



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JAPHETH MUNENE.....ACCUSED

J U D G E M E N T

1. **JAPHET MUNENE**, the accused herein is charged with offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. The particulars are that on 16th day of may 2017 at Mpaguani village, Gantaraki Sub-Location, Murugi, Maara Sub-County Tharaka Nithi County, the accused caused the death of **ALEX MAWIRA KIMITI** (the deceased herein.)

2. The accused denied committing the offence and the prosecution called a total of ten witnesses to prove their case against the accused who maintained his innocence in his defence.

3. Gilbert Kabara (PW1), the first prosecution witness testified and informed this court that he was outside his shop at a place known as Kalewa when he heard and saw the deceased asking the accused to refund him his Kshs.30/- . It was his evidence that the two were heated engaged in a argument as they passed by and that he decided to ask Charles Gitari Mbae (PW3) to accompany him in following both the accused and the deceased from behind as they continued quarrelling over the 30/- He added that as they drew close to where the two were quarrelling, he saw the accused ran suddenly away as the deceased fell down crying that Munene had stabbed him. He testified that when they checked, he noticed that the deceased was bleeding from the lower side of his chest. He then called the deceased's wife and a cousin Mwithi Ngai (PW5) before they made arrangements for the deceased to be taken to Chuka County Hospital where he later succumbed to the injury.

4. Obed Mugambi (PW2) a boda boda rider, testified that on the material date (16th May 2017) between 10 pm and 10.30 pm he was called on phone by his cousin named Joram Kariuki and informed that the deceased had been stabbed and requested for his services to ferry the deceased to hospital for treatment. He testified that when he arrived at the scene he found that the condition of the deceased was bad and was unsafe to transport him using a motorcycle. He therefore called a good samaritan with a car to do the job. He told this court that he accompanied the deceased with Murithi and others and that while on the way he inquired from the deceased about the person who had stabbed him and according to him the deceased responded that it was "**Mukima**" and that the accused person was known as "**Mukima**" in the locality or the village where both the accused and the witness comes from. The witness further added that they took the deceased to Chuka General Hospital where he succumbed to the injuries shortly while undergoing treatment.

5. Charles Gitari Mbae (PW3) told this court that he was present at the material place (Karewa Market) on the material date (16th May 2017) and time (10 pm) when the accused herein and the deceased disagreed over betting. He testified that the accused then left the place as the deceased followed him from behind. He added that the accused threw a stone aimed at the deceased who was demanding his 30/- from the accused. According to the witness, the accused had lent the accused Kshs.30/- to bet but lost the bet and was unable to refund causing altercation. The witness told this court that he followed the two and after a while he saw the deceased fall down and on reaching where he was, he found that he had been stabbed. He rushed to inform his parents and came back to take the deceased to Hospital. He added that as he was being taken to hospital, the deceased stated;

"Munene umeniumiza, umenimaliza tu hivyo" as he bled from wound on the side of his stomach where he had been stabbed. The witness further stated that he sat at the back of the car with Mugambi (PW2) and held the deceased as he lay across the car on their legs as they took him to Chuka General Hospital for treatment.

6. Catherine Kaari Micheni (PW4), an Assistant Chief of the locality (Gantaraki Sub-Location) where the incident occurred testified that he was called on her mobile phone by one M'Athari Kiringa, (the Sub Area Manager) and informed that Alex Mawira (deceased) had been attacked by the accused herein. She told this court that on receipt of the news, she informed the caller to arrange for the deceased to be taken to hospital for treatment and that she was later called and informed that the deceased had succumbed to the injuries and died. She added that she woke up at around 5 am and in the company of "**Nyumba Kumi**" security members, she went to the house of the accused and found it locked from the outside but that he was inside the house having locked himself in from out outside. She added that she called

the police and when they came, the accused handed them the key of the padlock he had used to lock the door and that when they entered into the house, the accused was arrested with a knife suspected to be the murder weapon. The witness identified the knife with a black handle in court as the knife she recovered from the house of the accused before handing it over to the police at the same place. The witness added that they also collected a sheath which fitted the knife at the scene of crime.

7. Leonard Murithi (PW5) on his part told this court that he was called and informed on the night of 16th May 2017 by Gilbert Kibaara (PW1) that the deceased had been stabbed by the accused person herein. He told this court that he accompanied the said reportee (PW1) to the scene of crime (near Karewa Tea Buying Centre) and found the deceased lying down and on checking him he noted that he had been stabbed on the midriff region. He further added that, they arranged for transport to ferry the deceased to Hospital and it was while they were on the way to Chuka Hospital that the deceased told them that "**Mukima**" had stabbed him. He clarified that Japhet Munene (accused herein) was known as "**Mukima**". He further added that the deceased died on arrival at Chuka General Hospital.

8. The witness (PW5) further told this court that the next day, he accompanied the Assistant Chief (PW4) to the house of the accused where they found him in though he had locked himself from the outside and that a sword was recovered in his house. He added that when they visited the scene, he saw blood stains on the ground and that he recovered a sheath which fitted the recovered sword. He told this court that he handed over the sheath to the Assistant Chief.

