



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 79 OF 2013**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**RAPHAEL KOBIA MATHETA .....ACCUSED**

**J U D G M E N T**

1. **RAPHAEL KOBIA MATHETA (“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 27<sup>th</sup> July, 2013 at Nkinyanga location of Igembe South district within Meru County, the accused murdered **ZAKAYO MWITO MUNJURI (“the deceased”)**. He pleaded not guilty to the charge and the prosecution called four witnesses to establish its case.

2. **PW1 Martin Kubai** the deceased’s brother, told the court that on the material day at about 5.00 pm, he was with the deceased together with one Charles Kubuchia at the deceased’s canteen at Kamucere village relaxing after work. The accused, who was drunk, came with a walking stick and a panga and began quarreling Charles Kubuchia asking him why he was there. The accused wanted to hit Charles but the latter avoided and ran off.

3. The accused then turned to the deceased and cut him on the leg and his big toe on the right foot. After assaulting the deceased, the accused ran away. **PW1** was about 1 ½ meters from the deceased the incident occurred. He screamed for help and neighbours turned up. He could not recall the neighbours but could remember **Priscilla Kendi (PW3)** and **Jacinta Nkirote (PW2)**. With the help of **PW3** and others, they bandaged the leg and took the deceased to hospital. **PW1** then called **Rose Karimi (PW4)**, the wife of the deceased and informed her about the incident.

4. The deceased was released from hospital and taken home. After 3 days, his condition worsened. He was returned back to hospital but was referred to Muthara on 4<sup>th</sup> August, 2013. He later died on 8<sup>th</sup> August, 2013 at 2.00 am.

5. **PW2 Jacinta Nkirote** testified that on the material day, she was at her home when she heard screams. She was about 100 meters away. She heard people screaming that Zakayo had been cut by Raphael. She went to the canteen and found the deceased bleeding from where he had been cut. The deceased had been cut on the left leg, the front part of the foot was taken off. He had also cut on the right leg which was however not so serious. She found **Martin (PW1)** and **Kendi (PW3)** at the scene.

6. **PW3 Priscilla Kendi** was at her home on the material day when at around 5 pm, she heard people screaming that somebody had been cut. The canteen is about 30 meters from her home. She ran to the scene to witness what was happening. The deceased was her brother in law and **PW1** her husband.

7. **PW4 Rose Karimi**, the deceased’s wife, told the court that on that day, she received a call from **PW1** who informed her what had happened. They took the deceased to hospital and reported the matter at Maua Police Station. On 30<sup>th</sup> July, 2013, the deceased ‘s leg got worse and they returned him to hospital where he was treated and taken back home. On 4<sup>th</sup> August, 2013, they took the deceased to Tigania Hospital where he was admitted but died on 8<sup>th</sup> August 2013. She had lived with the deceased for 13 – 14 years and had three children with him. That he told her that the accused had cut him. She knows the accused well for they are neighbours but they have never had any issues.

8. When put on his defence, the accused gave sworn testimony. He testified that on 27<sup>th</sup> July, 2013 at about 5.00 pm, he went to the deceased’s canteen where alcohol was being sold. The deceased found him there and told him to buy him alcohol but he did not have money. The deceased went into the shop and came out with a panga. He cut him on the left side of the head beside the left ear. He also cut him on the left wrist. He cut him because he had declined his request for alcohol. They had taken changaa and they were drunk. The deceased was his distant cousin and he did not have his money.

9. That after being cut, they started struggling for the panga. They both fell down. He freed himself, picked up the panga and cut the deceased as he saw that the deceased was overpowering him. He never reported the matter to the chief or police. He also did not go to hospital for any

treatment. After the incident he did not hide as he was arrested on 11<sup>th</sup> August, 2013 from his home.

10. 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.”***

11. In **Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR** the court held that from the definition of the offence, four ingredients need be proved. These 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 finally proof that the said unlawful act or omission was committed with malice aforethought.

12. On the fact of death of the deceased, all the prosecution witnesses testified that the deceased died on 8<sup>th</sup> August, 2013. **PW1** testified that he saw the accused cut the deceased with a panga on 27<sup>th</sup> July, 2013. The accused admitted that he cut the deceased but it was only after the latter had cut him on the head. Although, no death certificate or burial permit or a post-mortem report were produced the court was satisfied from the evidence on record that Zakayo Mwitijuri who was alive on 27<sup>th</sup> July, 2013 died on 8<sup>th</sup> August, 2013 at Tigania hospital.

13. With regard to the cause of death, no post mortem report produced or doctor or medical expert was called as a witness. In the case of **Ndungu v Republic [1985] 487** where the Court of Appeal held:-

***“Where a body is available and the body has been examined, a post mortem report must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined.”***

14. In **REPUBLIC v DANIEL ORWA OKEWE [2011] eKLR** the court stated:-

***“I must repeat that there was no medical evidence to support the contention by the state that the accused can be said to have caused the deceased’s death within the meaning of section 203 of the Penal Code or that the specific injuries which he inflicted on the deceased in the course of this attack resulted in his death.”***

15. In this case, the accused cut the deceased on his leg. The deceased was taken to the hospital and is said to have died about 12 days later. The court indulged the prosecution severally to call the investigations officer and a doctor to give evidence but the prosecution failed to do so. Medical evidence was crucial to connect the injuries sustained by the deceased and his consequent death. The absence of such nexus, in this court’s opinion, is fatal to a case. It is only in exceptional circumstances where such medical evidence may not be required. Such as where an assault severs a vital body organ or where the injury inflicted is obvious that it may lead to loss of injury. In the present case, although the deceased was assaulted on 27<sup>th</sup> July, 2013 and treated, he died on 8<sup>th</sup> August, 2013.

16. In **Dorcias Jebet Ketter & another v Republic [2013] eKLR** the Court of Appeal held that:-

***“In the case of Ndungu v. Republic (1985) KLR 487, this court discussed the principle that in some cases death can be established without medical evidence and also discussed other cases such as the Tanzania case of R v. Cheya (1973) EA 500 and after considering them at length stated as follows: -***

***“Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of the death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution.”***

***That was in respect of cases where the body is available but because of the nature of injury the cause of death cannot be determined even after postmortem. It is however important that even in such cases the court recognized the principle that there are cases where death can be established without medical evidence.”***

17. In the present case, the prosecution failed to produce any medical evidence to establish the cause of death. This case is not one of the very exceptional circumstances that death can be assumed to have been a natural consequence of the injuries inflicted upon the deceased by the accused. The deceased is said to have died 12 days after the incident. He had been in and out of hospital severally. He was said to have been confused and was even unaware of his own home towards his last days. It was imperative for the prosecution to make a nexus between the injuries inflicted by the accused and the deceased’s consequent death.

18. In this regard, although the fact of death had been established through positive testimonies of the prosecution witnesses, the cause of death was not proved beyond reasonable doubt.

19. Consequently, proof that the deceased met his death as a result of an unlawful act on the part of the accused and that the said unlawful act was committed with malice aforethought has not been established.

20. From the foregoing, the prosecution has not proved its case beyond reasonable doubt. I therefore find the accused not guilty of murder

contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya** and I acquit him under *section 215 of the CPC* and set him free.

**DATED** and **DELIVERED** at Meru this 5<sup>th</sup> day of July, 2018.

**A. MABEYA**

**JUDGE**