



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR NO. 8 OF 2015
(FORMERLY MERU HCCR NO. 35 OF 2015)

REPUBLIC.....PROSECUTOR

-VERSUS-

DAVID MUGENDI BORI.....ACCUSED

JUDGMENT

1. The accused, David Mugendi Bori is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63, Laws of Kenya. The particulars of the offence are that on the 8th day of April, 2012 at Kabeche trading centre, Chogoria location of Tharaka Nithi County within Eastern Province, the accused murdered Ephantus Bori Muriira (“the deceased”). The prosecution called seven (7) witnesses in support of its case.

2. PW2 Bosco Karani Joseph testified that, on the material day, he was in the front part of the premises owned by the deceased where he PW1 was carrying on welding activities. At about 2pm, he heard noises from the rear of that premises. When he rushed there to see what was happening, he found the accused raining blows and kicks on the deceased. When the deceased fell down, the accused picked a big stone (PEXh 2) and hit the deceased with it three times. The accused then run away leaving the deceased behind bleeding from the head, nostrils, eyes and ears. PW1 sought the help of Isaac Mwandiki (PW4) who rushed the deceased to a hospital in Chogoria where the deceased was pronounced dead on arrival. The witness told the court that he knew both the deceased and the accused as the premises on which he carried on his welding activities/business was owned by the deceased. Both the deceased and the accused lived within that premises at the rear. The witness identified the stone (PEXh 2) with which the accused had hit the deceased. In cross-examination, the witness told the court that the deceased fell to the ground as a result of the blows metted out on him by the accused. That being a sunday, there were no people around except Fridah (PW3), one Kinyua, Muriithi and Isaac. Isaac (PW4) was driving past but was stopped and helped to take the deceased to hospital.

3. PW3 Fridah Rima Nkando recalled that on the material day at around 2pm, PW1 called her to come and see what the accused was doing to his father (the deceased). When she arrived, she saw the accused holding a stone (PEXh2), with which he hit the deceased. She run away to call people. In cross-examination, she maintained that she witnessed the accused hit the deceased with the stone. That being a sunday, there were no people around. That the deceased was lying down facing up when the accused hit him with the stone. She knew the deceased as he was her landlord. PW4 Isaac Mwandiki Gitonga recalled how he was coming from church on the material day at about 2pm when he found a crowd of people at the deceased’s premises. He found the deceased lying down. Those present helped him put the deceased in his (PW4’s) vehicle to take him to hospital. On the way, he met one of the deceased’s sons by the name Murithi who accompanied him to hospital. On arrival however, the deceased was declared dead.

The people at the scene told him that the accused had hit the deceased with a stone. In cross-examination, he stated that PW1 was his employee and that he held no grudge against the accused.

4. Frankline Murithi Njagi (PW5), recalled how he identified the body of the deceased on 10th April, 2012 at Chogoria Hospital Mortuary. PW6 Henry Ntwiga M’Ntobori, a son of the deceased recalled how he identified the body of his father on 10th April, 2012 at Chogoria Hospital Mortuary for post mortem. He told the court how the relationship between the deceased and the accused had deteriorated over time because of the accused’s conduct. That the deceased had given the accused one of his (deceased’s) rental rooms free of charge but the accused had insisted for more as all his other brothers including PW6 were well off and lived far from where the deceased lived. That on the material day, the two had quarreled over the accused’s attempt to steal the deceased’s timber. That after hitting the deceased with a stone, the accused attempted to run away but was arrested by members of the public who handed him over to the police.

5. The investigating officer, PW7 I.P Joash Magero recalled how on the material day a report of the incident was made at Chogoria Police Station. He arranged to go to the scene. On the way he met the members of the public bringing the accused to the station. He re-arrested him and proceeded to the scene where he interviewed amongst others, PW2 and PW3. He recovered from the scene the stone with which the accused is said to have hit the deceased which he produced as PExh 2. He gathered that the accused was irritated when his father questioned him about the timber he had found the accused removing from the store. PW7 attended the post mortem of the deceased’s body on 10th April, 2012 and identified the postmortem report produced as PExh 1. In cross examination, he told the court that the stone (PExh 2) had blood stains when he recovered it from the scene. PW1 Dr. Poly Kiende carried out the postmortem on the body of the deceased on 10th April, 2012 at Chogoria Hospital Mortuary. On examination, she found the head having a crush injury on the nose, fractured nasal and orbital bones. The upper jaw was fractured with multiple fractured teeth. She formed the opinion that the cause of death was severe head injury secondary to crushed bones of the nose/orbit and upper jaw. She produced the post mortem report as PExh 1.

6. The accused gave sworn evidence. He told the court that on the material day he was at home when it started to rain. He went and covered with timber the maize that was spread outside. The deceased came and questioned him about the maize. The accused left him outside and went back to his house. He then heard some noise from the direction of the toilet of something having fallen. He rushed to the scene and found that his father had fallen down. He raised him up and found that his mouth was bleeding. He rushed across the stream to call his brother who was about 800m away but did not find him. When he returned, he found PW2 in front of the premises. He called one Kaizari with whom he took his father to hospital. Later, at about 4pm, his brothers told his neighbours to arrest him. He denied killing his father and stated that he had only removed the timber from the store and covered the maize that was being rained on. According to him, there were no people around except small children at the time. In cross examination, he told the court that he had a good relationship with the deceased. That the people present were in front of the premises. That he dragged the deceased from where he had fallen to a separate room before he ran across the stream to his brother for help. That the deceased fell on a hard surface and hurt himself.

