



**REPUBLIC OF KENYA**

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

**CRIMINAL MURDER CASE NO. 9 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**HARRISON MUTHIE KARIUKI.....ACCUSED**

**JUDGMENT**

1. **HARRISON MUTHIE KARIUKI**, the accused herein is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code and the particulars contained in the information on the charge is that on 6<sup>th</sup> day of July, 2012 the accused at Komboini village in Kirinyaga District within Kirinyaga County unlawfully murdered **MOSES KARABA KIBUTHA** who was his paternal grandfather.
2. The State represented by the Office of the Director of Public Prosecutions presented ten witnesses at the trial in support of their case against the accused person who defended himself against the charge by giving sworn testimony and no witnesses.
3. The trial against the accused herein began on 6<sup>th</sup> May, 2014 before Hon. Lady Justice C. W. Githua who was then presiding over this court and six witnesses were called by the prosecution to testify that day according to the proceedings on the file. **Millicent Wairimu Karaba** called as P.W.1 testified that on the 6<sup>th</sup> July, 2012, the fateful day, she was in the kitchen at around 8.00 p.m. cooking while her husband, **MOSES KARABA KIBUTHA** was outside seated around a bonfire warming. She then told the Court that she sent her grandchildren, Christine Wairimu and Arnold Macharia to take food to their grandfather outside which they did but shortly thereafter she heard screams and went outside to check.
4. Upon going out to check what was going on, P.W.1 further told the Court that she found the accused abusing the deceased telling him that he was uncircumcised and asking him how many courts in this country he knew. She told the Court that the accused then kicked the deceased as he stood up and he took a wooden chair which the deceased was sitting on and used it in hitting the deceased several times all over his body. She told the Court that she screamed as the accused continued hitting the deceased telling him that he was going to kill him that night. The wooden chair broke into pieces and the said witness further told the Court that the accused threatened to kill her and her 2 grandchildren when they attempted to rescue her husband. She testified that she ran away and called the assistant chief who came and found the deceased lying down badly injured. They then rushed the deceased to hospital but died on the way to hospital.
5. **Christine Wairimu Waweru** (P.W.2) also testified and corroborated the evidence given by her grandmother Millicent Wairimu (P.W.1). She told the Court that as she was taking water and food with Arnold Macharia (P.W.3) to their grandfather the deceased herein, when the accused emerged and abused the grandfather calling him uncircumcised boy before kicking him and hitting him several times with a wooden chair. She told the Court that they screamed but no one came to their rescue and were forced to take cover when the accused threatened to kill them. She further

