



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 32 OF 2012

REPUBLIC

VERSUS

MARY KATHETU GAICHU.....1ST ACCUSED

JOHN KIURA.....2ND ACCUSED

JUDGMENT

Murder

[1] The two accused persons, namely Mary Kathetu Gaichu and John Kiura were charged with murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 laws of Kenya. Particulars of the offence were that; the two, on 25th day of March, 2012 at Kithioroka village, Kithuura Sub-location, Imenti Central District within Meru County, jointly murdered Julius Muthengi. The prosecution called 6 witnesses in support of the charge. Each of the accused person gave sworn statement in defence thereof. The evidence is duly recorded and is part of record.

Elements of murder

[2] I should now determine whether the prosecution has proved their case beyond any reasonable doubt. To secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following:-

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

[3] Section 206 of the Penal Code provides:

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 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;

(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.

The death of deceased and cause of death

[4] Dr. Grace Mguyo carried out the post-mortem on the body of the deceased, one Julius Muthengi. She compiled a report thereto dated 5th November, 2012. The report was produced by Dr. Nicholas Koome Guantai who testified as PW5. PW5 stated that he had worked with Dr. Grace Mguyo for two years and he knew her handwriting and signature. PW5 stated that according to the report, the deceased had mid-thigh laceration on medial side with well outlined surrounding recrossed tissue around the wound. He also sustained a cut wound on the head measuring about 5cm at the frontal area, up to scalp. The doctor formed the opinion that the cause of death was poisoning from arrow penetrating injury. With that medical evidence, the death of the deceased and cause of death has been established beyond any reasonable doubt.

Who caused the unlawful act which caused the death

[5] Who caused the unlawful act that caused the death of the deceased? PW1, **Samson Kiambati Ngaruni**, told the court that on 25th March, 2012, he and other people were taking traditional liquor at the home of the second accused person. The 2nd accused was the one selling beer. Some of the people he could recall to have been there with him include Kamwara, Rufus Mureithi and Karangoo. He said that the deceased also came to the home of the accused at about 6.00pm. After taking two cups of alcohol, the deceased sat down. Then he was hit on the left thigh with an arrow by the 2nd accused and he fell on his back. The 1st accused who is the wife of the 2nd Accused came out with a panga and cut the deceased on the forehead. He ran off and went to call the father of the deceased one John Kibiri. But when they came back the deceased had already died. The body was taken by the police the following day.

[6] PW1 went on to give evidence that, deceased was passing by but the 2nd accused invited the deceased to come and partake of the traditional alcohol. The 2nd accused told the deceased "Njoo kuna Kitu". The deceased responded to the invitation and came. He also stated that before the deceased was shot with the arrow, there was a quarrel between the deceased and the 2nd accused. He gave more details in cross-examination that, the 2nd accused had asked the deceased to pay for the brew he had consumed. And the deceased stood up to remove the money. But before he could pay, the 2nd accused went into his house and came out with an arrow and shot at the deceased. He said that he is a relative of the accused as he has married from their family and so he knows the accused family well. The father of the deceased and the accused are brothers. But he has never heard of any quarrel between the two brothers before. In cross-examination PW1 insisted that the events he has narrated took place at 6.00pm and was snot dark; that he was not drunk and so he clearly saw what happened. He said the he reported matter to the police.

[7] **PW2, James Kamwara** testified that, in the evening of 25th May 2012 at about 6.00pm he went to the home of 2nd accused to partake of some traditional brew that the 2nd accused had prepared. Among the people he found at the home of the accused was Rufus Murithi and Samson Kiambati. The deceased also came and was served with first cup. And then the 2nd accused went into the house and came with an arrow and shot at the deceased on the thigh. The deceased fell down and immediately thereafter, the 1st accused came with a panga and cut the deceased on the forehead. This was about 6.00pm. He ran away after the incident and went home only to come back the following day and to find the deceased body lying on the ground with an arrow embedded in it. He reported matter to the police. He said that he had taken only 2 cups of muratina and so he was not drunk at the time these events took place. He however stated that he did not hear any quarrel between the deceased and 2nd accused prior to the attack. The 2nd accused is his uncle and the deceased was his blood brother.

