



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 81 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ANDRIANO KITHUMBI.....ACCUSED

J U D G M E N T

1. **ANDRIANO KITHUMBI** (“the accused”) has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence being that on 12th October, 2014 at Gikuru Village Nkandone sub location, Nduruma location Imenti Central District within Meru County, the accused murdered **DAVID MUTHENGI M’RUANDA** (“the deceased”). The prosecution called six witnesses to prove its case.

2. **PW1 Marrietta Nchoga**, the mother to both the deceased and the accused, told the court that on the material day, she was at her home with the deceased making ropes. The accused came and told them that he had been robbed of his land. The deceased answered him that no one had taken away the land. It is then that the accused stood and hit the deceased with a big stick on his head killing him instantly. She screamed and the accused walked back to his house.

3. At the time of the incident, no one else present except herself the deceased and the accused. Before the incident the relationship between the two was good. However, the land which she and the deceased occupied had brought some misunderstandings between the two brothers. At the time, **PW1** testified, she was about 100 years old and could not identify the accused in court as her sight was failing her. However, she told the court that at the time of the incident, she had good sight and she saw the accused assault the deceased.

4. **PW2** was **NO. 231896 CIP Wilfred Mwangi**. In 2014, he was attached to Gaitu Police Station as the OCS. He took the accused’s statement under inquiry. He told the court that on 12th October, 2014 at about 1 pm, he received a call from Corporal Francis Njoroge who was in charge of Chaaria Police Patrol Base which was under his station. He informed him that there had been a murder at the post. He went to the scene and found the deceased lying in a pool of blood with a deep cut on the left side of the neck. The accused was arrested at about 4 pm and taken to the Police Patrol Base and later transferred to Gaitu Police Station.

5. On 16th October 2014, **PW2** took the accused’s statement under inquiry (**PEXh1**) in the presence of his son Edward Murithi Kirumbi aged 32 years. He had advised the accused and allowed him to call his lawyer or relative but the accused opted to call his son. The accused told him that **PW1** had called him but because it was late, the evening of 11th October, 2014 around 6 pm to go and he opted to go the following day at around 9 am. When he arrived at **PW1**’s home, he found his brother, the deceased, seated near **PW1** making sisal ropes. He greeted them and thereafter his mother asked him a question of which he answered.

6. The accused then asked **PW1** where she would like him to build his house. At this point, the deceased told him to rise up and go away. He refused and insisted that he was at his mother’s house. That deceased took a panga which he had and hit him on the forehead. The accused used a panga he had and hit the deceased with it on the left side of the neck killing him instantly. After that, he went back to his house and waited for the police to come and investigate the matter. The police came and arrested him at about 1600 hours of the same day.

7. **PW2** made a certificate of how he took the statement. He recorded the statement in Kiswahili because the accused narrated his story in Kiswahili. He read it out to the accused before the accused signed it. However, **PW2** later learnt from the investigations officer that the deceased did not have any panga as alleged by the accused. That the accused was injured when he was being chased by the son of the deceased.

8. **PW3 Doctor Paul Wambugu** produced the report for the postmortem (**PEXh 2**) carried out on 16th October, 2014 by Dr. Stephen K. Chege. According to the report, the only injury that was identified on the body of the deceased was a massive left sided neck wound with vertebrae exposed. There were no internal abnormalities found. That the cause of death was a massive haemorrhage due to the deep cut wound on the neck.

9. **PW4 Fredrick Kibobori**, a son to the deceased told the court that on the material day at about 12 noon, he was washing his clothes at a tap water about 100 meters away. He heard his grandmother (**PW1**) screaming from the direction of his the deceased's house. He rushed to see what was happening. While at about 50 meters away, he saw the accused cut his father with a panga. When the accused saw him, he chased him for about 500 meters shouting "you people will know me". He tried to call Chief Muthinga but the Chief did not pick his call. His elder brother reported that matter to the police at Gaitu.

10. When he returned home, he found a crowd of about 50 people at the scene. Beside the body there was a panga and he identified it in court. The police arrested the accused and collected the body after taking photographs.

11. **PW5 James Kimathi Muthengi** a son to the deceased testified that on 12th October, 2014 at about 12.30pm, he was at home with the deceased and **PW1**. His uncle (the accused) came where **PW1** and the deceased were sitting outside between the houses of **PW1** and the deceased's. He was in his house and could not see them very well. He however heard the accused shout at **PW1** that he had been chased away by his children because his land was small and that the deceased should give him a portion of the land. The deceased responded that the accused should go and bring his brothers so that the deceased could give him land. The accused retorted that the deceased had insulted him. That accused proceeded to his brother's house by the name of Paul Muriungi. He returned a little while later armed with a panga. He hit the deceased with it on the head. The deceased tried to run towards his house but the accused followed and caught up with him and cut him on the neck with the panga.

12. **PW5** told the court that he was near when the incident occurred. The accused threatened him and **PW1** saying that he will kill another person. Sensing danger, **PW5** run away from the scene.

