



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 49 OF 2013**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**PIUS MWITI MUTHEE ..... ACCUSED**

**JUDGMENT**

[1] **PIUS MWITI MUTHEE** ('the accused') herein has been charged with 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 13<sup>th</sup> day of April 2013 at Kabuitu village, Thuura sub-location, Kirimampio Location in Igembe South District within Meru County jointly with another not before court murdered Harriet Nkatha. The prosecution called five (5) witnesses to establish its case.

[2] **PW1 Thomas Macuma** stated that on 13<sup>th</sup> April 2013 he was in the farm with his two children, Zachary Kaunyangi and Anne Kanocia, and his wife, the deceased. It was about 11.00 AM to Noon when they were taking breakfast so that they could start planting when the accused came and greeted them. He had a c-line which he lifted and cut the deceased on the forehead. He ran off and he began to chase him for about 50 meters but went back to where his wife was. He assisted his son Zachary who was carrying the deceased so that they could take her to the hospital. After about 5 minutes the accused came back in the company of Katopia and Milili.

[3] He left his wife and son and began to chase them away but Kitopia cut him on the left elbow while Milili cut him on the left shoulder. He got up and continued to chase the accused but he cut him on the forehead and he fell down. Zachary who came to help him told him that the deceased was dead. They were about 80 meters from the deceased. Anne who was small at the time had run away. They found a motor cyclist on the road who took him to Maua where he made a report at the Maua police station and was given a letter. He was stitched and remained at the hospital for 3 hours before being released. The body of the deceased was taken to Meru General Hospital mortuary.

[4] He affirmed that the accused is his nephew as he is the son to his elder brother. They did not have a good relationship with him or his brother. His brother used to claim that his land was bigger than his. The accused used to threaten to kill him or his wife. He had reported the matter to the police and was given an OB number which he could not remember.

[5] **PW2 Zachary Kaunyangi** son of the deceased and **PW1** stated that they were at the farm when at midday the accused arrived at the farm. He greeted them and they replied. Then the accused passed near the deceased, lifted his panga and cut her on the forehead. He held his mother's hand while his father chased after the accused. **PW1** came back and held the deceased by the other hand. But after about 5 to 10 minutes the accused came back with Katopia and Milili. His father told him to hold his mother as he chased them. Milili cut **PW1** on the shoulder, Katopia cut him on the elbow and Mwititi cut him on the head. The deceased told him to go. He took a stone and threw it at Mwititi and his father got a chance to stand. When she saw Mwititi near his mother she has been cut on the forehead and at the back of the neck and hand. He informed **PW1** that the deceased was dead. They took a motor cycle and went to Maua Police Station and then to the hospital. The next day they went back to the station to record statements with **PW1** and John Kubwithia.

[6] **PW3 John Kubwithia** testified that on 13<sup>th</sup> April 2013 at about 11.30AM to Noon he was coming from Kabuitu market going back home in a corridor between shops. He passed through it and met the daughter of **PW1**. He asked her what was happening and she pointed at the direction she was coming from. When he looked he saw the deceased running towards the town and the accused behind her holding up a panga. When the deceased reached a small house the accused cut her on the left leg and she fell. By this time he was about 50 meters away. He picked a stone and threw it at the accused which made him run off. The deceased told him to help **PW1**. She was bleeding from her forehead, head and leg. He called CPL of Kilumbi patrol base and informed him what had happened. Within 5 minutes he arrived and confirmed that the deceased was dead.

[7] **PW4 Dr. Maria Muthoni Mwangi** produced the Report on the post mortem conducted by Dr. Njuguna on the body of the deceased. She stated that the cause of death was severe hemorrhage of cervical spinal injury. The cause of death is consistent with deep cut on posterior of the neck. That there was also a cut on the forehead, lower limb and forearm was injured.

