



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 68 OF 2010
REPUBLIC.....PROSECUTOR
VERSUS
JOHN MWANGI WAINAINA..... ACCUSED
JUDGMENT

The accused **JOHN MWANGI WAINAINA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows

“On the 26th day of June 2010 at Munanda Farm in Nakuru North District within the Rift Valley Province murdered FREDERICK MBUGUA WAINAINA”

The accused entered a plea of ‘**Not Guilty**’ to the charge. The hearing commenced on 2/6/2011 before **Hon. Lady Justice Roseline Wendoh** who heard all fourteen (14) prosecution witnesses. On 28/1/2013 the Honourable Judge ruled that the accused had a case to answer and placed him onto his defence. After recording the accused’s defence Justice Wendoh was transferred to Meru High Court. It is at that point that I took over the case and heard the evidence of the two (2) defence witnesses. The matter is now pending the judgment of this court.

The brief facts of the case are as follows. The accused and deceased were brothers. The deceased was the eldest son in the family. Following the death of their father, a dispute arose between the two men regarding their land and the boundaries thereof. According to both the prosecution and defence witnesses this was a long-standing dispute which had even ended up in the court.

At the time of this incident the accused used to live and farm the land in Subukia. The deceased who lived in Nakuru would only go there occasionally. **PW11 ESTHER NYAMBURA** was the widow to the deceased. She told the court that on 25/6/2010 the deceased left their home in Free Area in Nakuru saying that he was going to visit his land in Munanda, Subukia. At 6.00pm the deceased phoned his wife and informed her that he would be staying overnight in Subukia. The following day 26/6/2010 the deceased did not return to his home in Nakuru. **PW13** later received news that he had been killed. She later went and identified the body of her husband at the mortuary.

PW1 MICHAEL MBUTHIA GATHURA told the court that he owned and occupied a parcel of land neighbouring that of accused and the deceased. On 26/6/2010 at about 7.00 am, **PW1** was herding his cattle when he heard screams. He rushed out to check what the problem was.

Upon arrival at the neighbouring farm **PW1** found a crowd there. He found the deceased lying on the ground and the accused who was wielding a panga cutting the deceased on the back of the head. **PW1** made a call to King'eero police station. The police came to the scene and collected the body. The accused who was also injured was found walking along the Nyahururu road by police. He was treated for his injuries and thereafter was placed in cells. Upon conclusion of police investigations the accused was arraigned in court and charged.

On 16/7/2014 the accused gave his defence to the charge. He confirmed that the deceased was his brother and that they had a dispute over the boundaries of their land. The accused told the court that on the material day the deceased came and began marking the boundary of his land. The accused did not agree with where the deceased had placed a string marking the boundary. A quarrel erupted between them which degenerated into a fight. The accused claims the deceased had a panga with which he cut the accused on the hand. They began to struggle over the panga. The accused snatched the panga and also cut the deceased. From that point the accused claims that he does not know what happened next. He pleads that he did not intend to kill his brother. The accused called two witnesses in support of his case.

Both sides having closed their cases, this court must analyze the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code, Cap 63, Laws of Kenya defines the offence of murder in the following terms

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

Therefore in order to successfully prove this charge the prosecution must tender evidence to prove beyond reasonable doubt the following crucial ingredients of the charge

- i. Proof of the fact as well as the cause of death of the deceased
- ii. Proof that the deceased met his death due to an unlawful act or omission on the part of the accused
- iii. Proof that said unlawful act or omission was committed with malice aforethought

On the fact of the death of the deceased there can be no controversy. Several witnesses testify that they saw the deceased lying in the shamba with serious cuts to his body. **PW14 PC STANELY MWENDA** told the court that after receiving a report about the incident, he went to the scene where he found the body of the deceased lying in a pool of blood **PW13 CORPORAL JOHN WAMBUA** is the scenes of crime officer who also accompanied the police to the scene. He took several photographs which he produced as exhibit in court **P. exb 1**. The photographs clearly depict the body of the deceased as well as the injuries thereon.

PW7 DANIEL MAINA MBUGUA a son to the deceased and **PW11** the widow to the deceased both confirm that they went to the mortuary where they identified the body of the deceased for purposes of the autopsy. All these witnesses who knew the deceased well identify him as **‘Frederick Mbugua Wainaina’**.

