



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL CASE NO. 118 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**SAMMY MUTUA MBATHA.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of Cap. 63 Laws of Kenya.
2. Particulars being that on 5/10/2010 at Maavuni village, Kilungu Sub-Location, Kitundu Location, Mbooni West District, Eastern Province murdered Nduu Mbatha Kioko.
3. Accused pleaded not guilty and matter went into trial.
4. The prosecution presented 7 witnesses before closing its case. The accused was put on his defence whereof he testified on oath and called no witness.
5. **PW1 Jacob Musembi Mbindyo** a grandson of deceased remembers that on 5/10/2010 at about 7.30 pm while burning charcoal and with help of same fire and moonlight saw accused carrying bow and arrows. Witness was within the homestead area. The grandmother house was about 20m away from where he was. The accused went to grandmother's house and knocked the door. The witness heard accused ask grandmother money.
6. The witness asked the accused which money he was asking the grandmother. The accused placed arrow on the bow and started chasing the witness. He ran to a neighbour's place. He explained to neighbour what had happened. The neighbour is called Mulwa Matheka. Together they went to the grandmother's house. The accused was not there but the grandmother was lying down with a cut at the back of the neck. The witness fell down in shock. The neighbour started screaming.
7. Neighbours came to the scene. The grandmother was alone. They found panga and arrows where the body was lying down. The witness identified the arrows and the panga. 2 arrows were found with head cap of accused in nearby bushes and so as the bow. He identified them. Police were called and came to the scene. They collected the body and later statement was recorded.
8. On cross examination by Mr. Kaluu advocate, he stated that he never screamed when he was being chased by accused. He said he was a student at the time and was burning charcoal. He estimated the distance he was from grandmother's house to be about 30m. He could see the house and saw accused enter the same. The accused was in the same land but different compound.
9. The accused was knocking deceased's door while demanding money. That is the time the witness intervened to find out what was happening. The accused is a son to his (witness) grandmother. He intervened because the accused was armed. There was light from fire and moonlight. The fire was burning and illuminating the place. He knew it was accused who killed grandmother as he found bow, arrows and panga accused had at the scene.
10. When he returned to the scene with a neighbour he found deceased's house door open. The deceased was dead and accused was nowhere to be seen.
11. **PW2 NM** 15 years old in Std. 7 and a niece (brother to her father) to the accused stated that on 5/10/2010 accused came home and asked her where her mother Syombua was and she said she did not know. The he (accused) went to the grandmother's house which was within the compound and he asked grandmother to open the house. Grandmother was mother to accused.

