



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 47 OF 2008**

**REPUBLIC**

**VERSUS**

**DISHON MACHARIA NYAWIRA.....ACCUSED**

**JUDGMENT**

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap.63. According to the information, on the 19<sup>th</sup> day of July 2008 at Jambo estate in Nyeri North district within central province he murdered Selipha Nyawira Macharia (the deceased). The deceased happens to have been his mother.

The accused denied the offence and duly entered a plea of not guilty.

The main prosecution witness in the case against him was his sister, Gladys Njeri Nyawira (PW1); on the 11<sup>th</sup> day of July 2008, at about 7.00 PM she was in the kitchen when the deceased knocked at the front gate for her to open. The deceased entered the compound as soon as the gate was opened; she immediately noticed that some timber, which the witness described as connecting their mother's house and that of the accused was missing. She therefore proceeded to the accused's house as the witness apparently went back to the kitchen.

While in the kitchen she could hear the conversation between the deceased and the accused; the deceased enquired about the missing timber; the accused is said to have admitted having taken it. The deceased angrily demanded to know why he had taken the timber but the accused did not offer any explanation. What followed was the deceased's scream, shouting in Kikuyu language that, "he has killed me". Nyawira rushed to the accused's house and found the deceased lying down, groaning in pain. She screamed as she attempted to lift her mother but the accused, who was apparently standing by and armed with a panga, ordered her to stop screaming. When she persisted, he also turned against her and assaulted her with the panga; in the process, she sustained cut wounds all over her body. She crawled and hid in a different room and she had to scream to be noticed when neighbours came to their rescue. They took them to the hospital where the deceased subsequently succumbed to her injuries.

One of the neighbours who responded to her screams and came to the house was Maina Mwangi Muriuki (PW2), the deceased's immediate neighbour. According to him, he heard somebody scream and say that "Macharia has killed us". As he and other neighbours prepared to come to the deceased's compound, the accused went towards them, holding a bag in which he had kept the panga. He handed over it over to Mwangi without any struggle. The panga is said to have been bloodstained. He together with other neighbours rushed to the accused's house and found the deceased lying on the floor, in a pool of blood. Mwangi drove the deceased and Nyawira (PW1) to the police station and thereafter to Karatina district hospital. He handed the panga and a sweater to the police.

Meanwhile, they left the accused under the guard of other neighbours one of whom was Jacob Gilbert Muriuki (PW3). Muriuki had found the accused being held by two people just outside the deceased's gate when he arrived at the scene. He helped Mwangi (PW2) carry the deceased to the latter's car; he is also the one who noticed that Nyawira had also sustained multiple injuries all over her body and was hiding; he assisted her walk to the car.

It was his evidence that members of the public were baying for the accused's blood and threatened to lynch him but he restrained them. He testified that the accused was tied with ropes and handed over to the police who were then manning a road block

Both Nyawira and Mwangi testified further that the deceased and the accused had a troubled relationship; according to Nyawira, although the accused had killed their mother, the latter helped him a lot and would bail him out every time he got into trouble with the police and was put in custody. On his part, Muriuki, being a pastor, had attempted to counsel the accused out of his errant conduct.

Police constable **Jared Mosongo Olucho (PW5)** together with his colleague Police Constable Mwaniki both attached to Karatina Police station were manning a road block on 19<sup>th</sup> July, 2008 when Mwangi arrived in his vehicle with the deceased and Nyawira. They left for the scene after Mwangi told them what had transpired at the deceased's home. While on their way, they met a group of people, about fifteen of them, frogmarching and beating the accused. They rearrested him and held him at the road block before he was picked by Police Constable

Masita and taken to Karatina police station. Constable Masita later investigated the case but he died before he could testify. Constable Olucho produced his statement and the murder weapon, amongst other items that were collected in the course of investigations.

The post-mortem on the deceased's body was performed by Dr Kimathi Paul (PW6) who determined that the deceased had sustained multiple skull fractures generally on the head as a result of which she suffered of what he described as 'intra and extracranial haemorrhage'. Some of her fingers on the left hand were amputated; the left forearm itself had a compound fracture. In the doctor's opinion, the cause of death was what he described as 'cardiopulmonary arrest due to severe head injury and multiple skull fractures secondary to assault'. He also opined that the injuries may have been caused by a sharp object and the nature of some of those injuries showed that the deceased attempted to protect herself.

In his defence on oath, the accused testified that a neighbour called him from where he was working in Kinamba, in Laikipia County and told him that his mother had been injured by iron sheets in a hardware at Karatina. While on his way to establish what happened to his mother, he was arrested by the police. He testified that it would take three to three and half hours to reach home from where he was working. He admitted knowing all the civilian prosecution witnesses but denied their evidence.

Section 203 of the Penal Code defines the offence of murder; section 204, on the other hand, prescribes the sentence upon conviction for this offence; however, this latter section has since been invalidated and declared to be inconsistent with the Constitution to the extent that it prescribes death as a mandatory sentence (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Turning back to **Section 203** of the Code, it reads as follows:

**203. Murder**

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

What this section entails is that in order to convict for a charge of murder, the trial court must be satisfied that it has been proved, beyond all reasonable doubt, that; first, a person has died; secondly, the death was occasioned by an act or omission of another person; thirdly, that the act or omission causing death was unlawful; and, finally, that the person causing death of another had malice aforethought.

