



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF MERU**

**HC CR NO. 12 OF 2012**

**REPUBLIC ..... PROSECUTOR**

**VRS**

**GAICHU MEENI ..... 1<sup>ST</sup> RESPONDENT**

**MUTHENG GAICHU..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**GAICHU MEENI** and **MUTHENGI GAICHU** (Accused 1 and 2) are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 13/2/2012 at Ura Village in Tharaka Nithi, jointly murdered **MUNENE GAICHU**. They denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses. The accused were called upon to defend themselves and they testified on oath but did not call any other witness. The prosecution case was conducted by Mr. Mulochi while the accused were represented by Mr. Mutwiri.

The 1<sup>st</sup> accused is the father of the 2<sup>nd</sup> accused. The deceased was the son of the 1<sup>st</sup> accused and a younger brother to the 2<sup>nd</sup> accused. PW1 Monica Kathang'a is wife to accused 1 and mother to the accused 2 and the deceased. PW1 recalled that on 13/2/2012, about 6.00 p.m. she had gone to a neighbour's house when she heard a lot of noise from her homestead. She listened and ascertained that there was a quarrel between the deceased Munene and Gaichu Meeni, her husband.

On entering the homestead, she saw accused 1 (Meeni) hit the deceased and he fell down. She got shocked and entered her house. She then heard accused 1 say that he was going to get a vehicle to take deceased to hospital. After a while, Accused 1 returned with a motor cycle to take deceased to hospital but he could not travel in the state he was in. She observed her son Munene and noticed that he was already dead and she informed accused 1 not to look for a vehicle.

PW1 noted a cut wound on deceased's head and went to inform a neighbor about it. The police were called on the same night and next day, the body was taken to the mortuary. PW1 said that accused 1 and deceased always used to have conflicts; that deceased lived away at Mitunguu but whenever he came home, he would cause problems and would steal their properties; that the deceased had chased away his own wife and children. PW1 further told court that though accused 2 was present, he never assaulted the deceased. PW1 also told the court that when the incident occurred there was another person in her home who had come to be treated by accused 1 because accused 1 is a herbalist; that the stranger informed her that the cause of the quarrel was that deceased called accused 1 a witch and that accused 1 only used to

share his money from the practice with accused 2. In cross examination, PW1 denied having actually seen accused 1 hit the deceased but found him already on the ground.

PW2 Zaberio Makumbi Kubu, a neighbour to the accused told the court that he was returning a spanner to accused 1 at about 7.00 p.m. on 13/2/2012. When at the gate, he heard Munene (deceased) asking accused 1 why he was beating him with a torch. On entering the home, he found Munene holding accused 1 by the neck against the store. PW2 feared that the deceased might turn on him and passed by quietly and went where PW1 was seated and gave her the spanner. PW2 said that PW1 was seated near another house. He left the home through the rear door and when leaving, he could hear Munene (deceased) tell the father he would slap him three times and that if he had strength, he should defend himself or call the wife or his favourite son to assist him. PW2 said he was an immediate neighbor of the accused 1 and was his friend. He also saw a stranger in the accused's home. PW2 denied seeing accused 2 on that day. PW2 also told the court that he knew that the deceased used to disturb his parents including taking away their properties.

PW3 Christopher Mung'ori recalled that on 13/2/2012 about 8.00 p.m., one Kajieta went to his home and started demanding money from Zaberio Makumbi (PW2). They tied up Kajieta and it is then Iguna (the other name of Gaichu (Accused 1) alleged that Kajieta killed Munene; that Kajieta was arrested the same day but on next day, he heard that it is not Kajieta but Gaichu (Iguna) who committed the offence. In cross examination, PW3 said that Iguna (Accused 1) went to his home about 10.00 p.m. when he was already drunk.

PW4 PC John Mutai is the Investigation Officer in this case. He recalled that on 14/2/2012 about 2.00 p.m., they received a report of murder and proceeded to the scene with the OCS. He recorded statements from witnesses who informed him that there was a quarrel between accused 1 and the deceased and that accused 2 went to rescue his father when they beat and killed the deceased. He said that Scene of Crime officers took photographs (PEX NO. 1) and that he recovered an axe under accused 1's bed and a thick piece of wood near the deceased's body (Ex. No. 2 and 3). He observed the body which had a deep cut wound on the left side of the face. PW4 witnessed the post mortem that was performed by Dr. Koome. Dr. Kooke found the cause of death to be cardio respiratory arrest secondary to severe head injury after a sharp object trauma to the head.

In his defence, accused 1 testified on oath that he was at his home about 6.30 p.m. when the deceased arrived while drunk; told accused that he would kill him that day and take his land; held him by the collar; hit him against the granary three times; kicked him and he fell. The tools he had used to build the granary i.e. axe and *panga* were still there. As he tried to free himself from the deceased, he took an axe and threw it at him and it hit him. He thought he had picked a stick; then he escaped. He noticed that the deceased had fallen; he called *boda boda* (motor cyclist) to come and take him to hospital. He went to police station to get a letter to take deceased to hospital. He looked for a vehicle but on arrival at home found the deceased had already died. He called police who came for the vehicle and he was arrested. He denied that accused 2 was present when he fought with deceased. He denied having planned with accused 2 to murder deceased.