12. She did not open but he pushed it. She heard screams as she was in the kitchen. Grandmother's house was 30m from their house. When accused talked to her she saw him via the aid of fire and lamb in kitchen. They live in same compound but accused's house was in different compound.
13. When she heard screams she rushed to see why grandmother was screaming. She found accused bending over grandmother, cutting her with a panga. There was a hurricane lamb which was on. The act was in sitting room.
14. When accused saw her, he chased her away. She ran to their house and locked herself and started screaming. Even when being chased she was screaming. Neighbours came to her rescue. She went outside of the house and told neighbours what happened. She went to the house and saw dead body of the deceased. It had a cut on the neck. She had seen accused cut grandmother while placing a wound under her neck. Police were called and came and collected the body. She later recorded statement.
15. On cross examination she stated that, she was 15 years old then she heard accused tell deceased open the door. Her brother was a neighbour by farm about 60m. Her brother is PW1. She didn't know whether accused chased her brother because after she was chased she locked herself in the house. She saw accused cut deceased with a panga. She saw PW1 when people gathered at the scene.
16. **PW3 Jane Syombua Mbindyo** stated that PW1 and PW2 crying on 5/10/2010 at 7.30 pm. Both are her 2 children. They narrated to her how accused killed her mother in-law. The accused is brother to her husband. She went to her mother in-law's house and found body with cut on the neck. There were neighbours who had come to the scene. She saw bow, arrows and panga and head cap he used to see accused wear. Police were called who came and carried the same. She recorded statement later.
17. On cross examination she said she used torch to see inside of deceased's house. The lamp had been put off. There were many people around.
18. **PW4 Peter Mbindyo Mbatha** testified; son of the deceased identified her body for postmortem. He recorded statement later. He said accused was his brother. Accused had threatened the deceased. He said he had 3 brothers but 2 had passed on. He had also 3 sisters still alive but married. He agreed he had land dispute with accused. He wanted his mother's share of land. PW1 and 2 are his children and PW3 his wife.
19. The accused also demanded Ksh.85,000/= from deceased for potatoes deceased had sold. At the time the dispute was over potatoes.
20. **PW5 police officer APC Elias Njiru Kibaara** of Mbooni West Sub-County Headquarters stated that on 5/10/2010 at 20.20 hrs while in patrol in company of PC Fredrick Karoki in Kilungu area of Mbooni West he heard loud voices. They rushed to the scene and people told him what had happened. They found dead body lying on a pool of blood inside a house. The neck had been cut. The police from Kisima came and collected the body. They saw panga, bow, 6 pieces of arrows near the body.
21. On cross examination he stated; he found body lying down. The items mentioned were besides it.
22. **PW6 Felister Mawia Mutua** stated that she is a neighbour. On 5/10/2010 at 7.30 pm she heard screams from children of Mbindyo. She asked them what was it but they continued screaming without answering. She saw people going to the Martha Mbatha's house and followed them.
23. On arrival she found her body lying down. Children said Sammy (accused) killed her. There were 2 children. Where body was lying there was a pool of blood. She had injury at back of her head. She saw it in the mortuary. She ran home after seeing the body. She wrote statement later. She didn't see accused that day.
24. On cross examination she said the distance from her home to deceased's house is about 200m. She could hear people talk from there. Mbindyo Mbatha lived same compound with deceased while accused was on same land but different compound. The children were telling everybody that Sammy killed grandmother. She did not see accused at the scene. He was watchman at Kisima and used to come in the evening.
25. On re-examination she said she took about 30 minutes to go to the scene after hearing screams. The children were screaming saying "*Sammy has killed Martha*". The children's mother was at the scene. Witness went with her lamb while others had torches. Accused was arrested at Kangundo within a month.
26. **PW7 Corporal Simon Luhathe** then attached at Mbooni Police Station stated that on 5/10/2010 at 9.10 pm he received call from the OCS informing of a murder report and instructed him to accompany him to the scene. They went to scene together with other officers of police. They found crowd gathered at the scene. They found the body lying on a pool of blood with deep cut at the back of the head.
27. They also saw arrows, bow and a panga. They also saw a hat which they were told belonged to the accused. They were told the deceased was killed by her son one Sammy Mbatha. They collected the body and took it to mortuary in Machakos where postmortem was performed. Accused was later arrested in Kangundo and charged. He produced exhibits 1(a), (b), (c), (d), (e) – arrows. 2 – panga. 3 – hat/cap. 4 – bow.
28. On cross examination they found deceased body lying on its stomach in a roomed house. No form of lighting was available. There was a blood stained panga. The panga and cap had no special marks. People said the cap was one accused used to wear. Accused was later arrested and brought to Mbooni Police Station.
29. After a number of adjournments, the prosecution closed case after failing to trace a doctor to produce postmortem report which they had of the deceased.

30. The court found the accused to have a case to answer and he opted to give sworn statement but called no witness. He stated that on 5/10/2010 where he was selling timber for building on 13/9/2010 police went to him and told him to take them where he had hardware. He was taken to Kangundo, Nguluni where he found his employee incharge of work.

31. He showed the owner of the premises who confirmed accused was a tenant. He was taken to police station and locked on 15/9/2010 at Mbooni Police Station where he was interrogated then on 27/10/2010 he was taken to High Court Machakos and then remand prison.

