



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CRIMINAL CASE NO. 78 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**BENJAMIN KYALO MULONZI.....ACCUSED**

**JUDGMENT**

1. **Benjamin Kyalo Mulonzi** the accused stands charged with the offence of murder contrary to section 203 as read with section 204 Penal Code. The particulars being that the accused on the 7<sup>th</sup> day of September, 2010 at about 12:00 noon at Masaani village, Uvaleni sub-location in Kasikeu location, Kasikeu division in Makueni district within the Eastern province murdered **Jackson Mulinge Mulonzi**.

2. The accused denied the charge and the case proceeded to hearing with the prosecution calling six (6) witnesses while the post mortem report (EXB2) was produced under section 77 Evidence Act by consent. The accused in his defence gave an unsworn statement and called no witnesses.

3. Despite the accused having been first arraigned in court on 24<sup>th</sup> September, 2010, the first witness in this case testified on 13<sup>th</sup> May, 2019. Pw2 **Agnes Mutinda Mulonzi** is the mother of both the deceased and the accused. She testified that she was at her home on 7<sup>th</sup> September 2010 noon with the deceased when the accused came and took a donkey to go and work with.

4. The deceased intervened saying the donkey had been injured and it should not go to work. The accused could hear none of that. The deceased chased away the donkey and a disagreement between the two brothers ensued. They followed each other quarrelling as Pw2 followed from behind.

5. The accused threw a stone at the deceased hitting him on the right ear and he fell down. Her screams attracted villagers who responded. She told them what the accused had done to the deceased. The deceased was groaning in pain and was carried to Pw1's home and placed under a shade. He was not able to sit nor talk.

6. By then the accused was in his house (uphill) and he threatened those present as he came to the home. Most of them ran away. Pw2 was locked up in the house, but on peeping she witnessed the accused smash the deceased's head with a big stone. He thereafter left. The deceased died after the smashing of his head. She went and covered him with a blanket.

7. A report was made to the administration and she was called by the assistant chief to his office. Reaching there, she found the accused already arrested. Police later came home and took away the deceased's body, after taking photographs. She identified EXB 1a – d as the bow and arrows the accused had when he came to the home to cause havoc.

8. In cross examination, she said she had followed the two brothers because they were quarrelling. She was adamant that she had seen the accused hit the deceased as she peeped through the window of the house they had been locked in.

9. Pw1 **Moses Mutuku Matolo** is a neighbor to Pw2. He responded to her screams on the material day and he was the first to come to her aid. He saw the accused at his house, and he was shown the scene where he found the deceased lying on his stomach. He was bleeding from the mouth. When other neighbors came, they carried the deceased to Pw2's home. While there the accused threatened them with a bow and arrows and they took off.

10. Pw3 **David Kasyoki Kamonde** went to the scene. He was able to see a swelling on the deceased's head. The deceased was bleeding from the mouth, and was equally unable to speak. He returned to the home at 4:00 pm only to be told by Pw2 that the accused had returned after everybody left and hit the deceased with a stone and he died.

11. Pw4 **Phillip Kyengo Ndivo** is the area assistant chief of Kavaleni sub-location. He received a report of the murder of the deceased on 7<sup>th</sup> September, 2010 at 12:55 pm, and he informed the O.C.S. As he and community policing members prepared to go to Pw2's home, they saw the accused emerge carrying his bow and arrows, and he entered a certain shop. They managed to arrest him and tied him up with a rope.

12. On being assisted by a principal of a nearby school, they were able to take him to Sultan Hamud police station. He identified EXB 1a-d as what the accused had when he was arrested. In cross examination, he said the accused was not violent when they arrested him.

13. Pw5 **Charles Mutisya Mwisya** witnessed the post mortem on the deceased's body as a neighbor. Pw6 Peter Mulonzi Mbuvi is a brother to the accused and deceased. He too witnessed the postmortem.

14. The postmortem report (EXB2) was produced under section 77 of the Evidence Act by consent between the prosecutor and the defence. From EXB 2 it is clear that the deceased had some injuries on the head, limbs, collapsed left lung and blood collection in the liver and spleen. The cause of death was found to be cardiopulmonary arrest due to severe/head injury.