[8] In cross-examination PW2 stated that he did not see the deceased pay for his drinks. He reiterated what he stated and affirmed that the incident took place at 6.00pm in broad day light. He was shown his statement which read that they were at the accused's home till 8.00pm. He denied that aspect of the statement and claimed that the statement was never read back to him. In re-examination he clarified that he was speaking in Kimeru and the officer was writing the statement.

[9] PW3, Rose Kathiri Kaimiru stated that on 25th March, 2012 at about 8.00pm she was at home when he heard screams from the house of the deceased. It was the wife of the deceased, Joyce Kagendo who was screaming. She ran to the home. Upon arrival she found someone had fallen on the ground with an arrow on the left thigh and a cut wound on the forehead. The person was John Muthengi- the deceased. She also met Kamwara, Kiambati, Kagendo and Kiria at the scene. She had a torch which enabled her to see. She enquired from the deceased and he told her that the John Kiura had killed him. Those were his last words. She told him that she is going to fetch for his father whose home was about 1-2 Km away. She found his father and went to the Kaathana AP Camp where they made a report. She was accompanied by Kamwara and Kagendo to the AP camp. She stated that she is not a relative of, but had known the deceased for over 20 years.

[10] PW4 Joyce Kagendo stated that she was the wife of the deceased, Julius Muthengi. She told the court that, on 25th March 2012 at about 2.30pm, John called Julius Muthengi who was returning from the farm. He was off loading luggage from his motorcycle when he was called by John. She stated that the home of the deceased and that of John are 30 steps apart. Muthengi went to John's home. John was his uncle. They later started singing and laughing. She was able to hear what was going from her house. She then saw John come from his home with a bow and arrow and shot at the deceased on the left leg. He fel on the ground. Then Mary came with a apanga and cut him on the forehead. She observed all these happenings as she was near John's homestead. The deceased was asking how his father could shoot him. She ran towards the home of John. Other people including Rose Kathomi, Mwenda Kiria and Josphat came but John shot another arrow and people were scared. The second arrow fell in their home. By that time Julius had left and fell in his house. She ran away and came back with his father only to find that Muthengi had died. They reported the incident to the Kathane AP Camp. The body was taken by the police the following day. She also recorded a statement. She said that there was no quarrel between them and the accused before this incident.

[11] In cross-examination, she stated that Julius came home at about 7.30pm and went to the home of John which is barely 30 meters away from their home. Only a fence separated the two houses. She could therefore hear and see what was happening in the home of John. She saw five people drinking brew namely, Stephen, Kanayaru, Kiamabati, Rufus Murithi nad Kiria. She insisted that she saw John shoot the arrow at the deceased.

[12] PW6, NO 232708, CIP Benson Gambo was the Investigations Officer (hereafter the IO) in this case. He received a call from 0722 688

662 on 26th March 2012 at about 7.00pm to the effect that someone had been shot by an arrow at Kithioroka. He visited the scene with two scene of crime officers. They found blood stains in the suspects' house- that where the deceased collapsed and died. They also found a body with an arrow embedded in the left thigh and a deep cut above the right eye and bruises. The arrow was removed by the scene of crime officers after the body was photographed. The arrow was kept as an exhibit (exhibit 2) and the body was taken to the mortuary. He interviewed some people at the scene who claimed that the suspects ran away after the incident. The scene was about 15 meters from the house of the suspects. On the same day, he received a call from OCS, Marimanti at about 5.00pm informing him that one Mary Kathetu had surrendered to that station. Because it was later he told him that he will pick the suspect the following day. The said OCS called again and said to PW6 that another suspect one John Kiura had surrendered himself to the station. The following day he took the suspects. They recorded statements and proceeded to the scene again for further investigation. The people there feared to speak but upon assurance of security they recorded statements noting that the accused were selling illicit brew when a quarrel ensued between the accused and the deceased which resulted into accused 2 shooting the deceased with an arrow. He stated that he established during investigation that the accused and the deceased had land disputes between them.

[13] In cross-examination PW6 stated that the body of the deceased lay about 15m from the house of the accused and about 2m from the home of the deceased. He stated that the accused was selling illicit brew at the time of the incident.

[14] According to the prosecution witnesses whose evidence is stated above, the 2nd accused shot the deceased with an arrow while his wife, the second accused cut the deceased on the forehead with a panga. The evidence by the doctor who performed the post-mortem was that the cause of death was poisoning from arrow penetrating injury. The question is: Who committed the unlawful act that caused the death of the deceased?