7. Ms. Kaaria, learned counsel for the accused submitted that on the material day, it was raining and the ground was wet. That this supported the accused defence that the deceased slipped on the wet ground and fell down. That there was no evidence of any bad blood between the deceased and the accused. That the prosecution had not proved any mens rea on the part of the accused. Mr Ongige for the prosecution submitted that the deceased and the accused did not live in harmony. That PW2 and PW3 saw the accused hit the deceased with the stone. That the act of hitting the deceased with a big stone was enough to prove mens rea on the part of the accused. To him the prosecution had proved its case to the required standard.

8. I have considered the entire evidence by the prosecution, the defence of the accused as well as the submissions of learned counsel. The accused is charged with the offence of murder. The burden lies on the prosecution to prove beyond any reasonable doubt that the accused attacked and inflicted injuries on the deceased as a result of which the deceased died. The prosecution must also prove that at the time the accused inflicted those injuries on the deceased, he had formed an intention either to cause death or

grievous harm to the deceased. Those circumstances that constitute malice aforethought are defined under section 206 of the Penal Code Cap 63, as follows:-

“206. Malice aforethought shall be deemed to be established by evidence providing 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.”

9. The prosecution relies on the evidence of PW2 and PW3. PW2 told the court how on the material day at about 2pm he heard noises from the back of the premises where he was carrying out welding activities. When he rushed there to find out what was happening, he found the accused raining blows on the deceased until the latter fell down. The accused then picked a stone (PEXh2) and hit the deceased with it three (3) times. That the deceased was facing upwards when the accused hit him with the stone. This was corroborated by PW3 who said that when she was called by PW2 to come and see what the accused was doing to his father, she found the accused holding a large stone (PEXh 2) with which the accused hit the deceased. The two witnesses identified the stone in court. PW7 told the court that he recovered the stone (PEXh 2) from the scene. That it had blood stains and weighed about 10kg. PW1 carried out post mortem on the body of the deceased on 10th April, 2012. She found that the deceased's head had several fractures. There was a crush injury on the nose, a fractured nasal orbital bones, upper jaw fracture and multiple fractured teeth. The cause of death was consistent with the evidence of PW2 and PW3 that the deceased was smashed on the head with a large stone while he was facing up.

10. The accused's defence is that the deceased fell on a hard surface hitting his head on the cement whereby he sustained fatal injuries from which he died. This court found the evidence of PW2 and PW3 consistent. They were both consistent and firm even under intense cross-examination. PW2 was not questioned about the ground where the deceased fell. PW3 when questioned about it admitted that although, it was a construction site, the deceased did not fall on any object leave alone a stone. PW6 told the court that he visited the scene. The ground was wet and one could see the impact made on the ground. It was never suggested to the witnesses that the ground upon which the deceased allegedly fell was cement and that he might have sustained injuries from such a fall. The evidence showed that the accused rained the deceased aged at 82 years with blows and kicks as a result of which he fell down. While lying down, the deceased was hit severally with a 10kg stone (PEXh 2) which PW7 recovered from the scene. When PEXh2 was recovered, it had blood stains. Simply put, this court did not believe the defence of the accused. The accused contradicted himself when he told the court that he did not call for help from the neighbours because he was not in good terms with them. He later changed and stated that there was no one in sight except little children. He also lied when he told the court that he called one Kaizari to help him take the deceased to hospital. The testimonies of PW2 and PW3 that it is PW4 who together with PW1 who took the deceased to hospital was neither challenged nor displaced. The contention by the accused that he took the deceased to hospital with Kaizari was meant to buttress his allegation that the deceased slipped and fell on a cemented surface. In any event, PW1 Dr Kiende denied in cross-examination that the nature of the injuries on the deceased's body could be caused by a fall. Accordingly, this court finds that the accused attacked the deceased with a stone (PEXh 2) as a result of which the deceased sustained injuries from which he died.

11. Was there any mens rea? I have already set out above what constitutes mens rea under section 206.

Counsel for the accused submitted that no mens rea was proved as there was no evidence of bad blood that was shown to have existed between the accused and the deceased. The prosecution submitted that the act of holding a large stone and smashing the deceased with it was enough to prove mens rea. The testimony of PW6 was that the accused and the deceased were at logger heads for a long time. That the deceased was not happy with the accused as he used to steal things from him. On the material day, there was evidence that the accused had removed the timber of the deceased from where the latter had kept it. The accused said that he had used the timber to cover maize from rain. He later changed the story and stated that he only removed a polythene paper from where the deceased had kept his timber. That the deceased found the accused covering the maize to protect it from rain, when he questioned him about it. It was not clear how timber could protect maize from rain. What is clear is that, the accused used a 10kg stone (PEXH 2) to smash the deceased's head with it. The accused must have known or intended that the stone would kill or cause the deceased grievous harm. No doubt, the impact to be left by such a large stone, more so on a frail 82 year old, must be devastating. In this case, it caused death. To my mind, the accused intended to either cause the death of the deceased or grievous harm on him. He intended his death.

12. In the circumstances, I find that the prosecution has proved beyond reasonable doubt that the accused murdered his father. I therefore find him culpable and I convict him of the offence of murder contrary to section 203 of the Penal Code.

DATED at Chuka this 15th day of **September, 2016.**

A.MABEYA,

JUDGE.