



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 20 OF 2008

REPUBLIC PROSECUTOR

V E R S U S

STEPHEN MUTEMBEI MUTHINJA..... ACCUSED

JUDGMENT

Stephen Mutembei Muthinja is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 14/1/2008 at Lanyiru sub Location of Tigania District, murdered **Mary Karambu Laalu**. The prosecution called a total of 5 witnesses in support of their case. The prosecution was led by Learned Counsel Mr. Mulochi. Accused testified on oath in his defence. He was represented by Mr. Wamache Advocate.

PW1 George Laalu Lingaya is the husband of the deceased, Mary Laalu. Accused is PW1's nephew, his brother's son. PW1 recalled that on 13/1/2008 about 6.00 p.m., he was seated near a kiosk when he heard a gunshot, went where people were gathered and found a bullet had fallen at the feet of Joseph Munyi and that the accused, Stephen Mutembei, told Munyi that he was only scaring him; that Munyi and accused were quarrelling over a gun which accused had and which Munyi wanted. Accused said that he could only give it back if he was paid his money. The two then left going different directions. He said that the Assistant Chief PW4 was present. Next day at 6.00 a.m. when in his house, PW1 was woken up by the accused who gave him a message to take to Joseph Munyi, that Munyi should return his radio which he had stolen from his house; that accused started walking away but returned and asked for a piece of paper for making tobacco. PW1 entered his house which was still under construction, got a piece of paper and gave him to roll the tobacco and as he wanted to start smoking, Joseph Munyi arrived armed with a gun and told accused that they should prepare for a fight; that accused who had a coat over his shoulder dropped it and PW1 saw that he had two guns; that Munyi stood at the door while accused stood at the corner of his house; that from where he was, he was able to see both Munyi and accused; that accused fired at Munyi but it missed; that the bullet hit his other house which was about 6 metres away; that his son came out of the house and said that his mother had been shot. He ran there and found the wife had fallen beside the bed and was bleeding. He noticed that she had a hole on the left side of the head. When he came out to seek for help, both accused and Joseph had left. He started to scream and Police came after a short while and took away the body.

PW2 David Kaberia, a brother to PW1 and uncle to accused heard a gunshot, followed by screams

at about 6.00 a.m. on 14/1/2008, rushed there and found a crowd of people; that before he reached the home, he met Munyi (his brother) on the road; that Munyi was putting a gun on the ground and he asked him where Mutembei was, but he denied knowing. He went to PW1's home and confirmed that the wife had been shot dead.

PW3 Hellen Kathari, is a sister to PW1 and therefore an aunt to accused. She recalled that on 14/1/2008 she heard a sound of 'twa' (gunshot) and then screams, then rushed to the direction they emanated from. She found the deceased had been shot dead and she rushed to report to the Chief.

PW4 Japhet Kubai, the Assistant Chief of Lanyiru Sub Location recalled that on 13/1/2008, he was at Lanyiru Market when he got information that two men from Laare were looking for him. The two men informed him that their guns had been stolen by Stephen Mutembei who had been their herdsboy; that Mutembei then arrived where they were seated, started abusing the men saying they would not get their guns unless they returned him his ID card and paid him three months' salary; that accused quarreled with the men and left. The men also left and when still at the same place, Mutembei returned armed with a gun; did not get the men and went in search of them; that accused's uncle, Munyi came and asked why accused had brought a gun to the market and it is then accused shot at Munyi's feet and Munyi ran off. The next day, he got a report from Hellen, PW3, that accused had shot PW1's wife. He visited the scene. He called the OCS Tigania, who came to collect the body.

PW6 PC Kipkemboi Lagat was the Investigation Officer in this case. He visited the scene of the murder with other Police officers where he found the deceased's dead body in a house, recovered a spent cartridge. He noted that there was a hole in the wall of the timber house, in which the deceased had been and the cartridge was near the kitchen. He took the cartridge and bullet that was found in deceased's body to the Ballistic Expert (PW5). He also attended the post mortem. PW6 further said he rearrested accused from Isiolo Police Station after one week where he had been arrested for illegal possession of a firearm but did not recover the firearm.

PW5 CIP Florence Kanini, a firearm examiner at CID Headquarters produced a report of the firearm examiner, Mr. Mwongela, who examined the cartridge and bullet was recovered. The examiner formed the opinion that the cartridge case and bullet were consistent with those produced by AK 47 family of firearms or Simonov Carbines.

PW7 Dr. Nicholas Koome of Meru Level 5 Hospital produced the post mortem report on behalf of **Dr. Isaac Macharia**. The Doctor had formed the opinion that the cause of death was cardio respiratory arrest secondary to a penetrating injury caused by a single bullet.

In his defence, accused testified on oath and stated that on 13/1/2008, he arrived at Lanyiru from his *shamba* at 9.00 p.m. He found his house had been broken into, his property had been stolen and when he informed one David Kaberia, he informed him that he had seen it with M'Munyi. Next day, he went to see his uncle Laalu (PW1) to send him to Munyi. When at Laalu's home, Munyi arrived there holding a gun and he fired a shot and ran off. He was later arrested on 28/1/2008 when it was alleged he killed somebody but he did not have anything that day, and he denied knowing how to use a gun.

