



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 7 OF 2017

REPUBLICPROSECUTOR

-VERSUS-

JOSEPH MWITA CHARLES alias KAREGE MDOGO.....ACCUSED

JUDGMENT

1. **Joseph Mwita Charles alias Karege Mdogo** was charged with the murder of **Stephen Mondu Nyaikobe** (hereinafter referred to as '**the deceased**'). The particulars of the information were that '*on the 4th day of February 2017 at Nguruna Location of Kuria East Sub-County within Migori County in the Republic of Kenya murdered Stephen Mondu Nyaikobe.*' He denied the offence and a trial was held.

2. The prosecution called six witnesses. **PW1** was a brother to the deceased. He was called **Daniel Marwa Nyaikobe**. A son to **PW1** testified as **PW2**. He was **Elisha Marwa** whereas the wife to **PW1** one **Susan Robi Sabai** testified as **PW3**. **No. 232903 Insp. Capis Otieno** the DCIO Kuria East District testified as **PW4**. **PW5** was **Dr. Benard Otieno** whereas **No. 46482 PC Joshua Adenya** who was the investigating officer testified as **PW6**. For the purposes of this judgment, I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. **PW2** was an eye-witness. He narrated what he witnessed on 04/02/2017. That, on the said day his parents hosted a ceremony in honour of his two elder siblings who had successfully completed the initiation process. Several people were invited including children and adults. **Gasiali** and **Joseph** (not witnesses) were children from the homestead of the accused person which was about 150 metres from the home of **PW1**. They were also invited and attended. The ceremony began at around 02:00pm and shortly thereafter one **Amos** who was from the homestead of the accused person went to collect **Gasiali** and **Joseph** from the ceremony. **Amos** in fact assaulted them as he dragged them off. The deceased intervened and asked **Amos** to leave the children celebrate with their friends and shall return home later. **Amos** left behind the two children at **PW1**'s home and went away.

4. The ceremony ended at around 06:00pm and people left at their own pleasure. At around 10:00pm **Amos** returned to **PW1**'s homestead in the company of the accused person. They entered the main house where the ceremony was held and sat on chairs at the sitting room. There were some children still playing at the sitting room including **PW2** whereas **PW1** and **PW3** were in the kitchen. The deceased then passed through the sitting room and the accused person asked **Amos** whether it was the deceased who had restrained **Amos** from taking away **Gasiali** and **Joseph**. **Amos** answered in the affirmative and the accused person arose from his seat and approached the deceased. He slapped and kicked the deceased who then fell, but got up. The accused person then held the deceased and **Amos** stabbed the deceased on the shoulder using a knife. The accused person also removed his knife and stabbed the deceased on the chest. The deceased screamed and **PW1** and **PW3** rushed to the sitting room where they found the accused person and **Amos** standing next to the deceased who was lying on the floor holding their knives which were bloodstained while the deceased was bleeding profusely. **PW1** and **PW3** raised alarm and **Amos** and the accused person escaped.

5. **PW1** reported the matter to Ntitaru Police Station. The Deputy OCS informed **PW4** who in turn assigned **PW6** the responsibility of investigating the case. **PW6** and the Deputy OCS while in the company of other officers visited the scene. The police had the body of the deceased photographed, collected it and took it to Kegonga Sub-District Hospital where **Dr. Andrew Magige** conducted the post mortem examination on the same day and which examination confirmed the two main injuries on the deceased. He also filled in a Post Mortem Form which was produced by **PW5** as an exhibit.

6. **PW6** continued with the investigations. He summoned some potential witnesses he had sampled when he visited the scene and recorded their statements. He was later called by **PW4** into his office and was handed over the accused person who had surrendered to the Area Chief and was led to the police. **PW6** interrogated the accused person and handed him over to the Deputy OCS for recording a statement under inquiry. He then preferred the charge against the accused person and produced the photographs and the mental assessment report as exhibits.

7. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused person on his defense. The accused person opted for and gave unsworn testimony without calling any witness. The accused person denied the charge and stated that he had left his younger siblings in his house as he went to work in Isebania town until 11/02/2017 when he returned home after he was informed that his house had been razed down by fire as his siblings were studying using a lamp which had a naked flame and

came into contact with the window curtains. That, on arrival at his home he proceeded to the Area Chief and reported the matter and he was referred to Ntimaru Police Station where he was instead arrested and eventually charged with an incident he knew nothing about. Upon closure of the defence case the matter was left for judgment.

8. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

9. It is not in dispute that the deceased person in this matter died. That position was confirmed by PW1, PW2, PW3 and PW6. The first limb is hence answered in the affirmative.

