



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 17 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MURITHI KIINGE.....ACCUSED

JUDGMENT

[1] The accused person, James Murithi Kiinge was 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; between the night of 16th and 17th February 2012 at Rugene village, Kanjagi sub-location, Kirima Itune location in Imenti North District within Meru County, the accused murdered Margaret Kagendo Mutethia. The prosecution called 10 witnesses to support the charge. The defense only had one witness. The testimonies thereto are duly recorded but will be evaluated accordingly.

Submissions by prosecution

[2] The prosecution argued that, on the basis of the evidence adduced, it has proved its case beyond reasonable doubt. They submitted that the witnesses showed that the accused detained the deceased the whole night of 16th – 17th February 2012, and armed with crude weapons, to wit, a rungu, a hammer, panga and axe seriously assaulted the deceased as a result of which she died. His reason was that the deceased was a witch and had bewitched him. It was their argument that the neighbours feared the accused and so they could not respond to the distress cries of the deceased. The 10 witnesses proved that the accused assaulted the deceased and she died of injuries inflicted by the accused. They referred to the medical evidence thereto. According to the prosecution, they established beyond reasonable doubt that the deceased died as a result of injuries inflicted by the accused. The accused executed the heinous crime in a calculated manner by using crude weapons repeatedly inflicting pain and injury on the deceased with the intention of causing torture and death. So they urged that all ingredients for murder were met.

[3] They also addressed the alibi and submitted that the alibi was baseless and mere afterthought for the prosecution witnesses placed the accused at his house (the scene of crime) at the material day; the accused was not even able to provide the parcel number for his alibi; and no single witnesses was called to prove his alibi. They sought rejection of the alibi.

Submissions by the accused

[4] The accused also filed final submissions. They argued that none of the witnesses corroborated evidence by PW1. There was no electricity or any solar-powered source of light which could have made it possible to see what was happening, They stated that the only source of light was a torch which was switched on and off by the accused. They took issue with the claim by PW1 that the accused had four different weapons which they say was not humanly possible for him to hold together at the same time. They also submitted that the government chemist did not find any blood on the axe allegedly used to hit the deceased on the head.

[5] According to them, it was strange that no one came to rescue the deceased and those who claimed to have been near the scene, none reported the incident when it was happening. They say serious doubts existed as to even whether the offence was committed.

[6] The accused also raised questions why arresting officer was not called yet his evidence was crucial. For that omission they sought an adverse inference to be made against the prosecution. They cited the case of **SAID AWADII vs. R [2014] eKLR**. Malice aforethought was also not established. They cited cases thereto. On the basis of the matters raised, they concluded that the prosecution did not prove case against the accused beyond any reasonable doubt and sought for his discharge.

ANALYSIS AND DETERMINATION

Elements of murder

[7] I should now determine whether the prosecution has proved their case beyond any reasonable doubt that:-

1. *The accused, of malice aforethought caused the death of Margaret Kagendo Mutethia by his unlawful act or omission. .*

[8] To secure a conviction of murder, the prosecution must prove beyond any reasonable doubt the following:

1) *The death of the deceased and the cause of death;*

2) *That the death was as a result the unlawful act or omission by the accused; and*

3) *That the accused had malice aforethought as defined under section 206 of the Penal Code.*

The death of deceased and cause of death

[9] From the evidence, the deceased died on the night of 16th -17th February 2012. And according to the Post mortem report prepared and signed on 21st February 2012 by Dr. Njuguna of Meru level 5 hospital, the cause of death was a severe head injury. **Pw10, Dr. Njeru Charles** during his testimony confirmed the report and indicated that the body had external injuries as fracture on the right leg and head. Accordingly the death of the deceased and cause of death has been proved beyond any doubt.

Who caused the unlawful act which caused the death?

[10] The next hurdle: Was the death caused by the unlawful act or omission of the accused? After voir dire examination the court found **PW1, P K**, a minor, to be of sufficient understanding on telling the truth. PW1 told the court that, on 16th February 2012 when he was at home, his uncle James Murithi Kinge, the accused called him and started beating him on the accusation of being a witch. He was with his small brother of eight months, when his mother, Margret Kagendo Mutethia came looking for them at the house of the accused. She found PW1 being beaten. The accused then pulled his mother into his house and locked the door. He then started to beat his mother with a rungu, panga, nyundo and axe. She screamed as his uncle made accusation against her; that she was a witch and he continued beating her. The accused would go out for about three minutes with a torch and then come back in. PW1, managed to fall asleep at some stage but when he woke up he saw the accused still beating his mother.