- testified that after some time some people including the area Assistant Chief came and they rushed the deceased to hospital but he died on the way before reaching hospital.
6. **Arnold Macharia Peris** (P.W.3) also testified and gave the same version of evidence corroborating the evidence given by both P.W.1 his grandmother and P.W.2 his cousin. He testified before this Court that he saw the accused emerge from a path leading to the toilet and started abusing the deceased that he was uncircumcised boy and that he had come to kill him. The witness further told the Court that he witnessed as the accused kicked the deceased on the chest and continued hitting him with a wooden chair when he fell to the ground. He further told the Court that he saw his grandfather bleeding profusely from the head as a result of the attack by the accused person.
  7. The fourth witness called by the prosecution was **David Kariuki Karaba**, a son to the deceased and father to the accused. Although he testified in Court that he was not present when the incident occurred as he had gone to the shops which were 500 metres away, he rushed back when he was attracted by screams emanating from the direction of his home and upon arrival, he found his father lying on the ground injured with people surrounding him. When he inquired from the deceased what had happened, he told the Court that the deceased reported that he had been assaulted by the accused herein who by then had reportedly ran away. The witness told the Court that he carried his injured father to the vehicle and escorted him to hospital from where he died on the way. He further testified that he could not tell exactly why the accused murdered his father but guessed that it could be a result of his father's desire to dispose of a portion of his land. The witness maintained under cross-examination from defence counsel that the accused as his son had no right to ask his grandfather for any portion of land as his claim lay on his (father's) share after getting his inheritance from his late father. He further told the Court that he had no intention of disinheriting the accused.
  8. **Frank Ngari Muriuki** (P.W.5) the area Assistant Chief, on his part testified before Court that on the material date, that is, 6<sup>th</sup> July, 2012 at around 8 p.m., he received a call from Millicent Wairimu (P.W.1) concerning the assault of the deceased by the accused herein. He also testified that he further received other calls from members of the public informing him that there were screams coming from mzee Karaba's (deceased) home. He further testified telling the Court how he headed there and later called the area chief to report about the demise of the deceased. He testified that with the assistance from the Area Chief and the administration Police officers they proceeded to the accused's home and arrested him after finding him asleep in his house. He further testified that he had prior to the incident, received complaints from the deceased that the accused person kept on abusing and harassing him wanting to be given a portion of land held by the deceased by force.
  9. Another witness called to testify was **James Kirondo Njeru** who was P.W.6, a grandfather to the accused. He testified that he was called on the night of 6<sup>th</sup> July, 2013 by one Peter Gathura Mutugi, the area councilor who informed him that his brother – the deceased herein had been killed by the accused herein. He testified that the accused had laid claim on the deceased's land and that he had on more than five occasions tried to resolve the disputes between the deceased and the accused who he stated had on one occasion cut a cow belonging to deceased into pieces.
  10. The arresting officer **I.P. Jacob Wesula** (P.W.7) testified before this Hon. Court and gave account on how he received a call from the area chief one **Mr. Ezekiah Kathirwa** on the material date at around 23 hours about the incident and explained how he went accompanied by a fellow officer A.P.C. Munyoki Maibo to arrest the accused herein. He further testified that he later handed the accused to Police officers from Sagana Police Station. The same information was confirmed by **P.C. JOSEPH SOITA** (P.W. 10) who also visited the scene upon receiving a call from P.W.1.
  11. The prosecution also summoned the doctor who performed post mortem on the body of the deceased. He summoned as P.W.9 and he was **Dr. KAROMO NDIRANGU**. He testified giving the nature of injuries he observed which were as follows:
    - i. Bruising on the forehead.
    - ii. Bruising on the lower ribs on the right side.
    - iii. Broken ribs (rib No. 8 to 12) on the lower right side.
    - iv. Raptured liver posterior haemopentoneoum (raptured liver).

The doctor produced the post mortem report as Prosecution Exhibit 3 and concluded that the deceased died as a result of intra abdominal hemorrhage (bleeding from the stomach) caused by a blunt object.

12. The accused person in his defence raised alibi and told this Court on oath that he had gone to the market early on the material date and spent the rest of the day drinking in 2 places which he gave as Prime Bar and another drinking joint at a place called Kimicha where he said that he spent the rest of the evening before going to his house to sleep. He testified that he had no witness to verify the information but added that he was arrested at night the same day while asleep at his house. He told this Court that he was not told why he was arrested and it was only after he was escorted to Embu High Court that he learned that he was being accused of murdering his grandfather. He claimed that his grandfather was a person he was very close to and in view of the good relationship he had with the deceased, other family members were jealous and that could explain why he says he was framed for the murder.
13. The accused in his written submissions through his learned counsel M/S Nduku submitted that the prosecution witnesses were unable to establish the intention by accused that he had the intention to kill or cause grievous harm to the deceased. He further submitted that the prosecution witnesses were unable to establish whether or not the accused person was drunk at the material time. On his part, he submitted that he was drunk and not in complete control of his senses and contended that he could only be convicted of a lesser charge of manslaughter but not murder.
14. The State through Ommoria Omayo learned prosecuting counsel, submitted that the prosecution case was proved to the required standard in law by the ten witnesses called to testify during the trial. In response to the defence of alibi raised by the defence at the defence hearing, Mr. Omayo faulted the accused for calling no witness to establish the fact and failing to establish that he was drunk.
15. The State further submitted that all ingredients of murder had been satisfied and that the accused had a guilty mind when he called the deceased uncircumcised and that he was going to kill him before grabbing a chair and used it to hit the deceased several times breaking the chair into pieces in the process. These actions Omayo submitted, were unjustified and proved that the accused had *mens rea* to cause grievous harm to the deceased.
16. This case raises three questions for determination which are:
  - i. Whether the accused actually attacked the deceased and inflicted the injuries that caused his death.
  - ii. Whether the accused was drunk or not at the material time.
  - iii. Whether the accused had malicious intention to cause death or grievous harm to the deceased.
17. On the first question, while the accused attempted to raise an alibi as a defence to the evidence adduced by the prosecution particularly the evidence of P.W.1, P.W.2 and P.W.3 all of who were present during the incident, this Court is satisfied on the strength of the evidence adduced that the accused was properly identified as the person who attacked the deceased without any provocation. Millicent Wairimu Karaba (P.W.1) heard the accused insulting the deceased outside as she was cooking and she knew him well as she is the grandmother and when she stepped out of the house she saw the accused attacking his grandfather with a wooden chair. Christine Wairimu (P.W.2) and Arnold Macharia (P.W.3) gave a more glaring account and told the Court that they saw the accused and heard him insulting the deceased before attacking him. They told the Court that they identified the accused through his voice and saw him as there was moonlight at the time. P.W.3 further told the Court that he clearly saw the accused emerge from a path leading to the toilet and started confronting his grandfather with insults and a kick before picking a wooden chair and using it to hit the deceased severally all over the body.
18. This Court finds that the prosecution witnesses were able to establish beyond reasonable doubt that the accused actually attacked the deceased and caused the injuries that led to his death as established by the doctor who performed post mortem examination (Dr. Karomo Ndirangu P.W.9) and produced the post mortem report as prosecution Exhibit 3. The injuries described by the doctor in his evidence report are consistent with the kind of the weapon (wooden chair) used and the description of the attack given by the prosecution witnesses present as aforesaid
19. I find that the accused's attempt to raise a defence of alibi is an afterthought. I observed the