15. The accused elected to make an unsworn statement of defence without calling any witness. He stated that on 7<sup>th</sup> September, 2010 he took a donkey for purposes of fetching water. He explained to his deceased brother that the donkey would walk back as he remained behind working on his shamba. He did so and released the donkey. He worked up to about noon and when he went back home he found the deceased had offloaded the water but had forgotten to remove something from the donkey's mouth.

16. When he inquired the deceased told him that there was no problem and a quarrel ensued between them leading to a small fight. He added that he regrets what followed since he overwhelmed the deceased and injured him by hitting him with a stone on the neck leading to his death.

17. Both parties filed written submissions through their counsel. Mrs. Owenga for the prosecution submitted that the conduct of the accused while executing the killing of the deceased confirmed that he was hell bent on killing his brother. She has referred to the first encounter then the second where he hit him with a stone on the head.

18. She submitted that the prosecution had confirmed this through the postmortem report and the defence of the accused himself. Counsel relied on two cases namely: - **R –vs- Samuel Muigai Chege (2019) eKLR Criminal Case no. 17 of 2018 at High court Kajiado; Ogeto – v- R (2004) 2 KLR14**. She therefore urged this court to find that the prosecution had proved all the ingredients required in a case of murder. Mr. Hassan for the accused submitted that the accused admitted to hitting the deceased on the back of the head with a stone. That this was confirmed by the postmortem. He faults the prosecution for not producing photos taken, bow and arrows and stones though mentioned. He casts doubt on the evidence of Pw2 who is the mother of both the accused and the deceased. It is his submission that the accused and deceased were brothers and were quarrelling when the incident occurred. Further that the actions leading to the occurrence of the incident occurred at the spur of the moment and there was no *mens rea* to the commission of the offence of murder.

19. Mr. Hassan further submitted that the critical elements in an offence of murder as set out in the case of **R –vs- Nicholas Onyango Nyolo (2014) eKLR** had not been proved in this case.

20. The above is now the case before this court for determination.

21. The accused faces a charge of murder contrary to section 203 as read with section 204 of the penal Code. Murder is defined under section 203 as:

### **Murder**

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

22. For a charge of murder to be proved the following ingredients must be satisfied:

- i. The fact and cause of death.
- ii. The *actus reus*: the act of causing the injury leading to the death of the deceased. The act or omission must have been orchestrated by the accused.
- iii. Malice aforethought which forms the “*mens rea*” must be shown to have been present.

### **The fact and cause of death**

23. The deceased was a younger brother of the accused. Their mother (Pw2), neighbors, (Pw1, Pw3 and Pw5), assistant chief (Pw4) and accused's brother (Pw6) and the postmortem report (EXB2) all attest to the fact that the deceased died on 7<sup>th</sup> September, 2010. The postmortem report (EXB2) has given the cause of death as cardiopulmonary arrest due to a severe head injury.” A head injury cannot be said to be a natural cause of death, hence the charge of murder. I therefore find the fact and cause of death to have been proved.

### **Whether the accused person's action or non-action caused the injury that led to the deceased's death.**

24. Pw2 who is the mother of both the accused and the deceased was present at the scene when this incident took place. It was at about noon

which is broad daylight. Pw2 explained that the cause of the quarrel between the two brothers was the use of a donkey. The deceased appears not to have wanted the accused to use the donkey. She said she followed them as they quarreled and she saw the accused pick a stone and throw it at the deceased who was hit on the right ear and he fell.

25. She ran away screaming. Pw1 who responded to Pw2's screams said the deceased was bleeding from the mouth. Pw3 stated that when he reached the scene the deceased was lying down unable to rise up or speak, he had a swelling on the head and was bleeding from the mouth.

26. From the evidence of Pw1 and Pw3, I do find that when Pw2 ran away screaming she missed seeing what more may have been done to the deceased by the accused. The evidence of how she saw the accused smash the deceased's head is not supported by the medical evidence or the evidence of any of those who testified. If the deceased's head had been crushed as claimed by Pw2, the postmortem report would have stated so but it has not.

27. The accused in his defence admitted to having fought with his brother, overwhelming him and injuring him. In fact these are his own words "***I overwhelmed him and injured him. I hit him with a stone on the neck. This led to his death.***" Mr. Hassan for accused submitted that the head injury was as a result of a fall. There is no such evidence on record. That submission is therefore not supported by way of evidence.

