



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 39 OF 2011

REPUBLIC

VERSUS

JOSEPH KIIRU MURAGE.....ACCUSED

JUDGMENT

On 29 November 2011, the lifeless body of Ephantus Ngatia Mwangi was found lying outside his house in Ngorano location. The accused was charged with his murder under section 203 as read with section 204 of the Penal Code, cap. 63, particulars being that on the 29 November 2011 he murdered the deceased at Ngorano location, Mathira West District in Nyeri County. Having been certified to be mentally fit to stand trial the accused pleaded not guilty to the charge when he was arraigned.

The state called seven witnesses the first of whom was the deceased's sister-in-law, Damaris Wanjiru. It was her evidence that on the night of 29 November 2011 she heard one John Muriuki, whom she described as her husband's brother (brother-in-law) call her. She went to his house and found her son who is the accused and Muriuki's son, Julius Muriithi (PW4), quarrelling. She left together with Muriuki back to her house. She, however, did not see the deceased that particular night. Later, the accused came asking for a match box; she gave him a lamp and he went to sleep as Muriuki went back to his house.

Wanjiru learnt of the deceased's death the following morning at about 7.30 AM. She disowned her statement to the police where she had indicated that she heard the deceased wailing on the particular night.

Julius Mureithi (PW4) confirmed in his evidence that indeed he fought with the accused in his house on the night of 29 November 2011 and that it was his father, John Muriuki who separated them. After the accused left and while he was in his house, he heard him quarreling with the deceased. He learnt the following day that the deceased had died.

Dr Kibicho conducted the postmortem on the deceased's body but the postmortem report was produced by Dr Obed Osoro (PW3). According to his report, the body was identified by Jackson Maina (PW2) and one Peter Murage. The circumstances of the deceased's death were that he was found dead on 29 November 2011. He was bleeding from the back of his right ear. The pathologist established that the deceased had sustained a deep cut on the right temporal region, that is, the lateral aspect of the head and blood was oozing from that side. He opined that the deceased died of cardiorespiratory arrest as a result of haemorrhage arising from a cut on the temporal artery. The pathologist certified his death and signed a certificate to that effect.

The deceased's wife, Margaret Nyaruai Muhindu (PW6) testified that she was asleep in her house when she heard noises outside. She also heard Wanjiru (PW1) call the deceased. The accused was fighting with Mureithi. Her husband then ventured out armed with a panga and a crow-bar. Soon thereafter she heard sort of shout. She screamed for help and went outside only to find the deceased already dead. She then ran away because unknown people were throwing stones at her house. She couldn't tell who among these people killed her husband. She further testified that she only came out of her hideout at about 5 AM the following morning and found a crowd of people outside her house. They wanted to lynch her because they thought she had murdered the deceased; however, she was rescued by the police who were at the scene.

The investigation officer, Chief Inspector of Police Andrew Kivindyo (PW7) got to know of the murder from the Ngorano location chief on 29 November 2011, at 8 AM. He went to the scene in the company of two other police officers. They found the deceased's body outside his house, just next to the door step. There was blood where his body was and he observed a cut wound on his right ear. A metallic rod was beside the deceased's body; a panga was also found next to his house, in a maize plantation.

It was his evidence that he got the rest of the information from the deceased's wife; in particular, she told him that the suspect and other members of his family were celebrating the victory of their candidate in a by election for a ward representative and the deceased was apparently in the opposing party. A fight ensued between the accused and Mureithi and it was in the course of that fight that the accused fetched a from his house and attempted to break into the Muriuki's house where Mureithi had escaped. The accused's mother attempted to restrain his son in vain and she is the one who locked Muriuki in his house to protect him from the accused. When she shouted for help, the deceased emerged armed with a metal rod and a panga. He was shouting and asking why the accused was creating disturbances. The accused,

on the other hand, dared him to come out of his house. He then jumped over the fence into the deceased's compound. The two men physically confronted each other and it is then that the deceased was apparently overpowered and fatally wounded. The deceased's wife escaped as the accused was hurling stones at her door. The officer testified that the rod that was exhibited in court was found inside the accused's house but that he recovered the panga from the maize plantation. According to him, the crowbar belonged to the accused while the panga belonged to the deceased. He saw a metal rod which the deceased was also armed with but he never collected it. According to him, he ignored it because it was not the murder weapon. He took the deceased's body to Karatina hospital mortuary and then arrested the accused.