[15] The poison from the penetrating arrow in jury caused the death of the deceased. Who shot the killer arrow? It is worth repeating that the prosecution witnesses stated that the 2nd accused shot the killer arrow. The version by the defence gives a different story. The 1st accused testified that she shot the killer arrow. She gave testimony as DW1 that on 25th March 2012 she received a call from Kirima informing her that her goats were sick. Her husband left for the shamba the following morning to take care of the sick goats. She remained home alone. She spent the first part of the day in women group meeting and returned home at noon and started to sell brew up to 4.00pm. She then went for her maize from the shamba until 7.00pm. She listened to her radio until 10.00pm when she decided to sleep. But before she could sleep she heard a bang on the door. She enquired who it was but the person banged the door even harder using a panga and a rungu until the door started to break. She realized the door will break down and the intruder will come in. although it was at night, she saw exactly who it was through the opening caused by the bangs. She then reached for the bow and arrow and shot an arrow at him. She got the target and shot him. She then woke up and sat on a chair. She said that the assailants were two. Her husband was not home at the time. He came after the fact. She narrated to him what had happened and he advised her that they should report the matter to the chief where they went and arrived at 3.00pm only to find the chief was not home. They reported the matter to the AP Camp who referred them to Marimanti police station where 1st accused was arrested. She stated that the person she shot was found later in his home but dead.

[16] During cross-examination, the 1st accused stated that she learnt later that the person she had shot was Julius Muthengi, the deceased. She knew him well. But she has never known the second person who was in the company of the deceased when she was attacked. She stated that she used to sell brew during the day and not during the night. She also affirmed that her husband was at Maigani at the time of the incident. This was far from home as you would walk for 4 hours. She denied that she stated in her statement with the police that the deceased abused her and called her a dog. She denied all the contents of the statement to the police as was put to her by the state counsel. She confirmed that Josphat Kanyagu was at home at the time. But Kamwara was not.

[17] The 2nd accused supported the evidence of 1st accused. He testified as DW2 and stated that on 24th March 2012 he was informed by his wife, the 2nd accused that their goats were sick. He set out for the shamba to take care of the goats. He and Zipporah Kabetu treated the goats with traditional medicine. He fed the goats and left for home at about 8.00pm on 25th March 2012. He arrived home at 10.00pm and saw two people hiding in the fence. These two were Kirima Kairi and Mwathi Kibui. He flashed his torch light upon them and they ran away. He thought that they had come to steal his maize. He then called his wife and asked her who were these people and what were they doing. She told him that they broke down her door and so she shot one with an arrow. He flashed light in his house and saw blood on the ground. He advised her that they should report the matter to the chief. They arrived at the chief's home at 3.00pm but did not find the chief as he was away in Nairobi. The then reported the matter to AP Camp at Kibunga who referred them to Marimanti. His wife was arrested. He was arrested the following day. When they left home they did not know whether the deceased had died or fell in their compound. He said that his wife shot the deceased with an arrow as the deceased was trying to break into the house.

[18] In cross-examination, the 2nd accused stated that the two people he found hiding in the fence ran away after he flashed his light. He was not there when his wife shot the deceased. He denied ever meeting Joyce Kagendo or Kmawara at his home on the material day.

[19] The account by the defence as to who shot the killer arrow is quite different from that of the prosecution. Mr. Namiti argued that the eye witnesses, i.e. PW1 to PW4 were consistent that the two accused persons caused the death of the deceased. There was no grudge between the said witnesses and the accused persons which may make them lie. He submitted that the defence was merely an afterthought and that is why it does not add up.

[20] I note that the prosecution witnesses especially PW1 and PW2 were consistent that the 2nd accused was the one serving them traditional brew on 25th March 2012 at his home. PW1 and PW2 stated categorically that they were taking brew with the deceased at the home of the accused. PW4, the wife of the deceased also testified that the 2nd accused is the one who invited his husband to a drink at his home on the material day. The 1st accused confirmed that Kiambati was at her home on the material day. The evidence of these witness is trustworthy and I do not find any reason to doubt them. Their testimonies place the 2nd accused at his home on the material day. I therefore find as a fact that the 2nd accused and his wife were at their home on the material day.