28. The totality of the evidence by the prosecution and the accused's own defence is that the accused's action of hitting the deceased with a stone on the head was what led to his death. I therefore

find the ingredient of *actus reus* established. It is the accused who inflicted the injury that caused the deceased's death.

#### **Whether malice aforethought was proved.**

29. Section 206 Penal Code defines malice aforethought 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 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 be caused;
- c. an intent to cause 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.

30. It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of **Republic –vs- Tubere S/O Ochen (1945) 12 EACA63** held that an inference of malice aforethought can be established by considering the following: -

- i. The nature of the weapon used.
- ii. The manner in which the weapon was used.
- iii. The part of the body targeted.
- iv. The nature of the injuries inflicted either single stab/wound or multiple injuries.
- v. The conduct of the accused before, during and after the attack.

31. Bearing all these definitions in mind, I now turn to the evidence that was adduced before this court and find the evidence by Pw2 **Agnes Mutinda Mulonzi** who is the mother of both the deceased and accused to be key. She said the deceased was a younger brother of the accused. The accused came for the donkey an act that was resisted by the deceased who chased away the donkey.

32. A quarrel then ensued and the two brothers followed each other quarrelling up to the point when the accused picked a stone and threw it at the deceased who fell down and had to be carried home.

33. Upto this point it cannot be said that the accused had premeditated or planned in any way to kill the deceased. He could be said to have been provoked by his kid brother who denied him the use of the family donkey by, by chasing it away.

35. The accused is said to have landed at his mother's home with a bow and arrows (EXB 1a and b) and threatening all those around. The men including Pw1 and Pw3 took off and returned later to find the deceased dead. Pw1's evidence is that she and some women were locked up in the house and so did not run away.

35. While in that house, she claims to have peeped through a window and seen the accused smashing the deceased head with a huge stone. Infact she reckoned that the deceased's head was completely smashed. Apparently none of the women she was with witnessed the smashing of the deceased's head. She did not also tell any of them what she had seen.

36. I will then look at the postmortem report for corroboration of her evidence, on this bit of smashing. The postmortem report (EXB2) shows that the deceased had injuries on the respiratory system, digestive system and the head. The following injuries were on the head: -

- Very large haematoma below scalp extending from the left temporal to the left occipital region.
- Epidural haematoma over right parietal occipital region.
- Large subdural haematoma covering both hemispheres.
- Blood oozing from nostrils, mouth and ears.
- Deep cut above right eyebrows.

This postmortem report supports the injuries mentioned by Pw1 – Pw3.

37. The question that keeps popping is whether this was premeditated. There is no evidence to show that this was premeditated. The evidence that exists shows that there was provocation to the extent that even after injuring the deceased the accused still arrived armed with a bow and arrow chasing away those who had responded to their mother's screams.

38. In the case of **Dickson Mwangi Munene and Another –v- R (2014) eKLR** the Court of Appeal stated

**“As stated either of these acts, intentional or reckless, constitutes malice aforethought under section 206 of the Penal code which is the mens rea of the crime of murder.”**

39. The duty is on the prosecution to prove the malice aforethought (*mens rea*) or the intention to kill.

40. Again in the case of **Nzuki –vs- R (1993) KLR 191** the court stated as follows: -

**“Malice aforethought is a term of art and emphasized that:**

**Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused.**

**i. The intention to cause death.**

**ii. The intention to cause grievous bodily harm.**

**iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. See also Hyman –vs- DPP (1995) E.A 55.**

41. Considering the principles above and the evidence adduced by the eye witness (Pw2) the actions by the accused were clearly not meditated though so unfortunate. He acted under provocation by his kid brother.

42. Provocation is provided for under section 207 and 208 of the Penal Code.

Section 207 provides

#### **Killing on provocation**

When a person who unlawfully kills another under circumstances which but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

Section 208 provides: -

#### **Provocation defined**

(1) the term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him

of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

43. Though the deceased was not armed with any weapon, his utterances and actions provoked the accused person into acting as he did at the spur of the moment. All considered, I am of the view that the charge of murder cannot be sustained against the accused.

44. I find him guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict him accordingly.

45. It is hereby so ordered.

**Delivered, signed & dated this 3<sup>rd</sup> day of December 2019, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**