accused as he gave his defence in Court and his demeanor was clearly pretentious. I was not persuaded that the accused person did not know why he was arrested until when he was taken to Embu High Court to be charged formerly with murder yet before then he admitted that he had been produced in the lower court at Baricho. I also note that prior to that he had been taken for mental assessment and the doctor certified that he was well oriented in time, place and person fully aware of what had happened as per the medical certificate produced as Prosecution Exhibit 2 at the trial.

20. I also find that the defence of alibi cannot hold as no evidence was adduced by the defence to establish it. As a matter of fact, the accused in his written submissions perhaps on reflection abandoned it altogether and put more emphasis on drunkenness which raises the next question for determination in this case.
21. On the issue of drunkenness, it is important to note that for an accused person to successfully raise a defence of a state of mind whether induced by alcohol or any other drug, he or she must establish and prove that when he committed the act he or she was incapable of knowing well the effect or the result of his/her actions. Intoxication per se is not a defence to criminal liability. The provisions of **Section 13 (1)** of the **Penal Code** provide as follows:

***“save as provided in this section, intoxication shall not constitute a defence to any criminal liability.”***

A look at **subsection 2** shows the exception to the rule which is that intoxication can only be defence where by reason of the same the person charged did not know the act or omission was wrong or that he did not know what he was doing and that the state of intoxication was caused by another person without his consent. That is the position of the law.

22. A look at the facts presented in this case, however, does not establish in any way that the accused was so drunk that he was unaware of what he was doing at the material time. All the prosecution witnesses called did not notice any sign pointing to the fact that the accused was drunk. P.W.3 a minor was cross-examined by the defence counsel on this issue and he denied knowledge of drunkenness. The only witness who made suggestions that the accused was drunk was FRANK NGARI MURIUKI (P.W.5) the assistant chief who went with the Police to arrest the accused in his house later after the incident. It was however, difficult to establish if the accused had drunk before or after the incident. The bottle of alcohol recovered was not produced and so it is difficult to establish which type of alcohol if at all the accused had consumed. Although the accused testified that he had gone drinking after selling his farm produce, he did not adduce evidence to demonstrate that he was too drunk or that he was not in complete control of his senses when he attacked his grandfather senselessly. The Court cannot be called upon to assume that because the accused says he had gone to drink beer after selling his tomatoes at the market, he must have gotten drunk and so drunk that he lost his senses. A defence of drunkenness cannot be assumed. It has to be proved. It is also a misconception for the defence to submit that the prosecution witnesses were obligated to establish whether the accused was drunk or not. The burden of raising any defence to a charge of murder is on the accused. The accused failed to establish and prove that he was so drunk at the material time that he did not know what he was doing to his grandfather. In any event as submitted by the State, accused testified that he had taken his drinks voluntarily as the law does not provide a licence for one to drink and murder and come back to say he was drunk.
23. This Court finds based on the evidence of P.W.3 and arresting officers P.W.7 and P.W.10 that there is no sufficient evidence that the accused was drunk when he committed the offence and even if I was to be persuaded which I am not, that the accused was drunk at the time, I would have found that he voluntarily put himself in that state and therefore the same could not be used as a defence.
24. On the question of malice aforethought, I find from the evidence adduced that the accused intended to seriously provoke and cause harm to the deceased. As indicated above the eye witnesses, P.W.1, P.W.2 and P.W.3 all heard the accused insulting the deceased before attacking him. P.W.2 and P.W.3 clearly heard the accused utter the following words directed at the deceased;

