



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO.29 OF 2015

(FORMERLY MERU HCCR NO. 11 OF 2014)

REPUBLICPROSECUTOR

-VERSUS-

JAPHET MUTHEE MBITI.....ACCUSED

JUDGMENT

[1] On 24th February, 2014, the state laid before this court information charging Japhet Muthee Mbiti (“the accused”) with murder contrary to section 203 as read with section 204 of the Penal Code Cap 63, Laws of Kenya. It was alleged that on 8th February, 2014, at Kagongogacheke village, Mutino Location in Meru South District within Tharaka Nithi County, the accused murdered James Kiura Muthee (“the deceased”). In support of its case, the prosecution called seven (7) witnesses.

[2] PW1 Eric Kinyua, a son to the accused, told the court that on 8th February, 2014 at about 10 pm, he was at home with his mother, Justa Kajoka (PW2), his sister Faith Gaceri, his brother James Kiura (“the deceased”) and a son of the deceased by the name Martin Mureithi. The accused was sleeping in his house whilst PW2 was in the kitchen cooking for them. Then the deceased had an exchange with the accused who was at the time drunk. When the deceased entered the accused’s house, the accused shot him with an arrow. PW1 and the others rushed into the accused’s house and found that the deceased had been shot with an arrow. They tried to remove the arrow but it broke leaving the arrow head lodged in the deceased’s body which however was later removed. The screams from those present alerted the neighbours who came and helped to take the deceased to hospital. PW1 told the court that the accused and the deceased had lived in a quarrelsome state. In cross-examination, he admitted that he never saw the accused shoot the deceased with the arrow but that the deceased had shouted that he had been shot with an arrow. He was firm that the arrow was shot from the accused’s house and not outside. He saw the accused come out with arrows. That the deceased was at the time unarmed although he had gone into the accused’s house to cause trouble. That although the accused had requested the deceased to go and sleep and they discuss the issues the following day, the deceased persisted in confronting the accused.

[3] PW2, Justa Kajoka recalled that on the material day at about 10 pm, she was in her kitchen preparing tea. She rushed out when she heard a commotion outside and found the deceased with an arrow lodged in his stomach. She tried to remove it but it broke. She screamed and the accused run out to the farm with a blanket. PW1 assisted her in removing the arrow head from the deceased’s stomach. They went to report the incident at Kathwana chief’s camp but were advised to return the following day as the deceased had succumbed to his injuries. That there was bad blood between the accused and the deceased to the point that the accused had alleged that the deceased was having an affair with her. In cross-examination, she confirmed that she never saw the accused shoot the deceased. She identified the arrow head (PEXh1) that

she had removed from the deceased. PW3 Martin Mugendi recalled how he heard screams on the material night from the direction of the accused's home. He met PW1 and his sister on a foot path who told him that the accused had shot the deceased with an arrow. That he assisted in taking the deceased to Ishiara hospital.

[4] PW4 APC Lawrence Komen was at the time stationed at Mutino Location Kathwana A.P Post. He recalled how he received information from the public about the murder of the deceased on the night of 8th February, 2014. The following day, he re-arrested the accused when he was brought to the camp by the area chief. PW5 John Mugambi Mbiti told the court how he identified the body on 18th February, 2014 at Ishiara Hospital Mortuary for post mortem.

[5] PW6 Corporal Cyrus Kainga investigated the case. On 9th February, 2014, he was instructed by his senior to go and collect a prisoner from Kathwana and visit the scene of crime. Accompanied by corporal Mutuko and PC Maina, they proceeded to Kathwana and found the accused in the custody of the Administration Police. They took him into their custody and proceeded to the scene. At the scene, they recovered an arrow head, a bow and two complete arrows which he produced as PExh 1, PExh 2 and PExh 3 (a) and (b). He later attended the post mortem of the deceased's body. In his investigations, he established that the accused had alleged that the deceased of sleeping with his wife (PW2). In cross-examination, he told the court that he concluded that PExh1 was used to shoot the deceased because it had blood stains when he recovered it. According to the witnesses he interviewed, the arrow was shot from the house where the accused was at the time of the incident. PW7 was Dr Nicolas Nkonge. He testified on the post mortem which was conducted on 18th February, 2014. On examination, the body was found to be pale with a stab wound in the Epigastric region of about 4 cm in length. The body had a deep wound and the injury had severed the abdominal artery. He formed the opinion that the cause of death was cardio-pulmonary arrest due to blood loss.

