



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 30 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL KIMANTHI KIIO.....ACCUSED

JUDGMENT

1. Daniel Kimanthi Kiio, the accused, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63, Laws of Kenya).
2. The particulars are that the accused, the said Daniel Kimanthi Kiio, on 19th day of October, 2010, at Jomvu area in Mombasa District within Coast Province unlawfully murdered Abdulrahman Rabi.
3. Section 203 of the Penal Code provides that **“any person of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”** And Section 204 of the Penal Code provides that **“any person convicted of murder shall be sentenced to death.”**
4. Under Section 203, to convict a person of murder, the prosecution must show and prove beyond reasonable doubt that the accused had malice aforethought when he caused the death of the deceased. Section 206 of the Penal Code provides that 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, 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 that will facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
5. Clearly subsection 20(d) of Section 206 does not apply. The deceased was not in custody. The deceased was killed in his house. The question is whether the accused killed, him, and whether he did so with malice aforethought. This calls for examination of the evidence on record.

6. In considering the evidence it is necessary to put on record that the evidence on record was not taken by me, and I did not therefore have the benefit of observing the demeanour of the prosecution witnesses. The record is however clear.

The Prosecution's Case

7. The accused and the deceased were neighbours. The deceased had been a truck driver, but had apparently lost that job. He was staying in his one-roomed house with his family, including PW1, Habiba Abdul Rahman Rabi, a minor, who after being subjected to a **voir dire**, was found **“to be intelligent enough to evidence.”**

8. The child's evidence was that she had been playing outside while her mother was cooking, and in the course of it, the mother had some used water poured out on the ground, and most probably next to where the accused was working on his timber, as he is described as a carpenter. She objected to the pouring of the water near where he was working, and demanded to know why she was doing so. Notwithstanding the answer by PW1's mother (who testified as PW3) that the water dampened the dust, the accused was upset. PW1 testified **“this man”** (pointing at the accused) said, **“I will kill all of you now”**.

9. At that point the mother PW3, closed the front door, and run through the back-door to report to the Police. In the meantime the accused started pelting the deceased's door with stones. Alarmed, the deceased crawled out of his one-roomed house and sought to know from the accused why he was pelting his house with stones. Without any reply, the accused hit the deceased at the back of the head with a plunk of wood (timber) **the deceased fell to the ground. The accused thereafter “took a stone next to him and went to him and fractured my father's hand.”**

10. This evidence was corroborated by PW1's playmate, PW2, and PW3, PW1's mother. Even after cross-examination by counsel for the accused, the evidence of both PW1 and PW2 was unshaken.

11. From evidence given by PW1, PW2 and PW3, PW4 (a village elder), corroborated the evidence of PW1, PW2 and PW3, that he found the accused under a citizens' arrest and threatened with lynching. PW4 rescued the accused and called the Police. PW6 re-arrested the accused. He found someone lying down his head was crushed down.

12. PW4 had known both the deceased and the accused. He had received reports of quarrels between the accused and the deceased over the deceased's children hanging around the accused's carpentry shed, and that both had assured him that there was no problem. The incident occurred hardly four days later.

13. The post-mortem report produced by PW7, Doctor Victor Njeru on behalf of Dr. Wahome the pathologist, who had left the public service, showed the injuries suffered by the deceased, **“partially severed left ear, cut inferior to left ear about 5cm long, fractures across both parietal bones, surgical suture dislocated left temporal mandibular joint”** and summarized the cause of death as **“Head injury with multiple skull fractures.”**

14. Indeed the photographs taken by PW5, the **Scenes of Crime Officer** are grisly, and show what PW1, described as repeated hitting the deceased's head with the large rough stone smashing it until brain matter oozed out. Out of the deceased's threat that **“I will kill you all now”** the accused's total anger was directed at the deceased.

The Defence Case

15. When put to his defence the accused testified on oath that the deceased **“dived”** in a rapid double somersault movement and hit and smashed his head against a tree-stump outside the deceased's house. The accused was the sole defence witness.

Analysis and Determination

16. From the prosecution's witnesses' evidence it is clear that the deceased was hit first on the back of the head and fell. The accused pulled him away from the area where he had fallen, looked for a stone, and smashed it on the deceased's head repeatedly causing multiple skull fractures. Although motive is irrelevant, it is clear to me that the actions of the accused were motivated by incredible malice. He commenced by chasing away the deceased's child, he followed it by pelting the deceased's house. Out of curiosity the deceased came out of his house to inquire why the accused was pelting his house with stones. Children are by nature curious. They will invariably observe any activity near them. It is no excuse for taking the curiosity of a child upon the child's parents, in this case, the deceased.

17. There was no plea of extreme provocation or insanity as the accused is said to have said to bystanders that he **had killed a hen**. The accused went out to vent his anger on the curiosity of a child, over the child's father. He not only had an intention to cause the death of, and grievous harm to the deceased, but by hitting the deceased on the back of the head followed by smashing a boulder on the deceased's head, the accused knew that his acts would not only cause grievous harm but also cause the death of the deceased. He had a clear intention to commit a felony. The elements of malice aforethought were established. The accused caused the death of the deceased with malice aforethought by unlawful acts – hitting the deceased on the back of the head, and smashing the deceased's head with a large boulder.

18. The accused had no plausible defence. To say that the deceased who had already been disabled by the accused with a hit on the back of the head could move soldier-like, dive and somersault and hit a tree-stump is stretching imagination to false heights. I find and hold that the accused, with malice aforethought caused the death of the deceased. I therefore find the accused guilty of the murder of the deceased, Abdulrahman Rabi, and convict him accordingly.

19. I therefore call upon the counsel of the accused and indeed the accused himself, to tell the court, in terms of Sections 323 and 329 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya), to submit why sentence should not be passed upon him according to law.

20. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 9th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Wangila for State

Mr. Igunza for Accused

Mr. Daud Isaack Court Assistant