



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 69 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIJAH MAKUNYI KIRUGI.....ACCUSED**

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

1. **Elijah Makunyi Kirugi** hereinafter “the accused” is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the **9<sup>th</sup>** day of **February, 2010**, at **Mukuruni Village, Kanthungu Location** in **Mumoni District** within **Eastern Province** he murdered **John Kithome Kirugi** (deceased).
2. The facts of the case are that on the **9<sup>th</sup>** day of **February, 2010**, the deceased left home on hearing a motor-vehicle honking. He went to check on the persons who were purchasing copper stones (precious stones) that were located on their ancestral land. He found PW2 **John Njoroge Ikanda** the representative of **Benda Industries LTD** that were buying the stones. PW2 negotiated with the Deceased and his brothers, the Accused inclusive. The stones were excavated and weighed. Prior to making payment the Accused disappeared. He returned armed with a panga. He demanded to know who had been paid the money. It happened to be the Deceased. He acted by cutting him severally. People scampered into the bushes to escape from the scene of the incident. The matter was reported to the police who investigated the case and charged the Accused.
3. When put on his defence the Accused denied having committed the offence in question. In an unsworn statement, he stated that he was not within the area as he had taken his child to school. He said that the Deceased went to sell the stones with his other brother. The following morning the Chief went to his home alleging that he had killed someone. He was made to enter the motor-vehicle that carried the Deceased whereafter he was taken to the police station.
4. Issues to be determined are:
  - Whether death occurred?
  - Whether it was caused by the Accused through an unlawful act or omission.
  - Whether the Accused acted with malice aforethought.
5. PW1 **Mary Masaku Kithome** the wife of the Deceased parted ways with him as he went to check on persons who were to buy the copper stones. He did not return home. The following morning on learning of his demise she went to the quarry where stones were being excavated and found her husband’s body. She identified it. PW7 **Dr. Allan Balongo** conducted a postmortem on the body of the Deceased which was identified to him by **Joseph Mutuna**. He formed an opinion that the cause of death was cardiopulmonary arrest secondary to severe haemorrhage due to multiple cut wounds. This was proof of the fact of death beyond any reasonable doubt.
6. PW2 **John Njoroge Ikanda**, a representative of **Benda Industries LTD** that was buying copper

- stones stated that he went to the Accused's place to purchase stones. On arrival he found the Accused but there was one **Kithome** who was being referred to as "Chairman". **Elijah** called his brothers, **Kithome** (Deceased) and **Joseph Mairetu**. The three (3) of them discussed and reached an agreement prior to allowing him to get the stones. He noted something peculiar in that **Elijah** (Accused) carried a bow and arrow. He declined to purchase stones as a result. The Accused returned the weapons home. He returned without the weapons. That is when they struck the deal/agreement. The Deceased was tasked to count the weight of stones, **Mairetu** counted the bags while the Accused was assisting in loading the stones into sacks. Calculations were done. At about **7.45 p.m.** the Accused disappeared. The sum of **Kshs. 2,835/=** was paid to **Joseph** who passed over the sum to the Deceased.
7. All over a sudden the Accused emerged and sought to know how much money had been paid. He (PW2) answered him. He remarked that on completion of his work they would tell the Chief and the police at **Kyuso**. He pushed aside one **Kunga** and unleashed a panga from beneath his clothes which he used to cut the Deceased on the head who fell down. People scattered, they ran into the nearby bush. He continued to cut him severally then disappeared into the thicket.
  8. PW3 **Joseph Nyaga Kirugi**, a Pastor and brother to both the Accused and Deceased stated that the three (3) of them were selling copper stones on the fateful date to PW2. He confirmed in material particular what PW2 stated. He stated that when the Accused disappeared from the place that they were selling from the stones, he told them to continue with the transaction and even gave instructions that the money would be given to the Deceased. After the money was given to the Deceased the Accused appeared and held himself akimbo. He demanded to know from PW2 how much money he had paid. He witnessed as the Accused cut the Deceased with the panga on the head, neck and as he continued cutting him while on the ground he ran and hid in the bush then went home.
  9. PW4 **Stephen Nguu Mbuli** a nephew of the Accused and Deceased who was present confirmed having seen the Accused having lifted up a panga that he used to cut the Deceased on the neck and as he continued cutting him even after he fell down. He ran away. The following morning he returned to the scene on hearing screams and found the wife of the Deceased. He saw the body of the Deceased which had multiple cut wounds.
  10. In his defence the Accused denying having committed the offence claimed that he was elsewhere having taken his child to school. He withheld pertinent information regarding the alleged child and the school.
  11. Eye-witnesses who testified saw him assaulting the Deceased with a panga. I am mindful of the fact that the incident occurred between 7.50 – 9.00 p.m. In the case of **Wamunga vs. Republic (1989) KLR 426** the Court of Appeal held that:

***“It is trite that where the only evidence against defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction.”***

12. With this in mind I do note that eye witnesses who testified saw the Accused cutting the Deceased with a panga. The head lamps of the motor-vehicle were in use which aided them to see the Accused a person. PW2 had negotiated the sale of stones with him at about **6.00 p.m.** His brother and nephew would not be mistaken as to his identity.

The recognition in the circumstances was beyond any possibility of error.

13. In the premises I find the Prosecution having proved that the Accused occasioned upon the person of the Deceased injuries that he sustained and subsequently succumbed to.
14. This therefore brings us to the issue whether he acted with malice aforethought. (**Mensrea element of murder**).

Malice aforethought is defined by **Section 206** of the **Penal Code** as:

***“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 flight or escape from custody of any person who has committed or attempted to commit a felony.”***

15. In the case of **Nzuki vs. Republic (1993) KLR 171**, the Court of Appeal stated thus:

***“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 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 these 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 and in none of these cases does it matter that the act and intentions were aimed at a potential victim other than the one succumbed to. The mere fact that the Accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder (See Hyman V D.P.P. (1975) AC 55.”***

16. In the instant case right at the outset PW2 had seen the Accused carrying weapons. He made him return them prior to engaging into any sale transaction with him.

Thereafter he disappeared and returned with a weapon concealed beneath his clothing. He unleashed it at an opportune time and used it to cut the Deceased severally.

17. According to the findings of the Doctor who performed the autopsy, the Deceased sustained multiple cut wounds on the head on the left radius, stab wound on the back, he suffered a depressed skull and fracture of the parietal bone. The injuries sustained were severe.

18. Having left and returned with a panga and demanded to know who had received the money, he acted deliberately. He even told those present to report the matter to the Chief and police which was evidence of an intention to either cause death or at least do grievous harm to the victim. He had absolutely no lawful excuse to commit the act that resulted into the death of the Deceased.

19. From the foregoing it is apparent that the Prosecution have proved the case against the Accused beyond any reasonable doubt. He is guilty and convicted for the offence of murder.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of March, 2016.**

**L. N. MUTENDE**

**JUDGE**