[6] In his defence, the accused told the court that on the material day, he went to Kathwana market and took alcohol upto about 7.30pm when he returned home. At about 11.00pm while sleeping in his house, the deceased woke him up and asked him to explain why he was quarrelling with his (the deceased's) mother (PW2). The accused pleaded with the deceased to go away and return the following morning when they would discuss the issue but the deceased refused. The deceased then kicked the door open, entered the house and slapped the accused. The deceased then went for the accused's arrows and bow that were perched between grass thatched roof and the wall. The two wrestled with each other and the deceased overpowered the accused. The deceased got injured by an arrow during the struggle. The accused then run away to Kathwana Police Camp where he found only one officer on duty. He stayed there overnight and reported the incident to the area chief on the following day. The area chief took him to the Administration police where he learnt that the deceased had succumbed to the injuries he had sustained. The accused told the court that he had in his house at the time sixty (60) arrows thirty of which were poisoned. He denied having shot the deceased with an arrow. He stated that his wife testified against him because he has been warning her against taking alcohol. In cross-examination, he stated that the deceased was drunk at the time. That after he fell, he came out of the house and left the deceased in the house with the arrow.

[7] This court has considered the testimony on record. The question is, has the offence of murder been proved. Section 203 that creates the offence provides to the effect that the offence of murder is committed when a person with malice aforethought causes the death of another person by an unlawful act or omission. The burden lies with the prosecution to prove beyond any reasonable doubt that the accused inflicted injuries upon the deceased which resulted in the death of the latter. The prosecution must also prove that the accused inflicted those injuries with an intention of either causing the death or grievous harm to the deceased. The circumstances that constitute the malice aforethought are set out in section 206 of the Penal Code Cap 63. The section states:-

“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.”

[8] The prosecution placed reliance in the testimonies of PW1 and PW2. Both PW1 and PW2 told the court that they did not see the accused shoot the deceased with an arrow. It was at night. The prosecution therefore relied on circumstantial evidence. According to his defence, the accused averred that the deceased sustained injuries when he and the accused were struggling over an arrow and bow which the deceased had reached for in order to harm him, the accused. In the submissions of Mr Kijaru, learned counsel for the accused, it was suggested that the accused was drunk and was acting in self defence.

[9] For the charge of murder to be sustained on the basis of circumstantial evidence, the prosecution must demonstrate that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. In **R .v. Kipkering Arap Koske & Another [1949]** 16 EACA 135 the Court stated:-

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis on innocence is always on the prosecution and never shifts to accused.”

In **Abanga alias Onyango –v- Republic Cr App. No. 32 of 1990** (UR) the Court of appeal held:-

“It is settled law that when a case rests entirely circumstantial evidence, such evidence must satisfy three tests

(i) the circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly be established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused,

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

[10] There is no doubt that on the material night, the deceased entered the accused house wherein he sustained injuries from an arrow in his stomach. PW1, who the deceased left outside when entering the said house, stated in cross examination that he heard the deceased shout that the accused had shot him with an arrow. PW1 and PW2 removed the arrow head from the deceased’s body. The post mortem report indicated that the injury sustained by the said arrow was the cause of the death of the deceased. The accused’s explanation is that the deceased was injured when he and the deceased were struggling over the control of the bow with which the deceased was allegedly reaching in order to shoot the accused with an arrow.

[11] The testimonies of PW1 and PW2 never disclosed any struggle between the deceased and the accused. PW1 who was near where the incident occurred was never questioned about the existence of any

struggle when he testified. It was never suggested to him that there was a struggle between the two. He was categorical in his testimony that, he heard the accused scream that he had been shot with an arrow just after entering the accused's house. In cross-examination, he was firm that the deceased had stated that it is the accused who had shot him with an arrow. The court notes that when those present screamed, the accused run away with a blanket to the farm. The assertion by the accused that he run away to avoid being harmed by the deceased cannot stand. It is also not plausible that the two struggled with each other for control of the bow, that the accused then slipped and fell and then the deceased fell on the accused. If that be the case, how would the accused, at split second, get the idea of grabbing the blanket and disappear to the farm?