[8] **PW5 NO. 65301 PC Urbanus Kivilu** stated that he and PC Albert Ambere investigated this matter even though his name does not

appear in the investigation diary. He testified that on the material day at 2. 45PM **PW1** together with **PW2** reported that the deceased was at midday attacked by the accused with a c-line. The deceased was serving lunch when the accused arrived and greeted them. He went straight where she was seated and cut her on the head and both legs and then ran away. **PW1** chased after him but the accused had two other people Patrick Milili and Katobia who were armed. The three pounced on him where; the accused cut him on the forehead, Milili on the shoulder and Katobia on the left elbow. When the deceased saw what was happening she sent his son to go and assist his father. The three suspects disappeared into a nearby bush.

[9] **PW3** was on his way home when he met a young girl running away and looking fearful. He tried to console her but only pointed with her finger where she left her mother lying. **PW3** followed the directions and found the accused slashing and taking away the life of the deceased. He stated that the accused was arrested in Mombasa. Milili was arrested and charged with grievous harm and was imprisoned to serve 6 years in jail and Katobia is still at large. The previous day the accused lost his son who was buried on the same day. It is not true that the accused had gone to the chief to obtain the burial permit of his son or that the deceased was killed by a mob.

[10] At the close of the prosecution's case the accused gave a sworn testimony and called three witnesses. **DW1 Pius Mwititi Muthee** stated that on 13<sup>th</sup> April 2013 at 6. 00AM he was at his home with his wife and two children. He woke up and went to buy miraa. His son Vidix who was 4 years old asked him to serve him tea of which he did. He told him that he will die. **DW1's** mother tried to speak to the boy but he replied that he feels that he will die on that day. He left and went to the market at around 7.00AM. While there he received a phone call from Murithi Moses enquiring whether the screams were coming from his home. He rushed home and found that his son had died and his wife had fainted. He called Pastor Johana Thurania who came over. They went together with him, his mother and Muriangi to the assistant chief for the burial permit. He told him that the burial would be for 14<sup>th</sup> April 2013 and not that day. It was issued to **DW1's** mother Joyce Kangai at about 11.00 to 11. 30 AM. The assistant chief was then called and informed that a woman was killed at Kabuitu. He went to take care of the matter and they went home. He stayed home for two weeks and then left for Mombasa with his wife and the remaining child. After a month he was arrested.

[11] **DW2 NO. 82049 PC** Peter Mburu stationed at Kabuitu Police patrol base stated that OB for 13/4/2013 – OB NO. 3 was reported by a call through 0736 840595 from Kaibutu market. The caller did not give his name but reported that the deceased had been butchered to death. OB NO. 4 and 5 also received reports. OB NO. 5 for 13/4/13 at 1600hrs recorded findings that a woman had been killed by mob who followed her to Shauri Yako. They killed with a c-line. It also states that the accused was seen by the daughter of the deceased.

[12] **DW3 Joyce Kangai** mother of the accused told the court that on the material day she was at home. She lives with the accused, his wife and children in the same compound but separate houses. The accused went to the market to sell miraa. His son was sick and he and his wife wanted to take him to hospital at 8. 00 AM but he died before then. They went to the assistant chief with the accused, his wife, Muriungi and Johana to take the permit. They were given the permit at 11. 45 AM which was given to her and she signed for it. The assistant chief told them that any family member could obtain the permit. Then the chief received a phone call and given bad news. After that they all went home together.

[13] **DW4 Josphat Muriungi** corroborated the testimony of **DW1** and **DW3**. He stated that his home and that of the accused are 2 KMs apart. He was at **DW1's** home at 9.00AM as his son had died. He confirmed that they went to the assistant chief. While there the chief received a phone call that a lady had been killed.

## Submissions

[14] The accused submitted that the prosecution has failed to prove their case to the required standard of beyond reasonable doubt because of inconsistencies and contradictions in the evidence of its witnesses.

## ANALYSIS AND DETERMINATION

### Murder

[15] According to **Section 203 of the Penal Code:-**

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

Thus, the prosecution must prove beyond reasonable doubt:

- 1. The fact of the death of the deceased**
- 2. The cause of such death**
- 3. 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**
- 4. Proof that the said unlawful act or omission was committed with malice aforethought.**

### The fact of death and cause of death

[16] The fact and cause of death of the deceased could be taken together due to their inextricable relationship. From the evidence adduced the deceased was attacked with a c-line and as a result she was severely injured. According to **PW4** and the post mortem report the deceased

died; the cause of death is consistent with deep cut on posterior of the neck. The cause of death was severe hemorrhage of cervical spinal injury. Before post mortem was conducted the deceased's body was identified Joseph Ntongai and Jacob Kirinya. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved.