9. Japhrey Miriti (PW6) also gave evidence that corroborated the evidence of PW5 particularly on what the deceased told them as he was being taken to Hospital. He stated that the deceased told him that "**Mukima**" had stabbed him with a knife.

10. Corporal Paul Mwangi (PW7) also testified during trial and told this court about the events of 17th May 2017. According to him, two people went to Iriga AP Camp where he was based and reported that members of the public had surrounded the house of a murder suspect with an intention to apprehend and lynch him. He told this court that he hurriedly in the company of another officer known as Stephen left and went to rescue the suspect. He found the Area Chief at the house with a mob. He told this court that the suspect was in though he had locked the house from the outside with a padlock. He added that when he identified himself, the accused gave him a key through the window and he opened the door and arrested him and took him to police station. He added that the Assistant Chief later came with a knife/sword recovered that which was believed to be the murder weapon. This evidence was corroborated by the APC Stephen Lemain (PW8) who confirmed that he was the one who had accompanied PW7 to rescue and arrest the accused person herein. He added that the mob was so charged and it took a lot of convincing to cool them down and allow them take the suspect to Chogoria Police Station.

11. Dr. Justus Kitili (PW9) the doctor who performed post mortem examination on the body of the deceased (Alex Mawira) told this court that he performed post mortem examination on 23rd May 2017 and the following were his findings;

- i. A deep penetrating wound about 4 cm long was visible on the abdomen.
- ii. Massive blood in the stomach cavity.
- iii. A cut on the small gut
- iv. Tissue connecting the gut and abdomen tissue was also cut.

In his opinion, the deceased's death was caused by haemoperitonium due to penetrating abdominal injury inflicted by a sharp object. He tendered postmortem examination report as P. Exhibit 3.

12. Corporal Kazungu Ngubao Jeremiah (PW10), the investigating officer in this case told this court that he received the report regarding the murder incident in this case on 17th May 2017 from Assistant Chief Catherine Kaari (PW4) and two APC officers (PW7 and PW8). He further told this court that said officers handed him the accused herein as the suspect in the murder. He booked in the suspect and placed him in custody. He told this court that he visited the scene where he observed some blood stains on the ground. He also told this court that he visited the house of the accused where he found that irate members of the public had burnt it down to ashes. He also stated that he was able to get two key witnesses who was with the deceased on the night he was stabbed. The witnesses were PW1 - Gilbert Kibaara and Charles Gitari Mbae (PW3). It was his evidence that the deceased and the accused had a quarrel over Kshs.30/- which the deceased advanced to the accused to enable him place a bet which he lost and was unable to refund the money leading to the heated exchange between the deceased and the accused person. He later recorded the statements from the witnesses. He also told this court that the murder weapon (knife) was recovered by the Assistant Chief while the sheath or cover of the said knife was recovered at the scene of murder. He added that the sheath fitted the knife perfectly.

13. When placed on his defence, the accused denied committing the offence and stated that on the material date he was busy at his home doing his daily chores and that he slept at 8 pm. He told this court that he was woken up the following day and informed that he had killed someone using a knife. He denied killing anyone raising *alibi* as his defence. He denied owning the knife that was used as a murder weapon. He added that he normally locks his door from outside but denied using a padlock. He faulted the defence witnesses for lying stating that they are all from one family. He however conceded that the Assistant Chief and the Area Chief are not from that family. He further added that the reason why he locks his door from outside is that he used to leave his house in a hurry and to avoid forgetting to lock his house he figured that it was better to be locking it from outside to avoid forgetting to lock it.

14. This court has considered the evidence tendered by the prosecution and the defence put forward by the accused person. It is now settled that for a charge of murder to be sustained, the following necessary ingredients/elements must be established and proved beyond reasonable doubt:

- i. Death of the deceased

ii. That the accused person committed the unlawful act that caused the death of the deceased (*actus reus*) and

iii. Malice aforethought

15. (a) Death of the deceased

To begin with the first element which is the death of the deceased, there is no doubt Alex Mawira (deceased) died on 16th May 2017 as per the doctor's (PW9) evidence. Doctor Kitili tendered a post mortem report (P. Exhibit 3) indicating that the report was in relation to the body of Alex Mawira. He told this court that he issued Death Certificate No. 1140205 as per his report to certify the death of the deceased.