If I consider the evidence before me from the perspective of this provision, I have no hesitation in reaching the conclusion that the fact of death was proved to the required standard. The deceased's children, Nyawira (PW1) and the accused himself were in agreement that the deceased was their mother who was alive and well until the 19<sup>th</sup> day of July, 2008 when she succumbed to the injuries she sustained on 11<sup>th</sup> July, 2008. Her body was subsequently identified at the mortuary by her brother Sospeter Mwangi Macharia (PW4) on 31<sup>st</sup> July, 2008 during the post-mortem exercise. Dr Kimathi (PW6) not only certified the deceased to have died and signed a certificate to that effect but he also made his opinion known on the cause of her death; his report in this regard was admitted in evidence.

With this evidence I am satisfied that the first element of the death of the deceased has been proved beyond all reasonable doubt.

As far as the second element is concerned, the evidence of the deceased's daughter is pivotal; she was at the scene of crime; she opened the gate for the deceased when she returned home; she also saw her walk towards the accused's house demanding to know where the accused had taken her timber; while in the kitchen, she heard the heated altercation between the deceased and the accused, before she finally heard the deceased scream and say that the accused was killing her. She rushed to the house and found the deceased lying unconscious on the floor, in the presence of the accused who was armed with a panga. She screamed for help but that only infuriated the accused further. He turned on her and cut her as well. She had to seek refuge elsewhere to save herself.

Her evidence was corroborated by the deceased's immediate neighbours, Maina Mwangi Muriuki (PW2) and Jacob Gilbert Muriuki (PW3) who were amongst the neighbours who responded to the deceased's and Nyawira's screams and rushed to their compound. Mwangi (PW2) encountered the accused at the gate when he approached them; he was still armed, but handed over the panga to him. Muriuki (2) found the accused subdued by two people; he helped take the deceased and her daughter to the car.

This evidence was not controverted at all; it leaves no doubt that the accused was the perpetrator of the injuries from which the deceased later succumbed. The panga was certainly the murder weapon because according to Dr Kimathi the injuries the deceased sustained were caused by what he described as a 'sharp object'. This description is consistent with the characteristics of a panga of the sort that the accused was armed with and which was exhibited in court.

The accused's defence that he was not at the scene but at Kinamba in Laikipia where, according to his own evidence, it would take him three to three and a half hours to reach home is hollow, to say the least. It is hollow because the neighbours went to the deceased's home as soon as she was attacked and found the accused, together with his injured mother and sister at the home. If the accused travelled because he had allegedly been informed that his mother had been injured, as he suggested in his evidence, he could not have arrived at the scene so soon after the incident. His evidence that his mother was injured in hardware was obviously inconsistent with the established facts.

In any event, as much as the accused made vain attempts to put forth what would be an alibi defence, the submissions by his own counsel put him at the locus in quo. This is because, when called upon to submit whether the accused had a case to answer, his learned counsel was categorical that indeed the accused assaulted his mother but that he was provoked in doing so; in these circumstances, so counsel submitted, the accused should have been charged with manslaughter rather murder.

The inescapable conclusion that one is bound reach from this evidence is that the accused was not only at the scene of crime, at the material time, but he also inflicted the fatal injuries from which deceased died.

Were the accused's acts lawful? certainly not. When I consider the evidence in its entirety, I do not find any justifiable reason why the accused should have literary hacked his mother to death. Contrary to submissions by his learned counsel, there was no evidence that the accused was provoked into committing the heinous crime. The deceased was not armed and therefore it cannot even be argued that the accused was defending himself; if anything, it is the deceased who, going by the evidence of Dr Kimathi, vainly attempted to defend herself with her bare hands, in the face of the vicious attack. According this witness, the amputation of some of her fingers on the left forearm and the fracture of this arm showed that the deceased may have tried to parry away the fatal blows.

The final question is whether the accused had malice aforethought; this is the mental element for the offence of murder. It can also be said to be the accused person's intent to commit the murder. Ordinarily, it is either express or implied. (See **Woolmington v DPP [1935] AC 462**). It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**). Both the forms of malice are captured in section 206 of the Penal Code; this part of the law reads as follows:

**206. Malice aforethought**

**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.**

According to Dr Kimathi, the deceased was subjected to multiple blows on the head as a result of which she suffered both internal and external haemorrhage; she eventually died because of cardiopulmonary arrest due to severe head injury and multiple skull fractures secondary to assault.

The accused inflicted these blows merely because the deceased had confronted him over the disappearance of her timber; this fact, combined with the nature and the extent the injuries the accused inflicted on the deceased, are a demonstration enough that the accused deliberately set out to kill the deceased or, at the very least, had an intention to do her grievous harm. Either way, I am satisfied that the prosecution established, beyond all reasonable doubt, that the accused's actions were backed by malice aforethought and thereby completing all the necessary ingredients for the offence of murder.

Inevitably, I have to come to the conclusion that the accused is guilty of the offence of murder contrary to section 203 of the Penal Code. He is convicted accordingly.

**Dated, signed and delivered in open court this 8<sup>th</sup> March, 2019**

**Ngaah Jairus**

**JUDGE**