



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 34 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

JULIUS NKUNJAACCUSED

JUDGEMENT

1. **JULIUS NKUNJA** (“the accused”) has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 20th day of February 2016 at around 2. 00PM at Kiinjo Sub-location, Katheri East Location in Imenti Central District within Meru County murdered **STEPHEN MBAYA MWIREBUA** (“the deceased”). The prosecution called seven witnesses to establish its case.

2. **PW1 Ayub Mwirebua** father of the deceased recalled that on 20th February 2016 he heard noises at the home of the deceased where he saw him chase the accused from his home. The accused went away to the road and came back to his compound as well as the deceased and started fighting. The accused took the fork *jembe* that was outside and hit the deceased on the head with it. He then dropped the *jembe* and ran away. His wife who was in the house came out when she heard noises. She took a scarf and used it on the deceased’s head as he was bleeding profusely. The deceased’s wife came and took him to the hospital where he was treated and discharged. Later at about 8.00PM he was taken back to hospital but later died.

3. **PW2 Frida Kiende** wife to the deceased told the court that on the material day at about 2.00PM the accused who used to construct a house for them came to their home. He had come for his balance of Kshs. 2,000/- of which the deceased told him that he would pay once he had finished constructing the house. She left them talking and went to fetch water.

4. On her way back home she met her husband going to **PW1’s** home to tell him to tell the accused to finish the work before he could pay the balance. They then saw the accused enter **PW1’s** home from another direction. The deceased proceeded to **PW1’s** home as she continued standing there. She saw her husband push the accused and telling him to go away. The accused then took the fork *jembe* that was left in the open and hit the deceased on the head. He fell down and her mother- in – law took a scarf and placed it on the deceased’s head. She immediately ran to the scene. They raised an alarm and a neighbor came and assisted them to take the deceased to hospital where he was treated and discharged.

5. The following day at 9.00PM her husband fell and started foaming in the mouth. They took him back to Githongo hospital. However, they were referred to Meru General Hospital but went to Consolata Mission Hospital. An x-ray was needed but the deceased died before then at 7. 30 AM. She went to Githongo Police Station and reported the matter.

6. **PW3 Silas Muthamia** stated that the deceased was his nephew. He was not present when the incident happened but he identified the body before post-mortem was done.

7. **PW4 Martha Kaimura** mother of the deceased told the court that on 20th February 2016 the accused and deceased came to their home. When the deceased was pushing the accused and telling him to leave the latter took the fork *jembe* she had earlier been using to plough and had left in the open and stabbed him on the head. The deceased fell on the ground and the accused ran away. She used her head scarf to cover the wound. The deceased’s wife came screaming and took him to hospital where he was treated and discharged. He was later taken back to the hospital where he died.

8. **PW5 Joseph Mawangu Mwirebua** stated that on the material day between 7.00 PM and 8.00 PM he was in the bathroom when he heard screams which were coming from **PW1’s** home. When his wife went to see what had happened she told him that it was his brother who had been hit with a jembe. He went and found him down and bleeding from his head, the *jembe* was at the scene and his mother was trying to stop the bleeding. They took the deceased to hospital but the following day at 9.00 PM they took the deceased back. The next morning the deceased died. He learnt later that the accused and deceased had a dispute over money.

9. **PW6 No. 67988 P. C Daniel Chumo** testified on behalf of No. 92210 P. C Geoffrey Cheruyot who was the initial investigating officer.

That on 20th February 2016 at around 3.40 PM a complainant, the deceased, reported at Githongo police post that at around 2.00PM that a confrontation ensued between him and the accused who then hit him on the head with a fork *jembe*. The accused wanted to get paid for the balance of Kshs. 2,000/- which was of the construction of the house of the deceased. The deceased was referred to Githongo hospital for treatment.

10. On 23rd February 2016 Silas Muthamia, **PW3**, made a report at the police post that the deceased had died on 22nd February 2016 prior to going for treatment. P. C Cheruyot and IP Ogeto visited the scene and found a fork *jembe* that was used. They went to the house of the accused but they found that he had fled. The accused was a mason and it was not established whether the accused had a contract in Isiolo. He produced the statement of the previous IO which was handed over to him (**Exh 3**) and the fork *jembe* (**Exh 1**).

11. **PW7 Dr. Maria Muthoni Mwangi** produced the post mortem report which was carried out by Dr. Brian Bett on 25th February 2016. The body had a cut wound on the frontal side of the head and also a cut wound to the posterior head on left side. There were also bruises on the left arm. The wounds on the head extended into the intra cerebral area of the head. There was bleeding into the substance of the brain. It was concluded that the cause of death was excessive haemorrhage.

12. When placed on his defence, the accused gave a sworn testimony. **DW1 Julius Nkunja**, the accused, told the court that he was a mason constructing a house for the deceased between November and December 2015. He did not complete the work but they had agreed that he was to put up the wall and roof as well as iron sheets of which he finished.

13. That on 19th February 2016 his colleague came from Isiolo and had some celebrations on Saturday 20th February 2016. They went to Gitebe Market where they met Gitonga, the deceased's brother who told him that Mbaya had received last installment of purchase price for land he had sold. Since it was late he decided to go to the deceased's home the next day for his money as the deceased owed him Kshs. 54,000/-.