[12] The conclusion this court makes is that, the two had had a bitter exchange before the deceased stormed the accused's house. At that time, the accused may have been apprehensive and he decided to arm himself. This is so because the evidence shows that the deceased was shot immediately he stepped into the accused's house. When the deceased screamed that he had been shot, PW1 and PW2 run to assist. It is then that the accused took off with a blanket preferably to cover himself in the cold night. The accused run to report to the chief because he feared the public would respond to the screams of PW2 and not the deceased.

[13] Mr Kijaru submitted that the accused's explanation that the deceased was only injured with the arrow and not shot with it was corroborated by the post mortem report (PEXH5) which showed that the wound was only 4cm. With due respect, the wound of 4cm referred to in the postmortem report is the external part and not internal. The report showed that the arrow penetrated deeply to an extent that it severed an abdominal artery showing that the arrow must have landed on the deceased's stomach with much force. It must have been shot at him and not just a mere bruise.

[14] On self defence raised by counsel, the law is clear that a person is entitled to use reasonable force in defending self or property. The force used must be reasonable and the person pleading self defence must show that he was in imminent danger. Section 111 (1) of the Evidence Act provides:-

“111(1). When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”

This however, notwithstanding, the burden lies throughout on the prosecution to show that the force used was not reasonable in the circumstances.

[15] In Morris Mungathia .v. Republic Cr App No.212 of 2006 the Court of Appeal in Nyeri held that:

“The law on self defence was succinctly stated in the Privy Council case of CHAN KAV .v. R (2) [1955] W.L.R. 192 as follows:-

‘In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence apart from that of insanity.

It would appear to us that the duty of an accused person facing a murder charge who relies on a defence of self defence is to lay before the court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self defence and that there was time and opportunity before the fatal blow to retreat [see Monzi Mengi .v. R. [1964] E.A 289”

[16] In the present case, the testimonies of the witnesses were that the deceased was unarmed. Although there was some exchange of words between him and the accused, the deceased entered the accused's

house unarmed. The accused's apprehension, if any, may not be well founded. Since the deceased was unarmed, the force used, shooting by a poisoned arrow was excessive in the circumstances. There was no evidence that the deceased used any threatening words against the accused from which the accused should have become apprehensive as to his safety. The deceased was only questioning the accused why he, the accused, was against his mother (PW2). This in all probability cannot be taken to have instilled fear or apprehension on the part of the accused as to his safety.

[17] As regards the contention that both the deceased and the accused were drunk, that may be so. However, there was no evidence to suggest that the accused was so drunk as to comprehend the effect of his actions. The fact that he picked a blanket and disappeared into the night when PW2 screamed, is evidence that he knew what he had done and feared the possible consequences. I do not find that the accused's drunkenness played any part in the act of shooting the deceased or diminished his judgment.

[18] As regards mens rea, the accused admitted that he had a total of sixty (60) number of arrows in his house. Thirty (30) of them were poisonous. It must have been obvious to him that shooting the deceased with any of the said arrows, might lead to death or grievous harm on the part of the deceased. PW2 testified that the accused was accusing the deceased of having an affair with her. The relationship between the deceased and the accused cannot be said to have been cordial. There was evidence that they had had altercations previously. Although the accused indicated that he loved the deceased for being obedient, he never denied the accusation that he had accused him of having an affair with his wife. He knew that an arrow shot at the deceased might lead to the death of the latter or grievous harm. He had the necessary mens rea.

[19] In the circumstances, I find that the prosecution has proved its case beyond any reasonable doubt. That the accused with malice aforethought caused the death of his son James Kiura Muthee and I accordingly convict him of the offence of murder contrary to section 203 of the Penal Code.

Dated and delivered at Chuka this 15th day of **September, 2016**

A.MABEYA,

JUDGE.