. The 2<sup>nd</sup> Accused stated that it was alleged that they had burnt the Deceased's house and killed him as they were his neighbours and that the Deceased was claiming ownership of their land.

11. The 3<sup>rd</sup> Accused stated that they were arrested following allegations that they had killed their neighbour who had a land dispute with them.

12. The 4<sup>th</sup> Accused also alluded to having been arrested for no apparent reason following the death of the Deceased.

13. This being a case of murder, the prosecution was duty bound to prove the:

- i. The fact of death;
- ii. The cause of death;
- iii. That the death was as a result of an unlawful act or omission perpetrated by the Accused;
- iv. The act/omission was perpetrated with malice aforethought.

14. By the time the police moved to the scene of the incident the Deceased's body was motionless. PW6 conducted an autopsy on the body hence confirming the death that resulted. This was evidence of proof of death.

15. Per the examination conducted by **Dr. Balongo**, PW6, the Deceased sustained deep cut wounds, two on the posterior of the neck, reaching the trachea at the C3 and C4 vertebrae. There was a deep cut wound on the left iliac fossa that was 5cm deep. There was a small cut wound at the level of L2 – L5 on the spinal column. The head had a cut wound at the occipital region, which however, did not extend to the skull. The neck had a deep cut wound at the posterior region. The spinal cord was severed at the level of C3, C4 vertebrae. As a result he formed the opinion that the cause of death was cardiopulmonary arrest secondary to exsanguination due to deep cut wounds on the neck.

16. There is direct evidence that the Accused persons did occasion the severe injuries that the Deceased sustained. The deep cut wounds that were sustained by the Deceased were consistent to sharp weapons stated to have been carried by the Accused persons. The 2<sup>nd</sup> Accused in particular was stated to have cut the Deceased on the neck before being joined by his Co-Accused who also hit him generally all over the body, acts that resulted into injuries that he sustained. In their defence the Accused persons denied having killed the Deceased but their denial was dislodged by evidence adduced by eye witnesses. Other than the relatives of the Deceased who were at home whose lives were at stake just like the Deceased, there were PW4 and PW5 their neighbours who witnessed the heinous act.

17. Total loss of blood from the body resulted from the deep cut wound on the neck. The injury was stated to have been inflicted by the 2<sup>nd</sup> Accused. However he was not alone. **Section 21** of the **Penal Code** provides thus:-

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

In the case of **Njoroge v Republic [1983] KLR 197** the court of Appeal stated that;-

*“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”*

18. It is evident that the Accused persons went to the home of the Deceased armed with weapons and upon arrival the 1<sup>st</sup> Accused, a father to his Co-Accused reminded them of what they had planned. His statement prompted them to act. It is evident that all the Accused are criminally culpable for the act that resulted into the death of the Deceased as they went there with a common intention which was translated into action that resulted into death.

19. This therefore brings in the issue whether they acted with malice aforethought.

20. Malice aforethought is defined by **Section 206** of the **Criminal Procedure Code** 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.”

21. In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR** it was stated thus:

*“What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused’s state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea—“the act itself does not constitute guilt unless done with a guilty mind,” encapsulates this principle.”*

22. It was stated that upon arrival the 1<sup>st</sup> Accused made utterances that established their premeditated plan. He urged his sons to act as planned and sent one of them to get fire. They set ablaze the house of the Deceased and when he attempted to escape they pursued him and killed him.

23. In their defence they stated that they had a land dispute with the Deceased. According to them he occupied their land. Although on the 13<sup>th</sup> day of **January, 2013** the Accused persons had offered to plead to a lesser charge of manslaughter which was not acceptable to the State the Accused failed to suggest in their defence what could have prompted them to act as they did per the direct evidence adduced by Prosecution witnesses. Therefore even if they would be believed that there was a land dispute between them the unlawful act they perpetrated proved their intention to cause death that they accomplished. In the premises they acted with malice aforethought.

24. Consequently I find each Accused person guilty of murder and convict them accordingly.

25. It is so ordered.

**Dated, Signed and Delivered at Kitui this 9<sup>th</sup> day of January, 2019**

**L. N. MUTENDE**

**JUDGE**