



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 50 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MUEMA DISHON.....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 of Laws of Kenya.
2. Particulars being that on 25/6/2013 at Katangini village, Muuni Sub-Location, Nguumo Location, Makeni County murdered Dishon Mutua Kisengai.
3. He pleaded not guilty and matter went into trial.
4. The prosecution closed its case after calling 6 witnesses. The court found accused to have a case to answer and he was put on his defence.
5. **PW1** was widow of the deceased who testified that on 25/5/2013 at 6 am after taking breakfast with her husband she went to take goats outside compound then her and her grandchild went to the shamba. Her husband who was a clan elder told her that he was going to attend a clan elders' meeting. His son the deceased was then asleep. She went to harvest green grams.
6. When she returned home about 1 pm she found her husband lying down under a tree shade. The blood was oozing from the back of his head. He was already dead. There was one yoke nearby. He used to make Yokes. She ran away trying to scream but she was not able to scream. She called a neighbour and asked whether she saw fight in her homestead; who answered in negative.
7. They both proceeded to the scene where body was. The neighbour Nzilani started screaming. The headman came, also chief and Assistant Chief. She did not find accused who she had left sleeping. She saw him again in November when he came home. She identified the Yoke which was near deceased body. She stated that the deceased and accused used to have quarrel and conflicts. The deceased was a drunkard and used to beat the accused and even her. He one time broke her thumb.
8. On cross examination she stated that when she left for shamba the accused had locked himself inside his house. Thus she did not see him. She said that deceased used to be very troublesome, when drunk. He had beaten accused such that he lost his hearing ability.
9. **PW2 Edwin Muindi Ndolo** stated that they went on 25/6/2013 to attend elders meeting and returned at 10 am. The deceased was to pay him Ksh.50/= he owed him. Thus he went to his home just to find him lying down covered. He went to call Assistant Chief. He also said while at home he was called by deceased wife just to go and find deceased lying down.
10. The Assistant Chief came and called police to the scene who came and collected the body. They also took blood stained yoke. On cross examination, he said he got report of the deceased from deceased's wife at around 12 noon.
11. **PW3 Josephine Mutave Dishon** daughter of deceased testified that on 17/3/2016 she was called by the OCS at Makindu Police Station. While there accused was called from cells. She witnessed the accused her brother record confession she thump printed. Her brother signed and so was the officer who recorded it.
12. She further testified that the accused and her father used to have bad blood thus conflicts. Deceased used to beat accused. The beating occasioned him to lose his hearing.
13. On the material day of deceased's death she got report while at her matrimonial home of her father's demise via telephone. She went home. The accused had run away since that date of incident and came back after a while and he was arrested.