In order to satisfactorily prove the **cause** of death medical evidence of the **effect** of those injuries on the mortality of the accused must be adduced. This evidence must be adduced from a doctor regarding the autopsy examination conducted on the body. **PW5 DR. TITUS NGULUNGU**, a pathologist based at the PGH – Nakuru confirmed that he conducted the autopsy on the body of the deceased. He noted several cuts on the head as well as a compound fracture of the skull with brain matter hanging out of the head. **PW5** concluded that the cause of death was **‘massive haemorrhage arising from head injury due to sharp force trauma to the head’**. He filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 1**. This was expert medical opinion evidence which was not controverted by the

defence. I therefore find as a fact that the deceased died as a result of having been attacked with a sharp object. Given a panga was recovered next to the body it is likely that the injuries to the deceased were inflicted by a panga.

Having proved the fact as well as the cause of death, the prosecution is required to prove that it was the accused who inflicted the fatal injuries on the deceased. **PW2 JULIUS KAIGWIRE MAINA** a neighbour told the court that he did not witness the actual assault upon the deceased. He only heard screams and when he arrived at the scene he found the deceased lying on the ground having already been slashed. **PW2** states that he did not find the accused at the scene when he arrived there.

PW3 PRISCILLA WAIRIMU KANG'ETHE was the wife to the accused. She states that she saw the accused and the deceased holding each other and fighting. **PW3** states that she saw the two men struggling over a panga but she too did not witness the actual assault on the deceased.

On his part **PW1** told the court that on the material day at 7.00am he was at his home. Hearing screams from the neighbouring shamba he rushed to the scene, **PW1** states that he found the deceased lying on the ground and accused cutting at him with a panga. **PW1** explained that the deceased lay between the accused's legs as the accused was slashing him with a panga.

PW10 DANIEL MOKU KIRANGU was also a neighbour to the brothers. He told the court that upon hearing the screams he rushed to the scene. He found the accused who was armed with a panga chasing the deceased. In his own words **PW10** states

"I went and found deceased was being chased by Mwangi (accused) who was armed with a panga. He chased him for about 3 meters. The deceased fell and deceased told accused my brother please don't kill me. Accused said what he had done to him let it come to an end. They spoke in Kikuyu. The deceased had raised his hand up. The accused cut him on both hands. The accused cut him several times on the head. Deceased fell down people arrived. Accused went away with the panga....."

Therefore there is clear evidence from two eye-witnesses who saw the accused slash the deceased with a panga. The incident occurred at 7.00am. It was daylight and visibility was good. **PW1** and **PW10** were both neighbours to the brothers and knew them well. Indeed they referred to the accused and deceased by name.

Neither witness was related to the family and neither was involved in the dispute between them. They had no reason to slant their evidence one way or another. Both witnesses gave clear evidence and both remained unshaken under cross-examination by defence. I am satisfied that they were telling the truth. The evidence of these witnesses coupled with the testimony of **PW3** who was a wife to the accused and obviously knew him well said that she saw her husband and the deceased struggling over a panga convinces me that it was the accused who fatally attacked the deceased.

PW14 was one of the first officers to arrive at the scene. He told the court that next to the dead body of the deceased he recovered two pangas **P. exb 13, P. exb 14**, a pair of open shoes, a pair of keys, a fork jembe **P. exb 9**. **PW14** also collected the blood stained clothing which the deceased was wearing a jacket **P. exb 12** and the shirt which the accused was wearing was also produced as an exhibit **P. exb 13**. Additionally **PW14** collected a sample of the blood-soaked soil where the deceased lay. All these exhibits were forwarded to the government chemist together with blood samples taken from the accused and the deceased for purposes of analysis and possible matching.

PW12 ALBERT GATHURI MWANIKI was the government analyst. He confirms receipt of the exhibits in question which were subjected to examination and analysis. His findings of the examination were tabulated in the report dated 8/7/2010 which **PW12** produced in court as an exhibit **P. exb 4**. The blood group of 'the deceased was found to be Group 'B' while that of accused was of Group 'O'. The trouser and shirt taken from the accused were both found to be lightly stained with blood of Group 'B'. The deceased's clothes were found to have been heavily stained with blood of Group 'B'. The panga recovered at the scene was stained with human blood of Group 'B' and the soil sample collected from the

scene was also stained with human blood of Group 'B'. From these findings it is proven that the panga in question was the one used to slash the deceased. The presence of blood matching the blood group of the deceased on the accused clothing is a strong implicating finding as it shows that the deceased's blood spilt or squirted out onto the accused's clothing. From the evidence adduced by the prosecution there can be no doubt that it was the accused who slashed the deceased.

In his sworn defence the accused readily admits that he was involved in an altercation with the deceased who was his brother at their shamba on the material day. The accused states that their quarrel degenerated into a fight during the course of which he snatched a panga from the deceased which panga he used to slash the deceased. Thus the accused does not deny that it was he who slashed the deceased in the shamba on that day. Therefore I find that *actus reus* of the offence of murder has been proved against the accused beyond reasonable doubt.

Aside from the '*actus reus*' or the act of offence, the prosecution must also tender evidence to prove the existence of '*mens rea*' which is the mental element for the offence of murder. In law *mens rea* is defined as '**malice aforethought**' which is defined by Section 206 of the Penal Code. It must be shown that the accused acted deliberately with intention to kill or to grievously harm the deceased.

In this case several witnesses have testified to the fact that there existed a long standing boundary dispute between the accused and the deceased. This dispute had even been referred to court. **PW3** the wife of the accused told the court that her family had had disagreements with the deceased over land since 1995. The matter was referred to the chief for arbitration. **PW6 JOHN NJOROGI GACHANGU** was the assistant chief of the area. He told the court that the dispute between the two brothers had been going on for over five years. Under cross-examination by '**Mr. Wambeyi**' for the accused **PW6** said

"I have been assistant chief in Munanda sub-location. Deceased had a case in their farm but used to live at Free Area. He used to till that land and come back to Nakuru. I knew the dispute. It was over land. Accused used to claim the land to be his"

PW6 went on to state that

"I have severally intervened over the disputes"

PW11 the wife of the deceased also confirms the existence of a land boundary dispute between the brothers. She stated that the dispute began when her mother in law died.

Similar evidence was given by the two witnesses called by the accused in his defence. **DW2 HARUN MWANGI WAINAINA** cousin to the two who was also a pastor stated

"I am aware there was a land dispute between the deceased and his father...."

PW2 explained that as a cousin and a pastor he tried to reconcile the brothers to no avail. **DW3 JOSEPHINE WANGARI** a sister to the accused also told the court that there was a dispute as the deceased was claiming the entire portion of the land left by their father as his.

It is not the duty or mandate of this court to resolve that dispute nor is it this court's duty to determine who amongst the brothers was the rightful owner of the land. Suffice to say, from the evidence available it is evident that there existed a bad relationship between the accused and the deceased over this long-standing land dispute. The situation was basically just a cauldron waiting to boil over.

And boil over it did on 26/6/2010 when the two met at the shamba. It appeared that the deceased set about demarcating his boundary. The accused not surprisingly objected. They began to fight.

The accused told the court that it was deceased who had the panga with which he cut him (the accused) on the hands. The court cannot dismiss this defence entirely. **PW8 PC MOHAMMED HUSSEIN MAMO** told the court that as he was on his way to the scene he met the accused. The accused told the

police officer that he had fought with his brother. **PW8** confirms that the accused was bleeding from an injury on his left hand. **PW6** also told the court that after the incident he went to King'eero police station where he found accused in the cells. **PW6** confirms that he saw a cut wound on the accused's left hand.

It is obvious to this court that the accused did not launch an unprovoked attack on his brother. The fact that the accused also had an injury on his hand gives credence to his defence that the deceased also attacked him. The accused in his defence stated that the quarrel began when the deceased began to mark off what he claimed was his land using a piece of string. **PW14 INSPECTOR PHILEMON SANGAO** the investigating officer confirms that a string was found at the scene near the maize plantation, thereby giving credence to the accused's defence. The trial Judge at the time did visit the scene but appears not to have recorded her own observations of what she may have seen there.

The accused did not attempt to run away or abscond. He was found walking to the police station and the accused reported to **PW8** a police officer that he had fought with his brother. These actions of the accused were bonafide and certainly not the actions of one who had a guilty mind.

From the evidence before me I find that there was no malice aforethought on part of the accused. The attack on the deceased was not premeditated. The *mens reas* for the offence of murder has not been proved. This was a situation where a long standing land dispute between the accused and his brother exploded. There is no evidence of premeditation on the part of the accused. The two fought and in his anger in the heat of the moment the accused slashed and killed his brother. Section 202(1) of the Penal Code provides

“Any person who by any unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter”.

I find that in the absence of proof of malice aforethought a charge of murder cannot stand. I therefore convict the accused on the lesser offence of manslaughter contrary to Section 201(1) of the Penal Code.

Dated in Nakuru this 21st day of July, 2017.

Mr. Obutu holding brief for Wambeyi

Mr. Chigiti for DPP

Maureen A. Odero

Judge