



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 55 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

CHARLES MBATHA NTHIWA.....ACCUSED

JUDGEMENT

Introduction:

1. The accused, Charles Mbatha Nthiwa, is 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.
2. The particulars are that on 17th August 2012 at Kituluni Sub Location, Mbuvo Location, Kathonzweni District within Makueni County, the accused murdered Annah Mutindi Kimanathi.
3. The prosecution called seven (7) witnesses in support of its case.

Prosecution's Case:

4. **PW1** was **Veronica Mwongeli Nthiwa**. She testified that she had travelled to Makueni on 14/08/2012 to visit her parents. That on 17/08/2012 she was in her mother's house, the deceased, who asked her for an axe to go collect firewood. That she then heard her mother screaming and on going outside, she found her dead. That she had heard Kimanathi screaming that someone was going to kill his wife. She ran towards the scream and saw Kimanathi trying to lift his wife who was already dead.
5. **PW1** was **Veronica Mwongeli Nthiwa**, she testified that on 17/08/2012 (material day), she was in her mother's house when the deceased arrived and borrowed an axe to collect firewood. She then heard her mother screaming that the deceased had killed herself. She had earlier heard Kimanathi screaming that a person was going to kill his wife and ran towards the farm where Kimanathi was. She saw him trying to lift his wife who was already dead.
6. She did not find Kimanathi struggling with the accused over the axe. She only found Charles's wife and Kimanathi who was bleeding from the side of the head. Kimanathi said he had been cut with an axe but did not see him being cut. Their neighbor, Michael Ndithya was also there. She went with Michael to Kilungu Police station where they recorded their statements. She did not get to know what killed the deceased and did not follow up.
7. On cross examination, she said that the accused is her brother. That after giving the deceased the axe, she did not see what happened next. That she heard her mother screaming that Ann had killed herself. That she did not see the deceased struggle with Annah but only saw them standing together.
8. In re-examination, she said that she didn't know why her mother said that Annah had killed herself.
9. At that juncture, the prosecution Counsel applied to re- open the examination in chief to enable the witness identify the axe. PW1 identified the axe and further stated that she did not find it at the scene where Annah died. On further cross-examination, she said that the axe did not have the writings it had in Court.
10. **PW2** was **Kimanathi Nthiwa**, the deceased's husband. He testified that on 17/08/2012, his wife woke up and went to fetch water for sale. She returned at 10.00am, prepared breakfast and proceeded to look for firewood in the bushes. He then heard his wife screaming and ran towards the direction of the screams. He found the accused holding his wife by the neck and beating her. He asked the accused to release her so that they could talk and agree.

