



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 120 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIAS MWITHALI KITHAKA..... ACCUSED PERSON**

**JUDGMENT**

1. The accused Elias Mwithali Kithaka was charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code.
2. Particulars were that Elias Mwithali Kithaka on the 27<sup>th</sup> day of November 2018 in Karichu village Nkanda Sublocation, Antuambui Location in Igembe North subcounty within Meru County murdered Agnes Enocia Mbaabu.
3. The deceased is said to have been in the house with PW1 at 10.00 pm on 27<sup>th</sup> November 2018 when the accused came and forced his way into the house by breaking the door using a stone. That on entry held the deceased by the neck and forced her out of the house and started beating her with firewood.
4. PW1 said that he kept beating the deceased and picked firewood after another when they got broken. She identified the pieces of broken firewood that the accused used to beat the deceased PW1 testified that accused didn't say why was beating the deceased who was his sister.
5. PW1 raised alarm and went to the home of accused and deceased to call their brothers. She reported to William Msafiri. PW1 said that the deceased was drunk when she went to her house. She said the accused and deceased had not quarrelled. She said the accused beat the deceased all over the body and when she tried to stop him he threw stones at her.
6. PW1 said accused suffered injuries when he resisted being apprehended by neighbours who responded to alarm. PW2 was called by PW1 and informed that the accused was beating the deceased and when he went to the house of PW1 he found the accused still beating the deceased using sticks/firewood.
7. That when he told him not to beat the deceased he swore not to leave her. That neighbours came and assisted in arrested the accused and his hands were tied with a rope. PW1 and PW2 took the deceased to hospital where she was admitted but she died the following day and accused was handed over to police and charged. PW2 said that when he arrived at scene it is the deceased who had injuries and was unconscious. He said it is the accused who was drunk.
8. PW2 said that his brothers had decided to settle the matter at home and the accused was released but when news came that their sister had died he was apprehended and handed over to police.
9. PW3 responded to the alarm and noise that emanated from their home and found the deceased lying in the compound by PW1 and he heard people say she had been beaten by the accused. That he called a motorbike and PW1 and PW2 took the deceased to hospital as he and his brothers Elias and other guarded him.
10. That the next day in the afternoon they learnt their sister had died and they informed Assistant chief to come and arrest the accused. PW3 said that the accused was injured on the hands by those who apprehended him. PW3 said he was a neighbour to the accused and he never heard the accused and his deceased sister quarrel. He said that the accused is his age-mate.
11. PW4 – Assistant Karichu Sublocation testified that on 28.11.2018 while in company of 2 area Managers he received phone call from PW2 who reported that his sister who had been assaulted by the accused had died at Maua Hospital. That he was requested to go and arrest the accused. He said that village elders Gerald and John Kirimi assisted him to apprehend the accused. In company of PW2 and the 2 village elders the Assistant chief (PW4) escorted accused to Laare police station.

12. PW4 said he didn't know of any differences between the accused and the deceased. He said he learnt the accused and the deceased had fought and he didn't know cause of fight.

13. PW5 CPL Fredrick Peter investigated the offence when it was reported on 28.11.2018 that the accused had fatally beaten his sister the deceased herein. He placed accused in cell, recorded statements of witnesses arranged for post mortem to be conducted and charged the accused.

14. PW6 Dr Githu Wachira produced Post mortem Report in which Dr. Micheal Ndirangu established that the deceased died due to cardio-pulmonary arrest due to concealed haemorrhage shock due to multiple traumatic assault with a heavy blunt object on the head.

15. Accused was placed on defence and in his unsworn statement said that when she met the deceased PW1's house the deceased wanted him to give her his miraa and the deceased didn't like it.

16. He said that the deceased entered the house and came out with a metal bar and hit his left arm- he produced X-ray film Exp1. That when he held the deceased she bit his thumb.

17. That in defence he started beating her using sticks and snatched the bar and threw it outside. That PW1 raised alarm and when people came they held and beat him. He said Msafiri -PW2, Muroki, Japheth Gitonga and Samuel held and tied him.

18. That as PW1 took the deceased to hospital he was left tied up upto 3.00 am when he was untied and went to his house. That the next day PW1 gave him Kshs 2000/- to go to hospital and he was treated. He said he had a fracture of the hand, bite of thumb and injury on the forehead. He learnt while in hospital that his sister had died and he went back home where the chief arrested him and took him to Laare police station and later to Mutuati DCI where he was charged and arraigned in court on 13.12.2018.

19. Accused said it is the deceased who started beating him with an iron bar when he refused to give her miraa farm. He said if he was not drunk he would not have fought the deceased.

20. From evidence on record, the issues for determination are:-

a) Whether prosecution has proved fact of death

b) Whether prosecution has proved cause of death.

c) Whether cause of death was unlawful act.

d) Whether the unlawful act that caused the death of the deceased was actuated with malice aforethought.

e) Whether it is the accused who committed the unlawful act that caused the death of the deceased actuated with malice aforethought.

21. The fact of death and the cause of death has been proved by the prosecution witnesses. The accused has confirmed his sister died when they fought. The doctor produced PM Report Exp2 showing the deceased had multiple injuries all over the body which led to her death.

22. According to PW1, the accused forced his way into her house by breaking the door using a stone and on entry held the accused without uttering a word and forced even out of the house and started beating her using firewood that was outside the house which she tried to intervene and stop the accused he threw stones at her. She raised alarm as she went to call PW1.

23. PW1 testified that he came and found the accused still beating the deceased with firewood and when he was being restrained from beating the deceased he resisted and as a result he sustained injuries which he claimed in his unsworn statement as having been inflicted by the deceased.

24. PW3 said that it took him and other of accused persons brothers to guard him as the deceased was being taken to hospital. The evidence of PW1 has not indicated that the deceased was the aggressor and PW1 was not questioned whether the deceased produced an iron bar and started beating the accused. PW1 is accused persons cousin whereas PW2 is accused persons brother and if the contrary was the truth they would not have said that it is the accused who attacked and fatally injured the deceased. The many pieces of firewood used in beating the deceased randomly and the fact that accused resisted being restrained from beating the deceased in the view of the court means he was not upto any good.

25. The accused persistently beat the deceased and left him unconscious. Accused pleaded he was drunk and that is why he fought with sister but there is no evidence he was drunk.

26. This court finds the prosecution's evidence has proved beyond all reasonable doubt that accused committed the offence of murder. He is found guilty and is convicted under S. 322 CPC.

**HON A. ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 21<sup>ST</sup> DAY OF NOVEMBER 2019.**

**In the presence of :**

C/A: Kinoti

State : Ms Mbithe for state

Mr Igweta Advocate holding brief for Mr Nyenyire Advocate for accused

**HON A. ONG'INJO**

**JUDGE**

**Ms Mbithe**

I don't have records for accused. We can take a date for Victim Impact Statement.

**Ms Igweta**

We can have a date for mitigation

**Order**

Mention 16.1.2020 for mitigation, victim impact statement and sentencing. Copy of Judgment to be supplied to state and defence.

**HON A. ONG'INJO**

**JUDGE**