[11] **PW1** continued to testify that his father **PW5, Rufus Mutethi** came to the accused house on the night of the incident at around 9:00 pm and asked him why he was beating his wife. His Uncle- the accused- told him that it was because she was a witch and she had bewitched him. Thereafter, his father PW5 just left and went to sleep and did not come back that night. PW1 narrated that it was only in the morning when he saw the police and they came to rescue them. He recalls also seeing **PW 11 Julius Mwathi** there in the morning and he had a brief conversation with accused as to why he had assaulted mother of PW1. His mother was collected by a boda boda and rushed to hospital, afterwards she was taken to hospital for her wounds to be treated.

[12] **PW2, Samuel Ndungu** told the court that, on 17th February 2012 he was the OCS at Giaki. He received information from officers in charge of Giaki AP Camp Inspector Muga of an incident in Rugene Village in Kirimani Location. The officers had arrested a murder suspect. Subsequently, Corporal Daniel Kimathi and Sergeant Karakate came with the suspect to the station and booked him.

[13] At around 9 am PW2 went to the scene with PW6 Peter Kisoi and before reaching there they met some people who had the body of the deceased and told them that she had passed away before reaching the hospital. They checked the body and found that she had physical injuries on both her hands and head. (See MF15 (a), (b), (c), (d), (e) and (f))

[14] They got to the scene where they interviewed the people present. They also accessed the house of the accused, where they did not see any blood stains but noticed that the scene had been disturbed and had been swept.

[15] Subsequently, they collected the body and took it to Meru District Mortuary, for a post mortem and further investigations. The exhibits that he received were a piece of wood (MF1), an axe with a wooden handle (MF4), hammer (MF2) and a machete (MF3). The items were brought to him by the AP's

[16] **PW3 Daniel Kimathi Isaiah** told the court that on 17th February 2012 he was at Giaki AP post when the area Chief, Mugambi came and told him of an incident. Together with the Chief and Sergeant Karkata they went to the scene. They organized for a motorbike to take Kagendo to the hospital and later booked the accused person.

[17] **PW 4 Judith Kangaria**, testified and told the court that she was the sister to Margret Kagendo Mutethia. That on 17th February 2012 she received a phone call from the police telling her that her sister died. Later, on 21st February 2012 she went to the mortuary and identified her sister's body.

[18] **PW5 Rufus Muthethia** told the court that he was the husband to Margret Kagendo Mutethia. That on 16th February 2012 he left home at 6:00 am for Kanjagi where he was running a hotel. He worked till evening and when he got home at around 9:00 he was told by Robert Mwiti's wife that his brother had taken his wife and children. He went to his brother's house (the accused) and found that he had taken his wife and children captive. He left for the sub area to report the matter but he was not at home. He then went back home where he slept. In the morning he went to report the matter to the sub chief who was not there. When he came back home there were many people around his home together with the police and area chief. His brother sat at the door of his house together with his wife who was lying on the ground and two children. He recalls that on that day he did not manage to speak to his wife. The chief then gave him a motorbike to take his wife to hospital but she died on the way.

[19] **PW5** during cross examination confessed that his house and the accused house were about 100 meters apart and on 16th of February 2012 he had taken alcohol.

[20] **PW6 Peter Kisoi** stated before the court that he was the I.O assigned to this case. That on 17th February 2012 he was at Giaki Police Station when the accused was brought to the station and booked. Together with the sergeant they went to the home of the accused where they discovered the following items:

- a) A blood stained piece of wood
- b) A blood stained hammer
- c) A blood stained machete
- d) A blood stained axe.

[21] That upon investigations they established that the accused assaulted the said Margret Kagendo whom he believed to be a witch. During cross examination PW6 confirmed that there were several homesteads around the accused home. However, when he tried to approach the neighbors they declined to answer his questions because they feared the accused person.