11. The accused said that he would not allow anyone on his border and refused to let go of the deceased. PW2 held the accused by the neck who then released the deceased. The struggle took about 20 minutes. The accused's wife, Wavinya found them and asked PW2 to release the accused which he did. The accused ran, took the axe and cut the deceased on the face.
12. PW2 went to hold his wife but the accused turned on him and cut him on the forehead. He started bleeding and fell. PW2 was holding the axe and the accused started to drag him while on the ground. PW2 then stood up and let go of the axe. The accused ran away and went to the police.
13. Further, he testified that Michael Mwangeli and his sister Veronica Mwangeli witnessed the struggle. He identified the axe because it had a bladder at the blade. He spent one week at Makueni hospital. It was his further evidence that the accused was his twin brother. That they were not living in peace at home and at one point, he (accused) had bitten him on the neck causing him to be admitted in hospital. That his wife was at a neighbour's land but had used a path belonging to the deceased to get there.
14. On cross examination, he said that before 2012, the accused was living in Nairobi with his family. That in 2010 when the accused went home, there was a land dispute between him and the accused. That after the dispute, everyone was given their portion of land to live in. That there was a road to get to the neighbour's land but his wife used to pass through the accused's land.
15. That after hearing the screams, he went and found the accused beating the deceased with his hands-blows and slaps. That he persuaded the accused to stop for one hour. That people gathered after the accused had already cut the deceased. That his mother's house was nearby and she heard the screams. That while he was holding the accused, his wife stood by. That he did not see his wife getting the axe from his mother's house. That when he got to where his wife and the accused were, he did not see the axe. He denied that there was a plan between him and his wife to kill the accused.
16. That he was not aware that the accused had taken the axe from the deceased when she was trying to cut him and threw it away. That he held onto the axe after being cut to prevent the accused from cutting him again. That the accused was not charged in Court for cutting him with an axe. That when the accused bit him on the neck, he forgave him and did not take him to Court.
17. That the land they were fighting over belonged to their father and witnesses were Michael, his mother and his sister. That the axe belonged to his mother and the deceased was given the axe by his sister (PW1). That there was no difference between the axe he was shown in Court and the one he saw on the day of the attack.
18. In re-examination, he said that people used to pass through the accused's land as a short cut and that the deceased was cutting wood at a neighboring land. That he saw the axe when the accused was getting it from his wife. That his wife had picked the axe and stayed with it and upon the accused being released by PW2, he snatched the axe from the deceased, cut her and then cut PW2.
19. **PW3** was **Michael Ndithya Musangania**. He testified that on 17/08/2018, he was headed home from Kavumbu where he had gone to sell cotton. He heard screams from his neighbor's but before he could get to their gate, he saw the accused with an axe running. The accused said that the axe he was carrying had killed someone.
20. He proceeded to where the screams were and found PW2 crying and the deceased lying down. PW2 had been cut on the right side of the head. He went to the police station with PW1 and found that the accused had already arrived with the axe and had been put in the cell.
21. On cross examination, he said that the accused and PW2 were known to him because their father bought land when he (PW3) was already there. That when he met the accused on the way he said "*do you see this axe, I have killed*". He denied the contents of his statement and said that he did not write it even though it had his signature. That he neither knew nor saw the person who cut PW2 and the deceased.
22. **PW4** was **CPL Faith Modi Mutiso**. She testified that on 17/08/2012, she was on official duty at Mbuvo A.P camp. That the driver, APC Shadrack Kisandi received a call from a chief informing him that there had been an incidence at Kavumbu. That there was a murder scene and someone had also been assaulted by his brother. That PW2 was taken to the road and they escorted him to Makueni District hospital. That he never met the person who assaulted PW2 and was not involved in the investigations.
23. **PW5** was **CPL Alex Ogenda**. He testified that on 17/08/2012 at 1.00pm, he got a call from Joshua Wambua telling him that he was required at the post. Wambua informed him that he had arrested somebody who had gone to the post with an axe saying that he had killed someone. PW5 was shown the axe and he saw the accused in the cells. Together with PC Erastus Kituku, they boarded a *boda boda* and went to the scene where the body was. It was covered with a leso.
24. They removed the leso and viewed the body. It had a deep cut on the face. There was another person lying down beside the deceased. He also had a cut on the forehead. He was speaking in Kikamba which he (PW5) could not understand. They carried PW2 to the roadside and put him in the A.P vehicle. They went back to the scene to wait for the OCS Makueni who later arrived with CPL Langat and scenes of crime officer, Olayo.
25. Photographs were taken and the body was transported to Makueni hospital mortuary. He identified and explained the photos which were then marked MFI A-P. He also identified the axe (MFI2), the accused's clothing i.e long trouser (MFI3), white vest (MFI4) and blue shirt (MFI5) He also said that the accused was the one in the dock.
26. On cross examination, he said that he was not the investigating officer. That on 17/08/2012, he saw the accused in the cells at the post. That a report was made by Michael Nthiwa and the accused took himself to the police post. That he was shown the axe which had blood stains. That there were many people at the scene and it appeared that there had been a struggle. That the deceased's husband was also at the scene with injuries on the head. That nobody was charged for injuring him.