After the close of the defence case, Mr. Wamache submitted that there were several guns at the scene and it cannot be ascertained which one fired the bullet that caused the death; that Munyi who had a gun has not been arrested; that there were inconsistencies in the evidence as to who had 2 guns and he urged the court to acquit the accused.

In reply, Mr. Mulochi submitted that PW1 clearly saw who fired the fatal bullet; that David Kaberia saw accused armed with a gun after the shooting and that there was overwhelming evidence implicating the accused as the perpetrator.

To prove a charge of murder, the prosecution has to establish that the following ingredients exist:

- 1. Proof of the fact and cause of death of the deceased;**

2. **Proof that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence.**
3. **Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence.**

Malice aforethought can broadly be defined as an intention to cause grievous harm or cause the death. **(See Section 206 of the PC).**

In this case, the post mortem was performed on the body of the deceased by Dr. Macharia who confirmed that the deceased died of cardio respiratory arrest due to a penetrating head injury caused by a single bullet. He recovered the bullet from the occipital region of deceased's head. His evidence corroborated the evidence of the witnesses who saw the body of the deceased soon after death, i.e. PW1, 2, 3, 4 and 6. PW6 recovered the spent cartridge at the scene. The bullet and cartridge were examined and found to have been fired by an AK 47 family for firearms.

The next question then is who fired the fatal bullet? In his defence, the accused denied that he has ever held a gun nor does he know how to use one. There is however, overwhelming evidence on record that the day before this incident on 13/1/2008 accused had a gun at the market and had scared his uncle Munyi by shooting close to him. PW1 and PW4 witnessed the incident. PW4 related to the court how some two men claiming to be accused's former employers had gone to him alleging that accused had been their herdsboy and had stolen their guns and that accused showed up just then and demanded to be paid his 3 months' salary and documents before he could return the guns. PW4 did not know the said men before. Accused's defence that he has never used a gun is totally dislodged by the testimonies of PW1 and PW4. PW1 and 4 confirmed that they saw accused with a big gun like that one used by Police. The cartridge found at the scene and bullet found in deceased's body were said to be consistent with those produced by AK 47 or Simonov cabins.

PW1 is the only witness to this incident. He said that accused went to his house about 6.00 a.m., knocked on his gate, PW1 opened for accused and he requested PW1 to ask Munyi to return his radio which Munyi had allegedly stolen from accused's house. Accused did admit that indeed he was at the scene i.e. PW1's house when Munyi arrived while also armed. It was PW1's evidence that accused was armed, not with one but two guns and that when Munyi challenged accused to prepare for a fight, accused fired at Munyi first. According to PW1, from the position where he stood, he could see both accused and Munyi and that it is accused who fired the single shot. PW6 who visited the scene also told the court from the position he was shown by PW1 where accused and Munyi stood, it could only have been accused who fired the fatal bullet. Only one cartridge was recovered at the scene. I had the opportunity to see PW1 and I have no doubt that he impressed the court as a truthful witness. His evidence is corroborated by pw4 and partly by accused's testimony. Accused is PW1's nephew, his brother's son while Munyi is PW1's brother – all close relatives. There is no reason why PW1 could frame accused and accused could not allude to any. I find pw1 to be a credible witness. He was candid that both Munyi and accused had guns. The quarrel between Munyi and accused had not started on 14/1/2008 but the day before when accused shot at Munyi in broad daylight while at the market in the presence of the Assistant Chief. Accused did admit that he had a good relation with PW1 and 2 before. In fact, that is why accused had gone to PW1 that morning to seek his intervention. Unfortunately, Munyi who seems to have also been in illegal possession of a gun has never been arrested. This court has no idea whether the Investigation Officer did enough to arrest him. What the court does not comprehend is why the Assistant Chief did not take action on 13/1/2008 to report to the Police that accused had a gun. Be that as it may, this court is convinced beyond any doubt that it is accused who shot at Munyi with whom they had a dispute but missed Munyi and the bullet instead hit the deceased who was still asleep in the house.

Whether the accused possessed malice aforethought; I find that the very fact of firing a bullet at a person is an intention to do grievous harm to that person or cause his death. In this case, accused intended to do grievous harm or cause the death of his uncle Munyi, but instead the bullet hit PW1's wife. **Section 206 (a)** defines malice aforethought as:

“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”.

In the end, I find that the deceased died from a bullet wound. The same was fired by accused. The mere fact of the use of a gun is proof of malice aforethought. I find that the prosecution has proved its case to the required standard, that is, beyond any reasonable doubt. I find accused guilty as charged and convict him of the offence of murder under **Section 322 (1) of CPC.**

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

11/2/2016

PRESENT

Mr. Kariuki for State

Mr. Wamache for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused