



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 45 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MUTUA PETER NTHANGU alias CHUA.....ACCUSED

JUDGEMENT

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63 Laws of Kenya).
2. Particulars being that on the night of 18th and 19th May 2009 at Kimooni village, Kiboko Location, Kibwezi District of Eastern Province murdered Titus Mutisya Kyengo alias Tito.
3. He pleaded not guilty and the matter went into full trial.
4. The prosecution case was via 10 witnesses. The accused tendered sworn defence but called no witness.
5. Both sides opted to tender submissions but relied on the evidence on the record.
6. The offence of murder is made of 3 ingredients which the prosecution has to prove beyond reasonable doubt namely;
 - (1) **The cause of death.**
 - (2) **That same was caused by accused unlawful act.**
 - (3) **Whether there was malice aforethought.**
7. On the first 2 limbs of the ingredients, the defence seemed not to contest them as accused testified that on the material night he was cutting paw and cabbages with a knife at home when the deceased attacked him with a club (rungu). He stabbed the deceased in self defence as he thought deceased wanted to finish him. The deceased to beat him it was not the first time. After stabbing him he ran away with knife and he did not know the extent of the injury.
8. The injury inflicted which caused death was confirmed by Dr. David Kasanga PW10 who conducted the postmortem. Upon examination of the deceased body he observed a deep cut on the chest. The cause of death was due to left hemothorax secondary to a penetrating chest injury caused by stab wound. This is consistent with the defence evidence that accused stabbed the deceased with a knife.
9. The defence and PW10 evidence establish the ingredients of murder as charged thus court holds that same was proved beyond reasonable doubt.
10. As to whether there was malice aforethought, the court has to evaluate the evidence on record relevant to the matter.
11. PW2 testified that on 16/5/2009 accused went to his (PW1) home between 8 – 9 am with a paw and asked for his knife which PW1 had taken earlier from him. He wanted to cut the paw using the same. He said he had given it to Ndambuki and took him to Ndambuki who in turn said he had given it to Tito (deceased). Later at about 5 pm the deceased (Tito) PW1 saw deceased chasing the accused. Deceased hit the accused with a stick. Accused fence into PW1 compound and PW1 chased him away. Deceased was on the road abusing accused, asked him whether he had come to smoke bhang. Later he was told (Tito) deceased was dead. He went to his home, viewed his body.

12. On cross examination he said he saw Tito deceased chasing accused while he was 50m away from them. He also saw deceased hit accused on the back. He heard him ask accused whether he came there to be given bhangì by Moraya. Moraya is PW1 neighbour. PW1 home is 50m from his home.

13. PW4 testified that on 18/5/2009 accused came to where he was constructing house when near the road. He picked firewood to light his cigarette. He stood inside the structure. The deceased came and picked a raft and broke into 2. He hit the accused and accused ran away. He ran towards PW2's home with deceased in hot pursuit. PW2 laughed saying the 2 smoked bhangì. The deceased then walked away to his place. The accused returned and requested PW4 to go and talk to deceased who is his (accused) uncle and requested him to avail accused a place of sleep. PW4 did not want to interfere. PW4 who was village elder and Chairman of Community Policing was on 19/5/2009 told that Tito (deceased) had been killed. He went and saw the body at deceased's home.

14. From PW2, PW4 and defence, it would appear the deceased used to beat accused frequently. The defence that deceased attacked accused before is strengthened by the similar fact evidence of PW2 and PW4 who witnessed the accused being beaten and chased by the deceased. Accused had to plead with PW4 to intervene and urge accused to avail accused place to sleep. This was the same night the stabbing and killing took place.

15. The court therefore upholds the defence that the accused stabbed deceased after he attacked him as he had done previously. However, the accused has not justified the use of a fatal stab which killed the deceased. The accused has not demonstrated that he could not run away from deceased attacks or use a lesser force. The stab was so deep and also a fractured (left) ribs.

16. Thus the court finds that malice aforethought was not proved beyond reasonable doubt thus charge reduced to a lesser offence of manslaughter and convict accused accordingly.

17. The court makes the following orders:

i. The accused is convicted of manslaughter.

ii. He shall be sentenced after mitigation.

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

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C. KARIUKI

JUDGE