27. That the people at the scene wrote statements but he did not interview any of them. He was just told that the accused had killed the deceased. That he witnessed the taking of the photographs. That he talked to the accused while in the cells as he knew him. that there was a problem between the accused and the deceased's husband. That he did not know whether the accused had reported about being invaded.

28. That he knew the reportee (PW3) as he was a watchman in a nearby school but he didn't know the relationship between him and the accused. He was aware that the accused and deceased's husband are twin brothers.

29. **PW6** was **Lawrence Kinyua Muthuri**, the Government analyst who stated that he had worked as such for 9 years. He had a Kenya Police exhibit memo form which was received at the Government chemist on 23/08/2012.

30. He also had the analyst's report. He testified that on the same day, he received the following items from PC Joshua Wambua (PW7) of Makueni police station; blood sample indicated as of accused, axe wrapped with newspaper, black trouser, blue shirt and white vest in kaki envelopes indicated as of accused, blood sample indicated as of deceased's husband and blood sample indicated as of deceased.

31. That they were required to examine and determine the source of blood. That he did DNA profiling and there was a stable conclusion that the DNA profile generated from blood stains from the axe, the vest and shirt matched the DNA profile generated from blood sample of the deceased's husband.

32. That he wrote and signed the report on 07/06/2013. He produced the report as exhibit 6(a) and the exhibit memo form as 6(b).

33. On cross examination, he testified that if an axe cuts two people, in DNA profiling, the sample would be captured of one person. That they did the blood stains on the weapon and on the clothings, they picked various blood stains on the clothing parts.

34. That the blood on the axe, trouser, shirt and vest was that of the deceased's husband. That if there were blood stains of different people, the same would have been traced via profiling. That they report on profiles which they find even if they are many.

35. In re-examination, he stated that on the mentioned items, there was no other blood stains save for the deceased's husband.

36. **PW7** was **PC Joshua Wambua** the investigating officer. He testified that on 17/08/2012, he was on duty at the police station when accused arrived running and was holding an axe. The accused said that his brother (PW2) and the deceased wanted to cut him with the axe. Shortly thereafter, two people arrived and said that the accused had killed somebody. PW7 took the axe and put the accused in the cells.

37. He informed the OCS Makueni, the OCPD and booked the report in the OB. That later, the OCS in the company of CPL Njagi , CPL Langat and PC Olago arrived at the post after visiting the scene. They had the deceased's body. That PC Olago photographed the accused as well as his clothes. They then proceeded to Makueni with the deceased and accused. He identified the person in the dock as the one who had gone to the station carrying an axe.

38. He produced the axe (exh 2), the trouser (exh 3), the white vest (exh 4) and blue shirt (exh 5). He said they had blood stains. He also said that he had photographs of the items, accused and deceased. He produced them as exhibits 1(a-p). He also produced exh 1(q)-certificate of officer producing photographs.

39. Further, he testified that the post mortem was conducted on 21/08/2012 at Makueni District Hospital and the cause of death was indicated as '*head injuries caused by trauma*'. He produced the post mortem report as exhibit 7.

40. The prosecution case was closed at that juncture and the accused was placed on his defence. He elected to give a sworn statement and call 3 witnesses.

41. **DW1**, the accused testified that he worked as a guard with a security firm. He denied the charge and said that he did not kill willingly and that the deceased was his brother's wife. He said that on the material day, he was at home and had gone to arrange firewood that had been cut by his son and was drying.

42. A day before, his son had told him that PW2 had chased him from where he had cut firewood yet the land was his (DW2's). That there was dispute over ownership of that part. The deceased emerged from the bush and asked what he was doing there. She then told him "*I remove testicles therefore I can't fear you*". DW1 didn't run away but told her to leave his land.

43. The deceased raised the axe to cut him but he held it, threw it and kicked the wood she was having. His wife arrived and saw the deceased holding his collar. He told her to take the axe and leave but she didn't. The deceased was saying "*Charles ameleta shida*".