16. (b) Actus Reus

Going by the evidence tendered in this case, there were two eye witnesses namely Gilbert Kibaara (PW1) and Charles Gitari Mbae (PW2). Both of these two prosecution witnesses gave vivid descriptions on what transpired prior to the stabbing of the deceased and after the attack. Gilbert Kibaara, a businessman at Karewa market where the incident took place saw the deceased pursuing the accused asking him to refund his 30/-. According to the witness, the verbal exchanges between the two were quite heated and that is why I called Charles Mbae (PW2) to accompany him as they followed the two protagonist from a distance. Charles Gitari Mbae also vividly described how he was in the company of both the deceased and the accused on 16th May 2017 at around 10 pm when a disagreement arose as a result of a bet placed by the accused which he lost after placing a bet of Kshs.30/- which he had borrowed from the deceased. After losing the bet the accused declined to refund the money to the deceased causing the disagreement and the verbal exchanges. The witness (PW3) saw the accused walk out as the deceased followed him closely. It was then that PW1 came into the picture as he also witnessed the heated exchanges as the accused walked away followed closely by the deceased. According to PW3, the accused first picked a stone and took aim at the deceased but that did not deter him from pursuing him. After a short distance they found the deceased lying down after he was stabbed on the side of his stomach. They saw the accused running away though the two witnesses never actually saw him stab the deceased.

17. This court however has considered the circumstances leading to the attack of the deceased and the circumstances clearly point at the accused person. For one, when PW1 arrived at where the deceased lay in a pool of blood, he heard the deceased say;

" Nimedungwa na Munene "

The same evidence was corroborated by PW5 (Leonard Murithi) PW2 (Obed Mugambi Karani) and PW6 (Miriti Japhrim). All the above witnesses took the deceased who was in critical condition to hospital for treatment and while they were taking him he repeated that "*Mukima*" had stabbed him. There is no doubt that the accused herein was also known as "*Mukima*" as all the said witnesses knew him by that name. This court has considered the evidence of PW1, PW2, PW5 and PW6 which shows that the deceased clearly mentioned the accused person in the state the deceased was in when he mentioned the accused, that in my view is a dying declaration within the meaning of **Section 33 (a)** of the **Evidence Act Cap 80** Laws of Kenya. The said dying declaration when taken with the surrounding circumstances (the lost bet and attendant heated exchange witnessed by PW1 & PW3) points to only one irresistible conclusion. The accused person was responsible for that fatal injury (stab wound on the stomach) which the doctor opined caused the death of the deceased.

18. This court has considered the defence of *alibi* raised by the accused and finds the same to be an afterthought. He claims that he had gone to pick some coffee is not supported by any audience. I further find his explanation on why he locked his door from outside with a padlock and using a window to access his house to be somewhat absurd. He told this court that he used to lock himself in from outside so that in the morning he would simply jump out of the window because he used to be in hurry and so to avoid forgetting to lock his door he came up with the crude and strange solution of locking himself in from the outside. Well though I find this comic and absurd, I am not persuaded by the same. Judging from his conduct, it is quite clear that the accused person was very afraid owing to what he had done the previous night and that explains why he thought locking his door from the outside could fool those out to apprehend him. There can be no other explanation from that strange conduct of locking himself in from the outside.

19. This court notes that the prosecution never followed up with the production/tendering of the murder weapon (sword) and the sheath as exhibits despite marking them for identification. This is despite the diligence of the Assistant Chief Catherine Kaari (PW4) of securing the sword plus its sheath and surrendering it to the police for further investigation. The knife was recovered at the accused house, while the sheath that the investigating officer stated fitted the sword perfectly was recovered at the scene of crime where there was a lot of blood stains. Though there was an omission on the part of the prosecution not to tender as exhibits murder weapon and sheath despite the same having been recovered, I still find that based on the dying declaration of the deceased as I have observed above and the surrounding circumstances as narrated by the prosecution witnesses, the prosecution has nevertheless established the crucial element of *actus reus* and successfully connect it to the accused person.

20 Mens rea or malice aforethought

The evidence tendered by the prosecution going by the evidence of PW1 and PW3 indicates that there was a very heated argument between the deceased and the accused person over Kshs.30/- which the accused had borrowed the deceased to place a bet which he lost. PW3 stated that when the deceased asked for a refund, the accused turned hostile and hence the heated argument. He (PW3) also saw the accused aim a stone at the deceased when the deceased pursued him as he walked away. The deceased thereafter and after a short distance away was found lying down after being stabbed with a knife on his stomach. The actions of the accused person on the deceased are deemed by law to

constitute malice aforethought. The provisions of **Section 206** of the **Penal Code** provide as follows.

"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 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....."

There is no doubt that the accused person fatally stabbed the deceased on the stomach and left him lying down in a pool of blood with indifference on what was going to befall him despite having spent the evening and part of the night together in a club. In my considered assessment that act constitutes malice aforethought as postulated in the above cited provision of the law. This court finds that the element of *mens rea* has been established and proved by the prosecution's case against the accused person.

In conclusion this court finds that the prosecution's case against the accused person has been proved beyond reasonable doubt. The accused person in an attempt to silence or stop the deceased from demanding his money from him, regrettably caused a cold murder on an innocent young person whose only fault was to demand his right. This court finds him guilty for the offence of murder and he is hereby convicted accordingly.

Dated, signed and delivered at Chuka this 3rd day of October, 2019.

R.K. LIMO

JUDGE