



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL CASE NO. 6 OF 2011.**

**REPUBLIC..... PROSECUTOR.**

**VERSUS**

**DISMAS ISUTSA .....ACCUSED.**

**JUDGEMENT**

**INTRODUCTION.**

1. The accused DISMAS ITSUTSA has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 29<sup>th</sup> day of December, 2010 at Rosterman village Shirere sub-location Bukhungu location in Central kakamega District within Western province he murdered CHARLES INZAI LISUTSA. He pleaded not guilty to the offence and the case commenced.

**Prosecution case**

3. The prosecution called four witnesses. PW1 JOHN ELOLO testified that the accused approached him on the 29<sup>th</sup> December, 2010 at the stage in Konyero Town. He wanted to take a sick person to hospital since he had a tuk tuk he went with the accused to Rosterman into a small house. The accused asked him to reverse to the door. The neighbours who were near there said that the accused should carry the sick person because he is the one who cut him. The accused then ran into a sugar cane plantation after he had an argument with the neighbours. He (PW1) entered the house and saw the deceased who was badly cut. They took him to hospital where on arrival he was pronounced dead by the doctor. He identified the accused at the dock. On cross examination by Miss Muleshe, he told the court that he didn't see the accused cut his father.
4. PW2, ANDREW LUKOWAM saw many people passing near his farm where he was working on the 29<sup>th</sup> December, 2010. He heard them talking about a child who had cut his father but he didn't get specifically who was saying that. His instincts showed him that he knew the person who they were talking about who was a neighbour.
5. He went to the neighbour's home where he found the old man who had been cut on the head. He asked him what had happened and the old man told him that his son Dismus had cut him and he wanted to be taken to hospital. He went outside and found a tuk tuk which was carrying the accused. As they went into the deceased's house, the accused ran away.
6. They managed to assist the deceased and took him to hospital where he died. The deceased brother was

also present and did assist in taking deceased to hospital. He identified the body of the deceased to the APs in hospital among other bodies.

7. On cross examination, he reiterated his earlier testimony that the deceased told him that it is his son Dismus who had cut him. He did not witness the incident.

8. PW3 No. 75104 Cpl. Njuguna testified that on the 29<sup>th</sup> December, 2010 he received a report of the injury of the deceased herein. He went to the hospital together with I.P Mwangi and P.C. Gatimu to see the injured but found that he had already died. They then went to Rosterman the deceased's house and saw blood stains.

9. They recovered a machete which after test they found that it was not used in committing the offence. He told the court that the one who reported namely PIUS MUYEKHO told them that he had talked to the deceased who informed him that he had been cut by Dismus his son. Their investigations revealed that the deceased lived alone since he had disagreed with his wife.

10. On the 2<sup>nd</sup> February, 2011 they were informed that Dismus had been spotted working at a construction site in Kakamega town and with the assistance of P.C. Barnabas and 2 others they went and arrested him. On cross examination by Ms. Muleshe, he confirmed that he went to the deceased house but did not take any photos. He observed that the family of the deceased had domestic problems and that the deceased did not get on well with the children.

11. PW4 was Dr. Dickson Muchana a pathologist with Kakamega County. He produced the post mortem report he prepared after conducting the same on the deceased on 31<sup>st</sup> December, 2010 at Kakamega PGH Mortuary. The body was identified to him by Pius Muyekho and Charles Bukoko.

12. He explained the 11 injuries sustained by the deceased and formed the opinion that the cause of death was multiple injuries caused by a sharp object. He produced the report which was marked as PEx. 1.

13. The prosecution closed its case at this juncture and the court found that the prosecution had established a case against the accused who was put on his defence.

### **Defence Case**

14. The accused in his sworn statement stated that the deceased was his father. He explained that he had a step-father by the name PIUS MUIRU who lived in the same compound with them. In their home he lived with his mother and the deceased. There was also a neighbour by the name ANDREW WALUKHOMBE. He testified that for a long time there had been no peace in their home because of a land ownership dispute.

15. On the 29<sup>th</sup> December, 2010 his father told him to leave home otherwise he would call thugs to deal with him; so he left. He did not know how his father was injured or how he died. He was only called and told that his father was injured. He rushed home to take his father to hospital where he found many people.

16. There was a disagreement on how to handle the situation so he decided to stay away. His father had been cut severally. He claimed that Pius Muiro was the one who killed his father because he wanted land.

17. On cross examination by Mr. Oroni, he told the court that it was Pius Muyekho who called him to give him the message that his father had been injured.

18. He said that he was arrested by PW3 at Muliro Garden some days after the incident. He maintained that he had never differed with his step-father PIUS MUYEKHO except on the issue of land. There was a grudge over the land which he states was registered in his grandfather's name.