44. DW1's wife told the deceased to leave him but she didn't. PW2 hit him and a fight ensued. He threw the axe away; he was now down with his wife. Their mother arrived due to PW2's screams. PW2 asked the deceased where the axe was.

45. His wife was asking them to separate and their mother was telling them to stop fighting and agree. The deceased came with the axe as they rose up. DW1 and PW2 rushed for the axe and both held it to avoid being attacked with it. They struggled with it and when he pulled it from PW2, it cut the deceased on the head. He moved it towards PW2 and it also cut him.

46. He didn't go to see where the deceased had been injured but ran away and went to the police station with the axe. A police man, Wambua, who was privy to their land dispute, asked him whether they were still having the land dispute.

47. On his way to the police, he met PW3 and told him that PW2 and the deceased wanted to kill him. He did not know where the deceased got the axe. While at the police station, he heard that Ann had died and another had been injured. He said that he didn't do it intentionally and that the death was caused by the fight.

48. Further, he said that he didn't have a good relationship with his brother (PW2) but they have since reconciled and he even gave a goat and bull over the issue. That those at the scene were their wives, their mother, PW2 and him. He maintained that it was an accident.

49. On cross examination, he said that the land dispute was there since 2010 and there was bad blood between him and his brother as well as his brother's wife. That he had not hit the deceased even when she insulted him. He maintained that he was talking the truth.

50. In re examination, he said that he had no grudge to kill the deceased and that the dispute was over land.

51. DW2 was Josephine Wavinya Madhava, the accused's husband. She recalled that on the material day she was at home at the verandah when her daughter asked her to go and see what the accused and deceased were quarrelling about. She went and saw them quarreling.

52. The accused threw the axe and asked her to pick it. At that time, the deceased was holding the accused by the neck and screaming. PW2 had also arrived and he asked the accused what the matter was but before the accused could explain, PW2 held him by the collar. At that time, the deceased had released the accused.

53. A fight ensued and they fell down. Their mother arrived and together with DW2, they asked them to separate. PW2 asked the deceased where the axe was. She ran away and came back with it. They struggled and it cut PW2 and accused. The accused ran away with the axe to the police station.

54. She explained that her failure to pick the axe was because of the way PW2 was holding the accused and because it was in a very thorny place. That the relationship between PW2 and accused was bad due to land but the land had now been share peacefully, they had reconciled and the accused had asked for forgiveness.

55. On cross examination, she said that she had been married to the accused for 21 years and they have 4 children. That they had learnt to live together via ups and downs of marriage. That she takes care of her husband and even testified on his behalf. That he has stood by him but would still call him out when he goes wrong.

56. In re-examination, she said that she love the accused and was telling the truth as an eyewitness and had no grudge against PW2.

57. DW3 was Esther Mutete, the mother of accused and PW2. She said that they are twins and their father died in 2017. She recalled that on the material day, she was off loading a donkey and heard some noise. She then found the deceased holding an axe and quarrelling the accused near the accused's home.

58. The two held each other and then PW2 arrived running. The accused snatched the axe from deceased and threw it and it cut deceased on the face accidentally. After that, PW2 took the axe and as he struggled with accused, he was also cut. The accused then ran away with the axe.

59. Further, she testified that her two sons had a land dispute but it was now over and they even sat with the clan and accused was to give a bull. The clan said that it would look for ways to pay PW2 and he is still waiting to be paid.

60. On cross examination, she said that she loves her sons equally.

Analysis and Determination:

61. I have keenly looked at the evidence on record and duly read the submissions of the accused person. The offence of murder has 3 elements to be established for prosecution to secure a conviction. See **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] EKL.R.** These are:-

(a) **The death of the deceased occurred.**

(b) **That the accused committed the unlawful act which caused the death of the deceased; and**

(c) **That the accused had malice afore-thought.**

Proof of death:

62. As previously noted by the Court (21/03/2016), the issue of death is not disputed by the parties. PW7 produced photographs showing the deceased lying on the ground with a cut on the face. He also produced a post mortem report indicating the cause of death as '*head injuries caused by trauma*'. This ingredient has therefore been proved beyond reasonable doubt.