[22] **PW7 Anne Wangeci Nderitu** testified and told the court that she is a government analyst for 20 years. She confirmed that she received the items listed by PW6 together with a blood sample from the deceased. She examined the items and after an analysis she found the following;

- a. The DNA from the wood and hammer were from an unknown female origin
- b. The DNA profile from the jacket were from an unknown male origin
- c. There was no blood on the machete

[23] She also found that the blood of the deceased was degraded so it did not provide a DNA profile. During cross examination it came out that in such situations they usually ask for fingernails but none were provided in this case.

[24] **PW8, PC. Gabriel Koskei** stated that he was meru DCI and is one of the gazetted scenes of crime officers in Gazette No 407 of 18.1.2010. He confirmed that he knew Cleophas Musing as a crime officer for they were trained together. He also worked with him for 6 months before he was transferred to Garissa. He confirmed that he also knew his handwriting and signature. He stated that the said Cleophas took 5 photos of the deceased, and prepared and signed a certificate thereto. (PEXH 5(a) and photos PEXH 5B-f). In cross-examination he confirmed that he was not there when the photos were taken.

[25] **PW9 Karen Karwitha** testified and told the court that on 16th February 2012 she was at home when she heard cries from Muguna and K coming from the accused home. She called her sister in law and they went to find out why the children were crying. When they got there they found out that Margret Kagendo was also inside. They went ahead to report the matter to the sub area and they were told it would be looked into.

[26] **PW10, DR. Njeru Charles**, produced the post-mortem report on the body of Margaret Kagendo. The report was prepared by Dr. Njuguna whose handwriting and signature he was conversant with for he has seen other documents made by him. According to the report the deceased died of severe head injuries. In cross-examination he confirmed that the body of the deceased had external injuries to wit; fractures of the right leg and head. There was no cut on the body. The type of weapon which inflicted the injuries was not however indicated.

[27] **PW11 Julius Mwathi** testified and told the court that on 16th February 2012 he was not home but he came back at around midnight. He heard about the incident and called the chief but he did not come. At around 6:00 am the next day he went to the accused home and found him sited at the door and Margaret was lying on the ground next to him. He asked the accused why he had killed her and he told him it was because she was a witch.

[28] The evidence presented by the witnesses was consistent that the accused assaulted the deceased and inflicted serious injuries which resulted into her death. The post- mortem report produced by PW10 show that the cause of death of the deceased was a severe head injury. This was consistent with the evidence by PW1. **PW1, P K**, a minor, of sufficient understanding gave a vivid account on how the accused was hitting the deceased all over her body with a rungu, panga, nyundo and axe. And he continued beating her throughout the night. PW1, confirmed that **PW5, Rufus Mutethi** came to the accused house on the night of the incident at around 9:00 pm and asked him why he was beating his wife. And the accused- told him that it was because she was a witch and she had bewitched him. Thereafter, his father PW5 just left and went to sleep. He also confirmed seeing **PW 11 Julius Mwathi** there in the morning and he had a brief conversation with accused as to why he had assaulted the deceased. There is sufficient corroboration here that the accused was at home at the time and he assaulted the deceased..

[29] **PW2, Samuel Ndungu** the OCS at Giaki, upon receiving information from officers in charge of Giaki AP Camp Inspector Muga of an incident in Rugene Village in Kirimani Location, he went to the scene with PW6 Peter Kisoi. They checked the body and found that she had physical injuries on both her hands and head. They also accessed the house of the accused, where they did not see any blood stains but noticed that the scene had been disturbed and had been swept.

[30] **PW3 Daniel Kimathi Isaiah** confirmed the evidence by PW2. He visited the scene together with the Chief and Sergeant Karkata. They organized for a motorbike to take Kagendo to the hospital and later booked the accused person. **PW5 Rufus Muthethia** corroborated what PW1 told the court. **PW6 Peter Kiso** was the I.O assigned to this case. His investigations corroborate what the other eye witnesses stated. He received a piece of wood, a hammer, machete and an axe- all of which were blood stained. These were the items PW1 told the court were used by the accused to beat the deceased. His investigations established that the accused assaulted the said Margret Kagendo whom he believed to be a witch. Although **PW7 Anne Wangeci Nderitu** stated that the blood from the deceased had been degraded and that nails would have offered DNA profile to compare with the blood in the exhibits forwarded to her, there is sufficient evidence that the accused used the weapons in beating the deceased and inflicted injuries on, and which caused the death of the deceased. The accused did not cut the deceased- this is a professional way of killing a person by inflicting blind or blunt but fatal injuries. The evidence by PW10 confirmed that there was no cut but the deceased suffered fractures of the leg and head. She died of severe head injuries. These injuries are consistent with the kind of beating described by PW1. Again, evidence by **PC. Gabriel Koskei** supports that conclusion. .