19. On re-examination by M/s. Muleshe accused testified that the land issue was between the step father and his father which had been going on since he was young. He maintained that Pius Muiru is the one who killed his father because he had previously assaulted his father and step mother. The defence then closed its case.

### **Submissions and Determination**

20. The prosecution and defence were directed to file their written submissions but only the defence counsel complied to the said directions. The court has gone through the evidence on record and the submissions on record.

21. This court is alive to the fact that the case herein was heard by three different judges and what remained was delivery of judgment. The court has entirely relied on proceedings and the exhibits on record.

22. From the evidence the issues for determination are:-

*(a) Whether the deceased died and what the cause of that death was;*

*(b) Whether the death of the deceased is attributed to an unlawful act or omission on the part of the accused; and*

*(c) Whether the accused person had malice aforethought in committing the offence.*

23. In the case of **NYABUTI & ANOTHER VS. REPUBLIC [2009] KLR 409**, it was held that *mens rea* which is an ingredient under section 206 of the penal code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out therein. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of their having been a prior plan to attack the deceased, it cannot be said that the killing was with malice aforethought see also **NJOGU VS. REPUBLIC [2007] 2 KLR 123**.

24. **Section 206 of the Penal Code** defines malice aforethought as follows: -

***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

***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;***

***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.***

***An intent to commit a felony.***

***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.”***

25. The Court of Appeal has on several occasions dealt with this aspect. In the case of **Joseph Kimani Njau vs R (2014) eKLR** in concurring with an earlier finding of the Court, but differently constituted in the case of **Nzuki vs R (1993) KLR 171 held as follows: -**

***“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;-***

***The intention to cause death;***

***The intention to cause grievous bodily harm;***

***Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those 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 in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.***

26. The Court in the above case went on to say that: -

***“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -***

***“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”***

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29. There is no doubt in this particular case that the deceased died. All the witnesses testified to that fact. Dr. Mchana, PW4 also testified that he carried out the post mortem examination on the body of the deceased on the 31<sup>st</sup> December, 2010 at the Kakamega PGH Mortuary and established that the deceased had suffered serious injuries. The doctor stated that the cause of death was multiple injuries caused by a sharp object force following assault. This then settles the first issue of determination.

30. On the next issue which is whether the prosecution has proved that it was the accused person who assaulted the deceased and inflicted the injuries upon him, there was no such firm evidence given by the prosecution. PW1 did not see accused cutting the deceased.

31. He only came to know that the deceased had been injured when the accused approached him to assist in taking the deceased to hospital. He also heard neighbours saying that the accused is the one who had inflicted the said injuries to the deceased who is his father.

32. He relied on what he heard from the neighbours to conclude that the accused is the one who cut the deceased. Further he came to the above conclusion because the accused ran away after there was a disagreement between him and his neighbours.

33. PW2 also relied on hearsay. People were passing next to his shamba and he heard them talking about a child who had cut his father. He didn't specify who exactly was saying this. He claims to have followed his instincts and he went to his neighbour's home where he found the deceased wounded with cuts on his body. He also claims to have seen the accused at the scene who later escaped from the scene. He asked the deceased what happened and the deceased told him it was accused who had injured him. This information has not been corroborated by any of the witnesses called by the prosecution. He never reported same information from the deceased to the police. The deceased brother whom he stated to have assisted to take deceased to hospital was not called to testify. The witnesses herein have relied on what they were told.

34. PW3 was told by one Pius Muyekho that the deceased told him that it was the accused who inflicted injuries on him. Pius Muyekho was not called as a witness. He is only linked by the accused to the killing of the deceased herein.

35. In the case of **Achira vsR CA no 47 of 2003**, the court held that, It would be unsafe to base conviction solely on a dying declaration where there is no satisfactory corroboration.

36. What I can say about the evidence in this case is that the incident herein was not properly

investigated. Such a serious offence ought to be thoroughly investigated. I find therefore that the prosecution has failed to establish whether the death of the deceased is attributed to an unlawful act or omission on the part of the accused person.

37. On the final issue for determination, I find that the prosecution has not established that the accused person had a plan to kill the deceased. No one saw accused inflicting injuries on the deceased which could have reflected and/or proved malice aforethought.

38. From the foregoing, I have reached the conclusion that the accused person is not guilty of the murder of his father CHARLES INZAI LISUTSA. He is therefore acquitted under section 322 (1) of the Criminal Procedure code and should be released forthwith unless otherwise lawfully held.

**SIGNED, DATED and DELIVERED at KAKAMEGA this 1<sup>ST</sup> day of SEPTEMBER, 2016.**

**C. KARIUKI**

**JUDGE.**

**In the Presence of:-**

.....**N/A** ..... **for the Accused person.**

.....**NG'ETICH** .....**for the Prosecutor.**

.....**ANUNDA** ..... **Court Assistant.**