[21] The prosecution witnesses were also consistent that the 2nd accused is the one who shot the deceased with the killer arrow. There

seemed to have been some quarrel arising from non-payment of the brew the deceased had consumed. This may have prompted the attack by the 2nd accused person on the deceased. The prosecution witnesses also confirmed that the killer arrow was lodged in the left thigh of the deceased and was embedded in his body until it was removed by the scene of crime officers who accompanied PW6, the investigations officer. See evidence of PW3 and PW6. PW4 also confirmed that the 2nd accused invited the deceased to partake of the traditional brew which the accused were selling. She stated that she saw and heard what was happening at the home of the accused for it was a stone throw away from her home. PW1, PW2 and PW4 also saw the 1st accused cut the deceased with a panga on the forehead. PW5, the doctor who carried out the post-mortem confirmed the arrow injury as well as the cut wound on the frontal part of the head. See post-mortem report. These injuries are consistent with the evidence of the prosecution witness. Therefore, all circumstances render support to the evidence adduced by prosecution witnesses and I believe them.

In view of the foregoing finding, I make a finding that the accused persons in their defence were trying to create doubt as to who shot the deceased with the killer arrow in the hope that the doubt will be resolved in their favour. Another thinking; their defence was contrived to portend an act of self-defence by the 1st accused. But it does not add up because the story by DW1 paints an incredible calmness on her part in the face of alleged intruders who had just broken down her door and would certainly have gained entry. In ordinary circumstances, she must have perceived threat of imminent danger and perhaps call for help or scream. But, she did neither of these things. She stated that she simply shot the alleged intruder and sat on her chair. She did not even attempt to raise alarm of what has happened or find out about the fate of the person she had shot yet she claimed she saw the person and she knew the arrow was poisoned. She did not even call her husband to inform him of the unfortunate event. She waited until he came home. The 2nd accused seemed to give credence to this story which does not hold sway. He alleged that he shone his torch light and saw blood on the ground; this was in his house. There is no evidence whatsoever that the shooting took place in the house. One wonders also why they had to walk in the night for such long distances to the AP Camp and the chief's home instead of going to the appropriate police station. I believe the prosecution evidence that the two accused persons ran away after the incident. There is overwhelming evidence which fits the standard of proof beyond any reasonable doubt that the 2nd accused shot the deceased with the killer arrow. The poison in the arrow caused the death of the deceased. Accordingly, I find as a fact and law that the 2nd accused caused the act that caused the death of the deceased.

Did accused possess malice aforethought?

[22] Section 206 of the Penal Code gives circumstances that constitute malice aforethought but on proof thereof. Applying the test of law, the 2nd accused shot the deceased with a poisoned arrow. He knew the arrow was laced with poison which may cause death. By shooting the deceased with such arrow which he knew or had knowledge it would cause death, may be an incident of malice aforethought. PW5 confirmed that the poison in the arrow caused the death of the deceased. However, I am aware that mere knowledge that grievous harm is likely or highly likely to ensue from the conduct of the 2nd accused may not in itself be enough to convert a homicide into a crime of murder. See **ROBA GALMA WARIO vs. R [2015] KLR**. Given the circumstances in which the crime was committed, there was no premeditation on the part of the 2nd accused to kill the deceased although grievous harm may have been anticipated. And I think this should be a crime of manslaughter rather than murder. Accordingly, I acquit the 2nd accused of the crime of murder but find him guilty of manslaughter contrary to section 202 of the Penal Code which provides:-

202 (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

I convict him accordingly.

[23] There is evidence from PW1, PW2 and PW4 that the 1st accused cut the deceased in the forehead. The post-mortem report confirmed that the deceased suffered a cut wound on the head measuring 5cm at frontal area, up to the scalp. But this injury was not the cause of death. Therefore, the 1st accused is not guilty of murder and I acquit her of the crime of murder. Except she assaulted and injured the deceased. Accordingly, I find her guilty of a misdemeanour of assaulting a person causing actual bodily harm contrary to section 251 of the penal code. I so convict her. The section provides:

251. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

Dated, signed and delivered in open court at Meru this 12th day of June, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kinyua for State

Mr. Igweta advocate for Mr. Kiogora for Accused.

Accused – I understand Kimeru

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F. GIKONYO

JUDGE