10. As to the cause of the death of the deceased, PW5 who produced a Post Mortem Report prepared by **Dr. Andrew Magige** who conducted a post mortem examination of the body of the deceased and whom they had worked together. The cause of the death of the deceased was opined as cardiopulmonary arrest due to deep stab wound on the chest which ruptured the lung occasioned by a sharp object. Since there is no any other evidence contradicting that of PW5 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb is also proved in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

11. This issue is aimed at establishing whether the accused person caused the death of the deceased and if so, whether it was by an unlawful act or omission.

12. The circumstances under which the death of the deceased occurred are clear. Whereas the deceased and the first three witnesses were members of the same family the accused person and Amos were their neighbours. They all knew one another quite well and that is why the children from the home of the accused person were invited and attended the ceremony at PW1's home.

13. Although the incident occurred at night there was ample evidence that PW1's homestead was well lit by solar-powered bulbs and the incident occurred at the sitting room inside PW1's main house where several children were still playing. PW2 carefully narrated how Amos came to the function to take away their children and how the deceased intervened. He went further to narrate how Amos returned in the evening in the company of the accused person and both attacked the deceased in his presence. He identified the weapons used as knives and how each of them stabbed the deceased once on the chest and around the neck.

14. The evidence of PW2 was corroborated by that of PW1, PW3, PW5 and PW6. When the deceased raised alarm and PW1 and PW3 rushed to the sitting room where they both met Amos and the accused person standing next to the deceased who was lying down while bleeding. They both held knives in their hands which were bloodstained as the deceased. On seeing PW1 and PW3 they escaped. PW5 and PW6 confirmed that the deceased sustained two stab wounds on the chest and around the neck. PW2 gave the narration of the events while referring to the assailants by their names.

15. The accused person however denied committing the offence. He centered his defence on the events of 11/02/2017. PW4 and PW6 stated that the accused person surrendered to the Chief who escorted him to PW4. The accused person however denied ever surrendering to the Chief but that he had gone to the Chief to report about his house which had burnt. Although the Chief did not testify a look at the corroborated evidence by the prosecution against the defence squarely places the accused person at the scene of the incident and in accordance with the charge. I am not therefore convinced that the accused person was not one of the two assailants. The totality of the evidence is that the identification of the accused person by recognition as one of the assailants was not in error and the second ingredient is likewise answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought:

16. I will now consider the third limb as to whether there was malice aforethought on the part of the accused persons in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

"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 fight or escape from custody of any person who has committed or attempted to commit a felony.

17. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“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 the 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 in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

18. My Lordships in the above case went on to say that: -

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”

19. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.” (emphasis added).

20. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. It is apparent that Amos did not take the intervention by the deceased that forced him to leave their children at the ceremony lightly. That is the reason Amos came back later in the night with the accused person while armed after being sure that the ceremony was over and most likely the attendants had left. Amos had been to PW1’s home at 02:00pm and he returned with the accused person well after about 6 hours. Even if the intervention by the deceased angered Amos there was ample time for him to cool off.

21. The way the assault was executed is as well worth looking at. Both the accused person and Amos were armed with knives. They entered PW1’s house and sat at the sitting room waiting to see the deceased. When the deceased appeared, the accused person asked Amos whether it was the deceased who had refused Amos to take the children and Amos answered in the affirmative. Without wasting any time, the accused person attacked the unsuspecting deceased leading to his death. That means the two had discussed the intervention by the deceased and agreed to look for the deceased for a revenge mission which was nothing short of attacking him with their knives. Further, the position of the stab wounds is also important. Each of the assailants stabbed the deceased once. The accused person stabbed the deceased around the chest whereas Amos stabbed him on the neck. There is no doubt that the areas hit are so critical in human life. Any attack with a penetrating

weapon on the chest exposes the delicate internal organs to damage and most likely uncompromised death. Likewise, any rapture of the throat or serious neck injury likely leads to death. The Post Mortem Form revealed the sizes of the wounds. They were not only big but deeply penetrating leading to the rapture of one of the lungs. An attack of such magnitude leaves no doubt that the assailant intended to kill. It is hence clear that the accused person and Amos planned the execution of the deceased and carried it out with precision.

22. I hence have no doubt in my mind that there was a clear manifestation of malice on the part of the accused person and the third ingredient is also proved.

23. As the prosecution has proved all the ingredients of the offence of murder against the accused person, I hereby find the accused person **Joseph Mwita Charles alias Karege Mdogo** guilty of the murder of **Stephen Mondu Nyaikobe** and he is hereby convicted under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of October 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muniko Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.