“you uncircumcised boy I have come to kill you.” This was shortly before he was reported to have then kicked the deceased and then followed up by hitting him several times with a wooden chair which broke to pieces as a result. The same witnesses testified that the accused threatened them as well when they screamed and tried to rescue the deceased.

25. The wooden pieces of chair were recovered by the investigating officer (P.W.10 Joseph Soita) and produced as prosecution Exhibit 1. This Court finds as I also take judicial notice of the fact that in this region calling one’s grandfather “uncircumcised” is not only highly provocative but also tailored to cause extreme annoyance and possibly a retaliatory fight. The accused did the same with no provocation at all from the deceased who was seated waiting to enjoy his evening meal. I also find the evidence of P.W. 5 Frank Ngari Muriuki, the assistant chief and P.W.6 a grandfather to the accused quite telling in regard to the previous altercations between the accused and the deceased over a land dispute. The evidence of the two said witnesses negates any suggestions made by the accused that he had a good relationship with the deceased so much that other family members were unhappy about it. The same possibly is far from the truth and find that the prosecution witnesses called had no grudge or differences with the accused to be motivated to frame him as he alleged.

26. The evidence of P.W.4, David Kariuki Karaba, a father to the accused and a son to the deceased and P.W.5 clearly points a picture of the accused being a person who was bitter and unreasonably directing his hostility towards his grandfather for not giving him a portion of his land when he ought to have been asking his father about inheritance issues.

27. This Court finds that on the basis of evidence adduced by prosecution that *mens rea* or malice aforethought which is a necessary ingredient of murder under **Section 206** of the **Penal Code** was satisfied in this case as evidence clearly shows that the accused set out with an intention to cause death or grievous harm by killing and clobbering his grandfather senselessly with a wooden chair. The manner in which he insulted his grandfather as aforesaid and inflicted the serious injuries could only lead to the conclusion that the accused intended to actually kill his grandfather just as he had said prior to attacking him. The same was despicable and senseless.

28. This Court finds that the prosecution have proved beyond reasonable doubt that the accused is guilty of murdering MOSES KARABA KIBUTHA on the 6<sup>th</sup> July, 2012.

Accordingly under **Section 215** he is found guilty of the offence

of murder under **Section 203** as read with **Section 204** of the **Penal Code**. He is convicted accordingly.

***Dated and delivered at Kerugoya this 13<sup>th</sup> day of October, 2015.***

**R. K. LIMO**

**JUDGE**

13.10.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Accused present

Nduku present for accused present

Omayo for the State present

**COURT:** Judgment dated, signed and delivered in the open Court in

the presence of Mr. Nduku for the accused and Mr. Omayo for the State.

**COURT: MITIGATION**

**NDUKU**

The accused is extremely remorseful. He is a young man under 30 years. He has lost his grandfather. He has lost his other family members. He has lost contacts with family. He asks for leniency from this Court and promises to be useful member of the society.

**SENTENCE**

**COURT:** The Court's hands are tied. Under **Section 204** of the Penal Code any person convicted of murder can only be given one sentence. So despite the mitigation which I have considered, the accused herein must be sentenced to death which I hereby do as provided by law.

R. K. LIMO

**JUDGE**

13.10.2015