[31] **PW9 Karen Karwitha** as well placed the accused at his house on the fateful night. She heard cries from the house of the deceased. She called her sister in law and they went to find out why the children were crying. When they got there they found out that Margret Kagendo was also inside the house of the accused. These are people who knew the accused well.

[32] **PW11 Julius Mwathi** testified and told the court that at around 6:00 am the next day he went to the accused home and found him sited at the door and Margaret was lying on the ground next to him. He asked the accused why he had killed her and he told him it was because she was a witch. This evidence corroborates that of PW1 and other witnesses. They placed accused at his house on the material day. The evidence I have analyzed proves beyond any reasonable doubt that the accused was his house on the material day, he inflicted injuries on the deceased as a result of which the deceased died. Therefore, by his unlawful acts, the accused caused the death of the deceased.

[33] From the foregoing, there is sufficient evidence on investigations carried out and other witnesses. I must state however, that failure to call the arresting officer is not fatal as the results of investigation carried out were laid before the court by appropriate and competent police officers including the IO. There was also sufficient evidence was adduced to support the charge. Therefore this is not a case where evidence is barely adequate as to warrant an adverse inference to be made on account of failure to call the arresting officer.

[34] I am aware that deceased claimed an alibi that he was away on the fateful night in another home at Kianjagi where his mother comes from. His claim was bare and is totally rendered helpless by the prosecution witness evidence which placed the accused in his house on the fateful night. The alibi is completely unraveled thereto. He could not even provide succinctly the parcel number of the land where he claims his other home is and he slept on the material day. I reject the alibi as mere afterthought. Therefore there is proof that the accused was responsible for the unlawful act that caused the death of the deceased.

[35] **DW 1 James Murithi Kinge** also made unsubstantiated claims that these are trumped up charges by his brothers whose aim is to steal land from him. He accused PW5 of spearheading a scheme to disinherit him of the property that the father had left him. I note that he admitted that a succession is yet to be filed. He stated that PW1 was couched on what to say. And that the prosecution failed to prove the DNA in the exhibits produced. These allegations do not hold sway in the face of strong and uncontroverted evidence by the prosecution. I reject them. .

Was there malice aforethought?

[36] Section 206 of the Penal Code provides circumstances which would amount to malice aforethought once proved by evidence. Specific intent to cause the death of another is emphasized. See Section 206 of the Penal Code below:

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 death of or to do grievous harm to any 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 is the person actually killed or not, although such knowledge is accompanied by the 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.

[37] See the case of **Daniel Muthee v Republic** [2007] eKLR that:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code..... ”

[38] The evidence shows that the accused person set out to kill the deceased because he believed she was a witch and had bewitched him. The accused person locked the deceased together with her two children in his house where he assaulted the deceased throughout the night. The accused used weapons to wit; rungu, panga, hammer and axe to beat the accused. These are heavy and dangerous weapons which the accused knew would inflict fatal blows. The doctor confirmed that the deceased sustained severe fractures in the right leg and head. She died of severe head injuries. As I stated, the accused did not cut the deceased but inflicted several severe blunt blows thus causing fatal fractures- this is a professional way of killing while you conceal the real intention of inflicting grievous bodily harm and ultimately death. The manner

he executed the heinous crime leaves no doubt that he was aware that his actions would cause the death of Margaret Kagendo. The different weapons used in attacking the deceased were meant to cause death or grievous harm. I am satisfied that malice aforethought was established in the sense of section 206 of the penal code. I find the accused guilty of murder of MARGARET KAGENDO, contrary to section 203 of the Penal Code and convict him accordingly under section 322 of the CPC. It is so ordered.

Dated, signed and delivered in open court at Meru this 6th day of December, 2018

F. GIKONYO

JUDGE

In presence of

M/S Gitonga holding brief for Carlpeters for accused

Namiti for state

F. GIKONYO

JUDGE