32. On cross examination he said he was in police cells on 5/10/2010 at Mbooni. He said he lived well with deceased who was his stepmother. He said he was last at home on 2/9/2010. He gave deceased money next day before leaving for Nairobi.

33. The parties agreed to put submissions but to the date of drafting of this judgement none of the parties had filed the same.

34. After going through the evidence on record, I find the issue is:

***i. Whether the ingredients of murder were proved beyond reasonable doubt.***

35. The burden of proof lies with the prosecution to prove its case beyond reasonable doubt. The offence of murder has 3 elements to be established for prosecution to secure a conviction. See **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] EKLR**. These are:-

- **The death of the deceased occurred.**

- **That the accused committed the unlawful act which caused the death of the deceased; and**

- **That the accused had malice aforethought.**

36. The medical report (postmortem) though prepared by a doctor, the same was not availed to court to show cause of the death. However the PW2 saw the accused on 5/10/2010 at 7.30 pm, cut the deceased. She died on the spot. Earlier before PW2 saw the accused cutting the deceased. The accused chased the PW2 with arrows.

37. It has been held that death can be proved in certain circumstances even without medical report. In the Nigerian case of ***Idemudia vs The State (1999) 5 SCNJ 47*** in answer to the issue for determination, His Lordship Lead Judgment (**Katsina-Alu JSC**) had this to say:

***“This was a criminal trial and in all criminal trials, the onus is on the prosecution to establish its case beyond reasonable doubt. In a murder trial, the prosecution must show conclusively that death was caused by the act of the accused. In other words, there must be a nexus between the act of the accused and the death of the victim. It is now settled that medical evidence though desirable in establishing the cause of death in a case of murder, is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with. That is the situation in the instant appeal. There is abundant evidence from eye-witnesses that the appellant shot and killed Ngozi Okpara instantly. Medical evidence on the circumstances of her death was clearly not essential.”***

38. When the PW1 and other people returned to the scene they found deceased body lying on a pool of blood with a deep cut at the back of the head. The police came to the scene vide PW5 and PW7 testimonies and collected body lying on a pool of blood with a deep cut on the back of the head. The body was taken to the mortuary and a postmortem was conducted thus the arrest and charge of the accused with offence of murder.

39. The court in all the circumstances finds that the death of the deceased was occasioned by the cut witnessed by PW2. The deep cut by a panga found lying along the deceased's body occasioned the bleeding (vide pool of blood) and death of the deceased. Though the postmortem was not produced, I find that there was prove beyond reasonable doubt that the cut inflicted by the panga killed the deceased. Thus the first ingredient of murder is established beyond reasonable doubt.

40. On the second limb of the ingredients, the act of killing was unlawful. The magnitude of the attack as witnessed by PW2 confirms same to be unlawful and unjustified. The same was act perpetrated by the accused as narrated by PW2 who was an eye witness. PW1 also was chased from the scene by the accused to avoid him witnessing the brutal murder. PW1 and 2 put the accused on the scene of the crime. The accused has not rebutted the same other than tendering a feeble alibi.

41. On the third limb of the offence, the malice aforethought, PW1 and 2 saw accused carrying arrows, bow and a panga. He forcefully entered the deceased's house demanding money. He chased the PW1 with arrows. PW2 went to answer deceased's screams and found accused cutting the deceased on the neck. The viciousness of the attack, the chasing away of PW1 and 2 from the scene demonstrates malice in which the accused harboured in attacking the deceased.

42. The accused's defence completely avoids the event of the 5/10/2010 and is based on alleged alibi. The PW1 and 2 are his nephew and niece who had no grudge to invent the story against him. They talked to him, they knew him, they cried after the murder and were crying telling everybody the accused had killed the deceased.

43. The court finds that the offence of murder has been proved against the accused beyond reasonable doubt. The court makes the following orders;

***(i) Accused is hereby convicted of murder and will therefore be sentenced after mitigation.***

**DATED, DELIVERED, AND SIGNED IN OPEN COURT AT MAKUENI THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

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**C. KARIUKI**

**JUDGE**