14. On Saturday he proceeded to the deceased's home and the wife of the deceased confirmed that he had the money. While still there a teacher called Marangu called him and he had to leave but told her that she would be back. Before getting to Marangu's home he met the deceased who was drunk along the road which was about 10.00AM. He told him that his wife had the money and should have given him but he told him that he would come back.

15. After meeting with the teacher he went back to the deceased's home. When he got there he found the deceased's wife and sister who left the home once he had entered. When the deceased saw him sit he produced a sharp panga ever before he had asked for the money. When he produced the panga and stood at the door he thought he was joking until he started beating him with the flat side of it but he cut him on the head. He managed to get out of the house but the deceased continued to pursue him. Charles Mburugu who owns a shop nearby heard the commotion and came and restrained the deceased.

16. He passed by the deceased's father's home which is 50 Meters away from the deceased. Suddenly the deceased emerged from the maize plantation still armed with the panga and running towards him. The women he was with ran away that is Mama Tabitha, Catherine, the deceased's wife and sister. As well as the deceased's father and mother. When he turned to run away he saw a *jembe* which he picked from the ground. The deceased continued trying to cut him and that is when the *jembe* fell on him and cut him on the head. He fell down and he ran away. If he had not shielded himself the deceased would have cut him.

17. From the evidence on record for the prosecution and the defence as well as submissions by the defence counsel the issues for determination as defined under section 203 of the Penal Code as well in the case of Republic vs Mohammed Dadi Kokane & 7 others [2014]eKLR are :-

a) ***The fact of the death of the deceased.***

b) ***The cause of such death.***

c) ***Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***

d) ***Proof that the said unlawful act or omission was committed with malice aforethought."***

18. With regard to the first and second issue, on the fact and cause of death of the deceased from the witnesses as well as the accused is that he hit the deceased on the head with a fork *jembe*. Before post – mortem was done the body was identified by Frida Kiende **PW2** and Silas Muthamia, **PW3**. According to the post-mortem report which was produced by **PW7** is that the cause of death was excessive haemorrhage secondary to stab wound to the head. Consequently, the fact and cause of death of the deceased has been proved.

19. On the third issue, it must be proved that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; that is *actus reus*. In this regard, the prosecution must adduce evidence to prove that it is the unlawful act or omission of the accused that resulted in the death of the deceased.

20. According **PW1** he heard noise at his son's home and saw his son the deceased herein telling the accused to leave his home. That the accused went away then came to his compound and Stephen also came to his compound and they started fighting. **PW1** said there was a fork *jembe* outside the house which Nkunja picked and used it to hit Stephen on the head. He said the fork *jembe* was lying under a tree and it belonged to his wife. **PW1** admits that Stephen was drunk when he confronted the accused person. He also confirms that this incident took place at 2 PM

21. **PW2** confirms that she saw the deceased pushing the accused person away when the accused went to his father's home, and that she saw

the accused pick a fork jembe that was lying within the compound and used it to hit the deceased.

22. **PW4** the mother of the deceased also testified that she witnessed the accused hit the deceased with a fork *jembe* on his head. She also said that she saw the deceased chasing the accused from his home and that they were pushing each other. That the accused went to the road and used another route to go to her home, that when the deceased saw the accused had gone to his mother's home he came to the home and asked what the accused wanted and he had already told him to go away. Although **PW4** claimed that she tried to separate the two, her husband **PW1** said that she inside the house when the accused person hit the deceased on the head and that it was a noise that attracted her from the house.

23. From the evidence of **PW1**, **PW2** and **PW4** it is not disputed that it was the action of the accused i.e picking a fork jembe and hitting the deceased on the head that led to the injuries that caused the death of the deceased. That action was unlawful and the accused does not dispute that he is the one who committed the offence. **PW6** stated that the deceased reported it himself at the Githongo Police Post that the accused had hit him on the head after an altercation.

24. Did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines malice aforethought as follows:

“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)”

25. Evidence of **PW1**, **PW2** and **PW4** confirms that it is the deceased who chased away the accused from his home by pushing him when he went to demand for balance of the labour charges that the deceased and **PW2** owed him. That when the accused went to **PW1** and **PW4**'s home again the deceased followed him and started fighting with him and questioning why he had gone there after he had told him to go away. The accused in his defence confirms that the deceased person confronted him while armed with a panga and in his defence he picked a fork jembe that was lying in the compound and used it to restrain the deceased from cutting him. In consideration that it is confirmed that the deceased is the one who confronted the accused person this court finds that his defence of self-defence was justified in the circumstances and he cannot be found to have had malice aforethought in the causation of offence of murder. This court finds that the offence proved by the prosecution is that of manslaughter for which the accused person is found guilty and is convicted.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 18TH DAY OF JULY 2019.

In the presence of :

C/A: Kinoti

Accused:- present in person

Mr Gitonga Advocate for the accused: No appearance – Mr Ashaba holding brief

Ms Mbithe for the State: Mr Chelule holding brief.

Mr Chelule Advocate

We don't have records for accused. He may be treated as 1st offender.

Order Mention 25.7.2019 for Mitigation. Accused remanded in custody.

HON A. ONG'INJO

JUDGE