#### **Of unlawful act or omission that caused the death of deceased**

[17] The prosecution needs to prove 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*.

[18] According to **PW1** and **PW2** the accused came and cut the deceased on the forehead. He ran off but came back accompanied by two other people who attacked **PW1** who trying to chase them away. **PW3** stated that he only saw the accused and deceased at the scene. He did not see **PW1** and **PW2**. The accused picked this contradiction and submitted that it materially affected the case by the prosecution. I will carefully consider that submission.

[19] The Court of Appeal in the case of **Richard Munene v Republic [2018] eKLR** held:

**“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”**

[20] The evidence of **PW1** and **PW2** was that they left and went to the police station and thereafter hospital. They left behind the deceased whom they state was dead. These two were at the scene with the deceased ab initio. They witnessed all that happened. **PW3** stated that he met a child running from the scene. When he enquired from the child about what was happening, the child who was frightened simply pointed at the direction she was running from. He looked and saw only the accused and the deceased. He saw the accused use his c-line and cut her on her leg. From the evidence adduced, there was the initial attack on the deceased by the accused. **PW1** and **PW2** managed to drive the accused away. But he came back with two other people who attacked **PW1** too. This was the second round of the attack. **PW3** came after the first attack because the child he met ran away after her mother was attacked by the accused during the initial attack. Therefore, the evidence of **PW3** does not detract from the evidence of **PW1** and **PW2**. All the three witnesses, namely **PW1**, **PW2** and **PW3** saw the accused with a c-line which he used to injure the deceased.

[21] The accused pleaded an alibi; that at the material time he was at the chief's office to obtain a burial permit for his son who had passed on the previous day. His defence was that while at the office the assistant chief received a call that a woman had been killed. The burial permit was however signed by the grandmother of the deceased child because the chief told them any family member could sign it. The question that lingers in mind is why the accused or his wife did not sign the burial of their deceased child. These two were the parents of the child and they were present. Secondly, the defence alleges that the assistant chief received a call that a woman had been killed. I am aware that the accused does not bear the burden of proving an alibi; the prosecution bears the burden to unravel the alibi. Nonetheless, the alibi should be raised at earliest opportune time. The alibi herein was raised during testimony by the accused. Nonetheless, the evidence by **PW1**, **PW2** and **PW3** placed the accused at the scene at the material time which routs the defence of alibi completely. Therefore, the alibi was an afterthought merely meant to remove the accused from the scene. The claim that the chief received a phone call about a woman having been killed is hearsay.

[22] **DW2** stated that the OB 5 stated that the deceased was killed by a mob and that the accused was seen by the daughter of the deceased. The evidence available that three people were involved in the assault upon **PW1** and the deceased. There was no evidence to show a mob was involved. In any event, even where a mob attacks a person, individuals who harm the person bear criminal responsibility. The initial OB3 which is said to have been made via a phone call is consistent with the testimony of **PW3**. The report is supported by evidence and does not mention a mob but that the deceased had been butchered. From the evidence adduced I am satisfied that the accused was in the company of two other people not before this court and committed acts, to wit cutting the deceased with a C-Line panga that resulted into the death of the deceased.

#### **Of malice aforethought**

[23] Did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** states that:-

**“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) .....”**

[24] There was bad blood between **DW1** and the father of the accused over land. That aside, the injuries inflicted on the deceased's body

were grave and were inflicted with a dangerous weapon- C-Line panga. Accordingly, the attack was with the intent to cause death or do grievous harm. Thus, I am satisfied that the prosecution has proved that the accused had malice aforethought in causing the death of the deceased.

[25] Consequently, I find the accused guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**. I accordingly, convict him of the murder of HARRIET NKATHA (“the deceased”).

**Dated at Nairobi this 12<sup>th</sup> day of October 2019**

-----

**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Meru this 14<sup>th</sup> day of October 2019**

-----

**A. MABEYA**

**JUDGE**