14. **PW4 Richard Mavindu Kioko** cousin to deceased witnessed the postmortem exercise.
15. **PW5 Mutwiwa Kisingani** deceased's elder brother got information of his brother's death via phone from PW1. He also witnessed postmortem exercise. He also had visited scene of murder.
16. **PW6 Maweu Ndolo** Sub-Chief testified that on 25/6/2013 he got call and went to the scene where he found deceased body at the scene. Blood was oozing and he was dead. There were many people already. He called the police who came and collected the body. There was also a blood stained yoke.
17. On cross examination, he said at the scene the ground was disturbed as if there was struggle.
18. **PW7 PC Samson Mailu** formerly of Makindu Police Station testified that on 25/6/2013 at 4.20pm while at police station, he got call from Assistant Chief informing him of the incident of murder. The OCS instructed him together with PC Wafula and a driver to proceed to the scene. They found AP Officers and chief at the scene.
19. They viewed the body and saw the injuries on the head. They got information that the accused killed his father and disappeared. They took the body to the mortuary at Makindu. They also took the yoke as the exhibit. Yoke was identified in court and produced as exhibit 1. The postmortem was later conducted. The accused was arrested in 2016.
20. **PW8 Assistant Superintendent of Police** in DCI Office Makindu recorded statement under inquiry of the accused as requested by the OCS. When he attempted to produce the same, the same was objected to by the defence thus trial within trial was undertaken. The court in a ruling overruled objection and admitted the confession.
21. **PW8 IP Faith Chesire** took over the matter from investigating officer IP Ndirangu when he left for Kangundo Police Station. She testified how accused who had ran away after the incident in 2013 reappeared and was arrested and on 19/2/2015 he recorded a confession.
22. He was later charged in court with instant offence. The statement of accused was produced as Pexh 2. Further with consent of both parties the postmortem report was also produced as Pexh 3. The prosecution closed its case at this stage.
23. The court was called to determine whether the accused had a case to answer and on a ruling the court returned a verdict in positive and put accused on his defence.
24. The accused was put on his defence. He tendered sworn statement but never called any witness. He stated that on 25/6/2013 in the morning his father told him to go where cows were and took them. He then left to where he used to work and came back after few months and found his father had died and buried. He didn't know who killed him. He denied the confession produced.
25. On cross examination, he said that after he left home, he never communicated with family members for 4 months. He has 3 siblings and had no grudge with them. They never informed him of his father's death. He says that he never absconded after the incident.
26. After closing the case, the parties agreed to exchange submissions but to date for the writing of judgement on 28/8/2019 none had filed the same. Thus judgement prepared without factoring the same.
27. After going through the evidence on record, I find the issues are:
- (a) *Whether the ingredients of murder have been proved to the required standard?*
  - (b) *If above in negative, is the offence of manslaughter proved by evidence on record?*
28. The 3 ingredients of murder are set out in case of Anthony Ndegwa Ngari vs Republic (2014) eKLR, the court found the elements of the offence of murder to be:
- i. *That the death of the deceased occurred.*
  - ii. *That the accused committed the unlawful act which caused the death of the deceased; and*
  - iii. *That the accused had malice aforethought.*
29. On the fact that death of the deceased occurred, same was confirmed by the postmortem report produced by the investigating officer by consent of both sides counsels. PW1, 2, 3, 4, 5 and 6 also saw deceased body at the scene. The defence did not contest the death of deceased and its cause i.e. head injuries. Thus the court finds that the first ingredient of murder as to the fact that death of deceased occurred was proved to the required standard.
30. As to whether the accused committed the unlawful act which caused the death of the deceased; the court is to analyse evidence tendered to establish whether same ingredient was proved.
31. PW1 said that on the material day at 6am went to the shamba. Her husband who was a clan elder told her that he was going to attend a clan elders' meeting. His son the deceased was then asleep. She went to harvest green grams. When she returned home about 1pm she found

her husband lying down under a tree shade. The blood was oozing from the back of his head. He was already dead.

32. The accused was not at home she saw him again November after a span of about 6 months after the incident. When she left home she said the accused had locked himself asleep. He used to be beaten by the deceased and in fact the deceased occasioned accused hearing problems through beating.

33. This element of beating was corroborated by PW3 accused sister. When accused was arrested after going into hiding for 6 or so months, he recorded a confession in presence and witnessed by his sister PW3. The statement was admitted after trial within trial. The accused detailed how he killed his father after the deceased assaulted him using a stick. He hit deceased with a yoke which was nearby killing him instantly.

34. Thus the second ingredient of murder was proved beyond reasonable doubt.

35. On whether accused acted with malice afore thought, the court has to look at the circumstances of the killing. As to whether there was malice aforethought, Section 203 of the Penal Code provides:

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

36. Section 204 provides that, ***“any person convicted of murder shall be sentenced to death.”***

37. Section 206 on Malice aforethought 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.”***

38. Further When unlawful death is caused by an accused in circumstances which would constitute murder but which there is evidence to establish that there was provocation leading to the accused acting in the heat of passion caused by that provocation the offence is reduced to manslaughter (see Wero vs Republic [1983] E.A 549 and RC vs Republic [2005] eKLR).

39. There is evidence of constant beating of the accused by the deceased and that at one time he beat him to the extent of impairing his hearing his hearing. The court observed that during the trial accused experienced a lot of difficulties in hearing and court was constrained to facilitate him to sit close to the Judge and the witnesses as testimony was being tendered.

40. It was stated by PW1, PW3 and accused himself that; same disability was occasioned by the beatings meted out to accused by the deceased. On the material day the accused in his confession stated that, the deceased is the one who attacked him with a stick and with the continuing bad blood continuing in the accused he was provoked without pre-meditation to the extent that he took the yoke which nearby and hit the deceased with the same. He died as a result of that attack.

41. The court finds that the ingredient of malice aforethought was not proved thus the court finds that though the killing was unlawful the same did not amount into murder but a lesser offence of manslaughter.

42. The court thus makes the following order;

***i) The accused is found guilty and convicted of the offence of manslaughter.***

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

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**C. KARIUKI**

**JUDGE**