13. **PW6 No. 42466 CIP Francis Njorge** was the Investigations officer. He testified that on the material day at about 13.30 hours he was at the station when he received a call from the area manager one Mr. Koome who informed him of the incident. Before long, Koome and the deceased's son Kimathi (**PW5**) came and made a report. He informed the OCS, Gaitu Police Station who assisted him with the police vehicle. In the company of the area manager, PC Mathenge and PC Musyoka, they proceeded to the home of the accused. They found him seated outside his house with a panga. He surrendered to them where they arrested him and recovered the panga which had blood stains. They then proceeded to the scene, and found the body lying in a pool of blood with a deep cut wound on the left side of the neck. **PW 1** briefed them of the incident whereby they took photographs which he produced as **PEXh 6 (a-b)**.

14. Later he prepared blood samples and sent them to the government chemist together with the panga (**PEXh 5**) The results were that the blood stains on the panga matched the finger nails of the deceased.

15. **PW7 Nahason Kithure Mwamba** testified that the deceased was his uncle. That on 16th October, 2014, he took Pius Mutua to the Meru General Mortuary to identify the deceased's body.

16. When put on his defence, the accused gave sworn testimony. He testified that on 11th October, 2014, he received information from Brian Mutethia that **PW1** was calling him. He went the following day and found **PW1**, Muthomi (son of the deceased), **PW4** and **PW5**. He asked **PW1** to show him where she would like him to construct his house of which she did. That he had come with a panga and string.

17. That **PW5** then asked him about the issue of the land and he told him to shut up. That it is then that the deceased asked him to leave. He responded that he was still talking to his mother (**PW1**). It is then that the deceased cut him on the head with a panga and he fell down. He also cut him on the left hip and he still has marks from the said cuts. When he tried to run away, **PW 5** hit him with a stone on the left side of the chest causing him to vomit blood. **PW4** cut his right hand above the elbow with a panga. That both **PW 4** and **PW 5** had pangas as they had just come from getting food for their animals.

18. That while running away, he swayed his panga with his left hand which cut his brother.

19. He testified that he caused the death of his brother unintentionally. He went to his home where the police found him vomiting blood. He was treated but he lost the medical documents. He produced a chest x-ray showing that he has 4 broken ribs. The medical report was dated 20th March, 2017. He alleged that the panga produced was not the one he used to cut the deceased. The actual pang is at home.

20. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows:-

"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

21. The four ingredients of the offence that arise from the definition and that need to be proved by the prosecution beyond reasonable doubt are; the fact of the death of the deceased, the cause of such death, proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused and proof that the said unlawful act or omission was committed with malice aforethought.

22. On the issue of fact and cause of death, evidence was tendered to the effect on the fateful day, the accused cut the deceased on the left side of the neck with a panga. The deceased is said to have died instantly. **PW6** produced photographs of the body as **PEXh. 6 a-b**. According to the post mortem report that was produced by **PW3** as **PEXh. 2**, the body had a deep cut wound on the left side of the neck. The doctor concluded that massive hemorrhage following a deep cut on the neck was the cause of death. I am satisfied that the prosecution has established the first and second issue of fact and cause of death.

23. The third issue is whether the death of the deceased was a direct consequence of an unlawful act of the accused. **PW1** told the court that on the material day when the accused came where she and the deceased were, he assaulted the deceased with a big stick. **PW4 and 5**

testified that, they saw the deceased cut the deceased with a panga.

24. In his defence, the accused did not refute that he caused the death of the deceased. He testified that the deceased assaulted him first. That it is while fleeing from the deceased, that the accused swayed the panga in a manner that the panga caught the deceased's neck and fatally cut him. The panga was positively identified in court.

25. The accused denied that the panga produced in court was the one he assaulted the deceased with. The court notes that PW 6 testified that the panga recovered from the accused was the one sent to the Government Chemists Department. That after analysis, it was concluded that the blood stains on it matched the DNA generated from the fingernails of the **(PEXh4)** deceased. The court is therefore satisfied that the panga produced in court was the murder weapon.

26. It was the accused's defence that the deceased assaulted him first. That he was fleeing from the deceased when he fatally wounded him. It is not clear how the deceased who was said not to be armed would pursue the accused who was armed. Further, considering the nature and extent of the injuries, it is more likely than not that the accused intended to injure the deceased. The nature and extent of the injuries are not consistent with an intended swing of a panga backwards but rather a well calculated act of aggression. I am satisfied that the evidence proved that it is the wrongful act of the accused that caused the death of the deceased. The injury was deliberate and not unintended as alleged by the accused.

27. On the final issue, was there any malice aforethought. **Section 206 of the Penal Code** provides that:-

“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)

(d)

28. The injury sustained by the deceased was fatal. The accused attacked the deceased with a lethal weapon, a panga. It would appear that there was deep rooted simmering land dispute between the deceased and the accused. This in my view is what led the accused to fatally injure his brother.

29. According to **PW1** the deceased was not armed. This was confirmed by **PW4** and **PW5** who witnessed the incident. The accused had come to the homestead while armed with a dangerous weapon. He came to ask PW1 about being given a portion of the land occupied by the deceased. He may have intended to eliminate him to get it altogether. The nature and extent of the injuries. As well as the locus of the injury, it leaves no doubt that the intention was either to cause death or grievous harm.

19. Accordingly, I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Andriano Kithumbi** and accordingly convict him of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya.**

DATED and DELIVERED at Meru this 5th day of July, 2018.

A. MABEYA

JUDGE.