In his defence, the accused testified that he lived in Kajiado but had visited his mother around the time this incident occurred. On the material night his uncle Githinji Mwangi called him and it was while he was in his house that Mureithi came in drunk and slapped him. After their respective parents' interventions, they both went to sleep. He learnt of the deceased's death the following day. He denied having murdered him and also denied that he quarreled with him. He admitted that the deceased was his uncle. The accused denied that he owned any weapon or that any was found in his house.

The offence of murder is defined in section 203 of the Penal Code as follows:

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

The punishment for murder was previously prescribed in section 204 of the Code but that part of the law has since been declared to be inconsistent with the constitution for the reason that it leaves no room for the exercise of discretion by the trial court in sentencing and instead prescribes death as the mandatory penalty. See the Supreme Court decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**.

For an accused to be convicted of this offence, the prosecution must prove first, the fact of death of a person; second, that the death was as a result of an act or omission of another person; third, that the act or omission was unlawful; and, fourth, that the unlawful act or omission was activated by malice; in other words, the perpetrator had malice aforethought.

Malice aforethought is the mens rea or the mental element of the offence of murder and it is either express or implied; it is usually 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**). It finds expression in section 206 of the Penal Code which prescribes the circumstances under which it may be deemed to have been established.

The fact of death of the deceased in this case is not in dispute and, in any event, was proved beyond reasonable doubt by the prosecution. Damaris Wanjiru (PW1), Julius Mureithi (PW4) and the deceased's wife Margaret Nyaruai Muhindu (PW6) were all consistent in their evidence that they woke up to find the deceased's lifeless body sprawled next to his house. His wife saw the body soon after he was murdered. The investigation officer (PW7) retrieved the body from the scene and took it to the mortuary. Finally, the pathologist (PW3) certified the deceased's death and produced a certificate to that effect. The body was positively identified to him by one of the deceased's relatives.

Again, there is sufficient evidence that the death of the deceased was not only as a result of an act of another person but also that the act was unlawful. This is so because the fatal injury to the deceased's head was not self-inflicted and from the evidence available, it was certainly unjustified.

What in my humble view has not been proved to the required standard is whether the accused inflicted the fatal blow. The only evidence linking him to the deceased's death is that of Julius Mureithi (PW4) who testified that after his fight with the accused and after his father separated them, he heard the accused quarreling with the deceased.

The deceased's wife, on the other hand, testified that all she knew was that the accused was fighting with Mureithi when her husband ventured outside armed with a panga and a crow-bar. She heard him make some noise but did not witness anything because she had locked herself in the house. It was her evidence that there were many people outside the house and she could not tell who among them killed the deceased. As a matter of fact, she was almost lynched herself when she came out of her hideout because she was thought to have murdered him.

The investigation officer gave an elaborate testimony of what could possibly have happened and concluded by saying there was a physical confrontation between the deceased and the accused. It was his testimony that the accused overpowered the deceased and struck him to death.

The trouble with the investigation officer's evidence is that it was not the outcome of his independent investigation but rather what he was told. He confirmed this when he stated that all he told the court is what he heard from the deceased's wife.

Now, there would be nothing wrong in the investigation officer repeating what this witness told him considering that she not only testified but also that she was one of the witnesses whom the investigation officer interrogated in the course of his investigations; however, the deceased's wife's testimony was at variance with that of the investigation officer in its material aspects. In particular, nowhere did the deceased's wife state that the deceased and the accused quarreled and ended up in a physical combat in which the accused wounded the deceased after he overpowered him or at all. Yet the investigation officer largely relied on the information purportedly given by the deceased's wife to charge the accused.

Having concluded as I have that there is no evidence to link the accused with the deceased's death, it would be superfluous or academic to delve into the question of whether there was malice aforethought.

All in all, when I consider the evidence in its entirety, I am inclined to come to the conclusion that the prosecution has not proved its case

against the accused beyond all reasonable doubt; the evidence is simply not sufficient to support a safe conviction. Accordingly, I hereby acquit the accused and he is therefore set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 20th September 2019

Ngaah Jairus

JUDGE