



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 8 OF 2018**

**REPUBLIC.....PROSECUTION**

VERSUS

**KYUNU MAMBO.....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).

Particulars being that on 10/1/2014 at Kwa Mboo village, Kiumoni Sub-Location, Muusini Location in Kathonzwani District within Makueni County murdered JACINTA MUTIVI KINYILI.

2. He pleaded not guilty and matter went into full trial. The prosecution called 5 witnesses and closed its case.

3. When accused was put on his defence, he opted to remain silent.

**Prosecution's Case:**

1. **PW3 Christine Kathina Mwangangi** testified that on 10/1/2014 at 3 pm while at home with deceased at a veranda she went to look for a child who was crying inside the house. While inside the house she heard a voice of somebody asking who is there. Then she heard something falling. She went outside and found deceased (her mother) fallen down with cut on the head and bleeding while the accused was wielding a panga cutting her.

2. She started screaming and the accused stopped cutting her and he chased her and she ran away. She called her brothers and neighbours who came to the scene. Her brother Musau came with a car and they took deceased to Makueni Hospital. The deceased later passed on in the hospital. Meanwhile at 6 pm she learned that the accused had been arrested at Chemule.

3. On cross examination she said she found accused cutting the deceased while she was lying down on the floor. She did not know why the accused was cutting her.

4. **PW2 Stephen Kuyiu** heard her brother's wife (PW3) calling him at the gate. She was screaming calling saying "*mother had been cut severally*". She said Kyunu (accused) had occasioned the injuries on her.

5. He proceeded with her to the scene. He saw the deceased and observed several cuts inflicted on her. PW3 told him Kyunu (accused) inflicted some injuries to the deceased.

6. PW2 called his brother on phone. He came with a motor vehicle and they rushed her to the hospital at Wote. On arrival she was pronounced dead. The Accused is PW2's cousin.

7. **PW1 Dominic Musau Kinyili** testified that on 10/1/2014 at 3 pm he received a call from Asman his brother (PW2). He got information from PW2 that his mother had been cut. He took a taxi and rushed home. He found his mother injured. He found neighbours gathered there at home.

8. He observed her injuries on head, and chest area. They took her to hospital at Wote, Makueni. She was pronounced dead on arrival. They took her to the mortuary. The postmortem was carried out later and he was one of the people who identified her body.

9. **PW4 Erastus Githuku** Police Officer at Kavumbu Police Post testified that on 10/1/2014 PW1 reported the attack of her mother by Kyunu Mambo the accused. He was told she was taken to hospital. He recorded report in the OB. Him and Corporal Ogenge the scene of

crime officer proceeded to the scene.

10. While at the scene he got report that the accused was arrested by members of public and they were beating him. He proceeded to where the mob was beating the accused. They rescued him and then proceeded to Makueni Referral Hospital where they found the victim had already succumbed to injuries. They took accused to the police post and detained him in the cells.

11. Blood stained panga was recovered. Postmortem was later conducted. Blood samples were collected from deceased and accused and were forwarded to the government chemist for examination. He also recorded statements of the witnesses. Accused was subsequently charged with the offence.

12. **PW5 Dr. Solomon Maundu** testified that he is the one who conducted the postmortem of the victim .He prepared and produced the postmortem report which confirmed the injuries inflicted on the deceased. He concluded that the cause of death was severe head injuries and blood loss or hemorrhage.

13. On close of the prosecution case, the court ruled that the accused had a case to answer and he was put on his defence.

14. When given opportunity to tender his defence, his advocate stated that he had instructions that the accused opted to remain silent. The court asked him if it was so but he remained silent.

15. Thus the defence was deemed closed and judgement date was given and meanwhile the parties' counsels were given time to file submissions on their request but none filed as at the time of drafting the judgement herein which was after time lines of filing the same. Thus no submissions were tendered by either side in the case.

**The Issues are:**

§ After going through evidence on record, I find the issue is; ***whether the ingredients of murder under the charged provisions have been proved beyond reasonable doubt?***

**Analysis and Determination:**

16. There are 3 ingredients of murder as set out in the case of **Anthony Ndegwa Ngari vs Republic (2014) eKLR**, the court found the elements of the offence of murder to be:

***(a) That 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 aforethought.***

17. Also in the case of **Republic vs Titus Mbia Singi** the court held that these are the crucial ingredients of the offence the prosecution was required to prove beyond any reasonable doubt in the instant case.

18. As to the fact that a death occurred, the same is not contested. PW3, 2, 1, 4 and 5 confirmed same. The doctor PW5's testified and produced postmortem report which confirmed cause of death as due to the severe head injuries and hemorrhage thereof.

19. As to whether the death was occasioned by the unlawful act by the accused, PW3 witnessed the accused viciously attack deceased. When she screamed he chased her with a panga. There was no reason assigned as to why he was cutting her. Thus the second limb on ingredients of murder has been proved.

20. On whether there was malice aforethought, the court notes that the act meted out to the deceased by the accused was extremely vicious. This was a 75 year old woman who had not provoked the accused to deserve the vicious attack which killed her within a span of a few hours. The accused has not proffered any reason to justify the attack inflicting the noted injuries.

21. Section **206 of the Penal Code** states:-

***“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) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or***

*attempted to commit a felony.”*

22. In the case of **John Mutuma Gatobu vs Republic [2015] eKLR** the Court of Appeal stated:

***“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal....***

***There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought”***

23. The court thus finds that the element of malice aforethought was established by evidence on record. The court finds the 3 ingredients of offence of murder under section 203 as read with section 204 of the Penal Code (Cap. 63 Laws of Kenya) has proved beyond reasonable doubt.

24. Thus the court makes the following orders;

***i) The accused is hereby found guilty of and convicted of offence of murder accordingly.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2019.**

**C. KARIUKI**

**JUDGE**