Proof that the death was caused by an unlawful act committed by the accused:

63. PW2, DW2 and DW3 were present when the death occurred. They all testified that the deceased was hit on the face by an axe which was

thrown by the accused and the blood stained axe was produced as (exh 2). PW3 saw the accused running with an axe and his evidence was corroborated by the accused who said that indeed, he met with PW3 while on his way to the police station.

64. PW7 (*Joshua Wambua*) was at the police station when the accused arrived running and holding an axe and his evidence was corroborated by the accused who testified that after the incidence, he ran to the police station where he found an officer known as Wambua and Wambua asked him whether they were still having a land dispute. In light of the post mortem findings, I am convinced that indeed it was the accused who committed the unlawful act of hitting the deceased on the face with an axe. Accordingly, the second ingredient has been proved to the required standard.

Malice aforethought:

65. It is not in dispute that there was a land dispute between the accused and PW2 who are twin brothers. It is also not in dispute that all the eye witnesses are family members. The accused agreed that indeed it was him who cut the deceased with an axe but contends that it was purely accidental.

66. I have keenly looked at the evidence on record and it is clear that the confrontation was started by the deceased. Their mother, DW3 testified that upon hearing the noise, she went to the scene and found the deceased holding the axe and quarreling the accused. The axe had been borrowed by the deceased from PW1.

67. It is also evident that the confrontation occurred on the accused's portion of land. The quarrel quickly escalated into a fight and PW2, the deceased's husband joined in the fight. In the course of the struggle, the accused managed to get hold of the axe but threw it away and asked his wife to pick it.

68. In my view, this was a perfect opportunity for him to use the axe to hurt the deceased but he instead chose to throw it away. This shows that he was conscious of the fact that the axe was a weapon with the potential of causing harm in the circumstances.

69. The evidence shows that while PW2 and accused were still fighting, the deceased re-introduced the axe and both men held it because each of them was trying to avoid injuries from it. In my view, this was a natural reaction because it is inherent in every human being to avoid danger. According to the accused, when he eventually managed to pull the axe from PW2, it cut the deceased on the forehead.

70. The accused's version of how the events unfolded is that indeed, the injuries caused on the deceased and PW2 were accidental and could have been inflicted on any of those persons at the scene including the accused.

71. However the DW3 version of the unfolding of event leading to the killing of deceased appears more credible as DW3 is mother of both accused and PW2 husband of deceased. She was more independent witness. Thus the accused and deceased held each other and then PW2 arrived running. The accused snatched the axe from the deceased and threw it and it hit deceased on the face accidentally.

72. Further, the fact that it was not the accused who introduced the axe at the scene only goes to show that his actions were not pre meditated. If anything, it is evident that he made effort to remove the axe from the scene.

73. However the accused mishandled the axe in that as they struggled with it and when he pulled it from PW2, it cut the deceased on the head. He moved it towards PW2 and it also cut him.

74. The land dispute notwithstanding, I agree with the accused's submissions that '*malice aforethought*' was not established to the required standard.

75. The upshot is that since the killing was not intentional, the accused can only be convicted for the lesser offence of manslaughter. I note that the plea of manslaughter had been offered by the accused way back in 2015 but rejected by the prosecution. More diligence from the prosecution would go a long way in assisting Courts and saving precious judicial time.

Conclusion:

76. Having been arrested in August 2012, the accused was admitted to bond in July 2016. He was therefore behind bars for approximately 4 years.

77. The court has thus makes the following orders;

- i) The accused is convicted to a less offence of manslaughter and shall be sentenced after mitigation thereof.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE