



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 59 OF 2014

REPUBLIC.....PROSECUTOR

Versus

ANTHONY MWIRIGI.....ACCUSED

JUDGMENT

**Murder**

[1] The accused person, namely Anthony Mwirigi was charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on 30<sup>th</sup> August 2014 at Mirigu village, Nyweri Location, in Meru Central District within Meru County murdered Erastus M'Arithi Muchai.

**Elements of Murder**

[2] To secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following;

1. *The death of the deceased;*
2. *The cause of death;*
3. *That the accused caused the unlawful act or omission which caused the death; and*
4. *That the accused had malice aforethought as defined in section 206 of the Penal Code.*

**The death of the deceased and cause of death**

[3] Dr. Guantai carried out a post-mortem on the body of the deceased, one Erastus Muchai. He compiled a report thereto dated 4<sup>th</sup> September 2014 in which he formed an opinion that the deceased died and the cause of death was exsanguination 2° to deep cut wound to the neck and base skull. The report was produced by **PW6 Dr. Timothy Kiruja**. He testified that Dr. Guantai is his colleague and therefore he knows his signature and handwriting. The medical evidence produced therefore established the death and the cause of death of the deceased.

**Did accused cause the unlawful act which caused the death?**

[4] **PW1 PETER MURIANKI M'ARITHI** told the court that on 30<sup>th</sup> September 2018 at around 1:00 pm he heard screams. When he went to the road he found his mother screaming. There were fundis near her who were constructing a toilet. When he asked why his mother was screaming he was told that his father had been slashed. When he went to the scene he found his father lying on the ground. He had had three deep cuts on the neck. When he called him he responded and said that Antony Mwirigi had cut him. He asked Lawrence Matumbi, PW3 to assist them with a vehicle to take the deceased to hospital and offered to fuel the vehicle. He also asked him whether he can use his phone to call his brother. They boarded the car and went to Kariene Police Station where they made a report. Angelina, Elizabeth, Jason were also at the scene. At the police station they met with the sub chief Janet Kagwiria who received the report. They proceeded to Meru General Hospital and all this time the deceased was talking emphasizing that they should inform the chief how he was cut. The doctors received him well and commenced emergency treatment. They were told to wait outside and after a while they were informed that their father had passed on. They went to Kariene Police station and informed them that their father had died. The police advised them to go back to the police station the following morning to record their statements.

[5] **PW2 ISAAC ARITHI** testified that on 30<sup>th</sup> September 2014 at around noon to 1pm he received a call from Matumbi the foreman informing him that his father was sick and should go to the scene so as to take him to hospital. However, before he left for the scene he

received a phone call from Beth (his wife) who informed him that Anthony was cutting the deceased. He left urgently and when he got there he found his brother there and their father lying on the ground. When he spoke with the deceased he told him that Anthony had cut him. He had deep cuts below the left ear and at the back of the neck. They took his father and went to report the matter at Kariene Police Station. They found the assistant chief Janet who received their report. They then took the deceased to Meru General Hospital and the Chief accompanied them. They reached the hospital and the doctor started treating the deceased. At around 4 pm the sub chief told him that their father had passed away. They reported the matter to the police the same day and recorded their statements the following day.

[6] **PW3 CHARITY M'ARITHI** testified that the accused person is her child and the deceased was her husband. That on 30<sup>th</sup> August 2014 they had not had water for 3 days. The accused then went and to find out whether the accused had cut off the water as he had done earlier. Later Kiogora's wife came and told her that her husband was lying in the school compound. She proceeded to the scene where she found her husband on the floor where he was connecting the water. She sounded alarm and started rolling on the ground. She then asked PW1 to remove him from the ditch. PW1 then asked the fundis to provide them with transport to take the deceased to hospital. Another of her children also came to the scene and took the deceased. However because there was a lot of blood, she was taken home. She was later told that the deceased had died.

[7] **PW4 LAWRENCE MATUMBI** testified and told the court that he is a mason and on 30<sup>th</sup> August 2014 he left home for Nyereri Secondary School for work. At about 10.30 am the deceased passed by his place of work and said hallo to them. He said that he was going to correct some water connection. At about 12.30 he left to look for scissors to cut iron sheets, he passed through a footpath and he saw the deceased lying with his head on the trench. He called the deceased but he did not answer. When he moved closer and he saw that he had been cut on the left side of his head. He raised alarm and his colleagues came and saw that the deceased had been injured. He decided to go to the home of the deceased to alert them of the incident. He found the accused at home and he called him twice but he refused to answer. He told him about his father and he threw his hands at him. He also met the wife to Kiogora and told her about her father in law who then told her husband and the deceased wife. He went back to the scene and the deceased wife came and started screaming. She was accompanied by her son called Peter. He later drove them to the police station and then to the hospital.

[8] **PW7 JOHN KILONZO** testified that on 30<sup>th</sup> August 2014 he was on duty when the deceased was brought to Kariene police station. It was reported that he was assaulted by his son. The report was booked and the deceased was taken to hospital. At 1730 hrs Isaac Kiogora and Peter Kiriangi came back to the station and informed them that the deceased had died in hospital. He visited the scene and at around 2030hrs the accused surrendered himself at Kariene Police Station. When he surrendered himself he told PW 7 that he assaulted his father over a disagreement on water pipes connecting water to his shamba.

[9] **DW1 ANTHONY MWIRIGI** testified and told the court that on 30<sup>th</sup> August 2014 he left home at 8.20 am for Nkubu S.D.A Church as it was the last day of a camp that was hosted by the church. He left church in the evening at around 5 and 6 pm. As it was raining he took shelter on the verandah of the shops. He met 3 police officers to the station to face complaints which had been filed against him. When the rain stopped they proceeded to the police station.

[10] **DW1** defended himself and said that this case is a fabrication as he was not at home and did not see the deceased on the material day. He however had a serious misunderstanding with his brothers. When the deceased retired he came home in 2009 and took control of all family finances. Initially their mother was running the family finances and he refused to support her taking back the authority. He has been using the water since 2007 which was installed by the deceased and him. Additionally his brothers live on the same land and they all use the water together.

[11] From examination of the evidence that was adduced, it is clear that there were no eye witnesses to the assault of the deceased. The evidence implicating the accused was the confession of the deceased. Accordingly, the court must decide on whether the deceased made dying declaration and if so whether he identified the accused as the person who had assaulted him. PW1, PW2 and PW3 all testified that the deceased told them that the accused was the person who assaulted him by cutting him with a panga. The accused denied the allegation that he assaulted his father and claimed that he had not seen the deceased on the material day.

[12] According to section 33(a) of the Evidence Act, a statement made by a deceased person relating to the cause of or any circumstances of the transaction which resulted in his death is admissible in evidence. The section creates an exception to the rule against admissibility of hearsay evidence. See the section below:-

### **33.Statement by deceased person, etc., when–**

*Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–*

#### **relating to cause of death**

*(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;*

[13] In **Philip Nzaka Watu vs. Republic [2016] eKLR**, the Court stated the following on admissibility of a dying declaration:

*“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is*

*dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”*

[14] Did the deceased make a dying declaration on the cause of or circumstances of the transaction which resulted into his death?

#### **Did unlawful act of the accused cause the death?**

[15] Both **PW1** and **PW2** informed the court that they live on the same land with the accused but their father was one shamba from where they live. When they arrived at the scene of crime- albeit at different times- each spoke to the deceased who said to them that Anthony, the accused, cut him. Each one of them confirmed to the court that the deceased had deep cuts at the back of the neck and below the left ear. Dr. Guantai in a post-mortem report on the body of the deceased, one Erastus Muchai, dated 4<sup>th</sup> September 2014 formed an opinion that the deceased died and the cause of death was exsanguination 2° to deep cut wound to the neck and base skull. The report also confirmed the injuries as narrated by PW 1 PW 2, and PW 4. The report was produced by **PW 6 Dr. Timothy Kiruja**. PW1 and PW 2 stated that the deceased was talking all along from the time they found him at the scene up to the time they left him in the hands of the doctor in the hospital. These two witnesses were with the deceased at the scene and up to the Hospital. Their testimonies were consistent and uncontroverted. The doctor confirmed that the injuries suffered at the neck and base of the skull resulted into his death. The cuts the deceased talked about resulted into his death. The deceased also said to PW1 and PW2 that the cuts were inflicted by the accused. These are circumstances of the transaction which resulted into his death. It matters not whether the deceased was in anticipation of death. Such statements are admissible as to the cause of or circumstances which resulted into his death as his death is now in question in these proceedings. The dying declaration has been proved and is admissible herein. By this finding, I also find that the deceased met his death by unlawful act of the accused; cutting the deceased with a panga.

#### **Of malice aforethought**

[16] Mens rea on the part of the accused makes death caused by unlawful act or omission a murder in law. This is referred to in our law as malice aforethought. Ordinarily, circumstances which constitute malice aforethought are stated in section 206 of the Penal Code as follows:

*206. 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 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.*

[17] From the evidence, the accused had earlier on diverted water that was connected to his father's (deceased's) home. The deceased went to rectify the situation. The quarrel over the water between the accused and the deceased seems to have been long-drawn and recurring. The accused wanted to continue using his father's water. But, the deceased was now determined to stop the accused from using his water. The testimony of PW3 added that the accused had always expressed intention of killing his father because of their water dispute

[18] See also the evidence by **PW 5 KIRINYA MUUTAI** who is the brother of the deceased, that on 29<sup>th</sup> August he visited his brother's home at 6.00 pm the deceased complained to him that the accused had cut off his water and his cows were running thirsty. He advised him against reconnecting the water as the accused had threatened to kill him. However the deceased decided to go ahead with the reconnection. On 30<sup>th</sup> August 2014 his son, Paul told him that the deceased had been cut. He later found out that he had been taken to the police station. He went to the police and recorded a statement.

[19] The foregoing notwithstanding as motive is not relevant, the dying declaration by the deceased confirmed that the accused assaulted and cut him with a panga. Medical evidence confirms the grievous nature of the injuries sustained by the deceased and caused his death. Notably, a panga or machete is a dangerous weapon. And attacking a person with such weapon portend an intention to cause grievous bodily harm or death of the person. In the circumstances, it is justifiable to infer that the accused by attacking the deceased with a panga and with such brutal force as demonstrated by the deep cuts was possessed of the knowledge that he would cause grievous bodily harm or probably the death of the deceased. I therefore find that the accused with malice aforethought caused the death of the deceased.

#### **Conclusion**

[20] Consequently I find the accused person guilty of the offence of murder contrary to Section 203 of the Penal Code of Kenya and accordingly convict him for the murder of ERASTUS M'ARITHI MUCHAI under section 322. It is hereby so ordered. Right of appeal explained.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 3<sup>RD</sup> DAY OF OCTOBER, 2019**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Ngugi for accused

Musyoka for state

Accused present

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**F. GIKONYO**

**JUDGE**