Accused 2 testified on oath and denied murdering his brother. He denied having been present at the scene. He said that on 13/2/2012, he was at a party at his friend's (Monica Kamene) home till 9.00 p.m. He went to his father's home, found accused 1, the deceased and neighbours. He denied that he ever quarreled with his brother that day.

Having carefully considered the evidence of both the prosecution and the defence, there is no doubt that there was a confrontation between accused 1 and the deceased on the material day. In fact accused 1 does not deny inflicting the fatal cut wound on the deceased. The only question that the court will need to answer is whether the injury was inflicted in self defence or it was intentional and secondly, whether accused 2 was involved in assaulting the deceased.

The key witnesses in this case are PW1, the wife to accused, and mother to both accused 2 and the deceased; and PW2, a neighbor and friend to accused 1. According to PW1, accused 2 was present at the

scene but did not take part in assaulting the deceased. PW1 and 2 told the court that it was later about 6.00 p.m. to 7.00 p.m. but they were able to see as it was not yet dark. PW2 on the other hand denied seeing anybody else at the scene except the accused 1, deceased, PW1 and the stranger who had come for treatment. He specifically denied seeing Muthengi (Accused 2) at the scene. Though PW1's evidence was in itself questionable, because PW2 told the court that she was indeed at her home even when the quarrel between the deceased and Accused 1 started, yet she denied it, claiming to have been at a neighbour's house. I believe she must have seen accused 2 at the scene when it all started. It seems both PW1 and 2 withheld evidence to try and protect accused 2 but since the evidence of the 2 is contradictory, the court will give the accused 2 the benefit of doubt based on his defence and that of accused 1 that he may not have been present at the scene or even if he was there, it is not clear what role he played if at all.

From the finding of the post mortem (PEX No. 4), the deceased sustained a deep cut wound on the left side of the face resulting in open skull fracture and that was the cause of death. There is no evidence that the deceased suffered any other injuries. It seems he died from one fatal blow inflicted by the axe that PW4 found hidden under accused 1's bed and which accused 1 admitted to as the murder weapon. The photograph produced in court shows a deep open wound on the face of the deceased. The injury inflicted on the deceased adds credence to the accused 2's defence that he may not have been party to assaulting the deceased.

As observed earlier in this judgment, PW1 does not seem to be a credible witness. She did not tell the court the whole truth as to what transpired on the evening of 13/2/2012. At first she told the court she saw accused 1 hit the deceased and saw him fell. However, in cross examination, she made a total turnaround. She denied witnessing the incident but instead claimed to have been told by the stranger in the home. It seems she did not want to tell the court the source of the quarrel on that day. But PW2 heard the deceased complain that accused 1 had hit him with a torch before deceased got hold of accused 1 and threatened to slap him. We have only the explanation given by accused 1 as to what happened thereafter. The court has been told that the deceased was a trouble shooter, was a drunk and would take away the parent's property without permission or steal. It seems that there was an altercation between accused 1 and deceased on the said date and it is during that altercation that the accused 1 cut the deceased with an axe on the head. Section 17 of the PC avails an accused the defence of self defence. The section states:

***“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law”.***

The defence of self defence usually goes hand in hand with the defence of provocation which is available pursuant to Section 207 of the PC. In the case of *Mungai v Rep 1984 KLR 85*, the Court of Appeal considered when the defence is available when it stated thus;

***“No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”***

In another case *Mokwa v Rep (1970-1980) KLR 1337* the Court of Appeal said:

***“Where self defence is successfully raised as a defence to a charge of murder a verdict of manslaughter on the ground that excessive force was used in self defence is duly open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have countered and aimed the blow which he inflicted”.***

In the instant case, the only other person who shed light on what transpired before the deceased was injured was PW2 who saw the deceased holding the accused by the collar and threatening to slap him. There is no evidence from either PW2 or accused 1 himself that the deceased was armed with anything. For that reason, the use of the axe to fend off a person who only wanted to slap accused1 was excessive force in the circumstances. I have also observed from the photograph exhibited that though it was one single cut, the force was excessive in the circumstances because he could have aimed elsewhere than the head.

To prove the offence of murder, the prosecution has to demonstrate that the accused:

1. ***Committed the act that caused the death (actus reus)***
2. ***That the accused had the intention (mens rea) to commit the act (malice aforethought).***

In this case, there is no doubt that accused 1 committed the act that caused deceased's death. However, there is not a scintilla of evidence that he intended to kill the deceased. The injury that was inflicted on deceased arose out of a fight or conflict between accused and deceased. For that reason, I will find that the death was unintentional. Accused 1 did not possess the malice aforethought necessary to prove a charge of murder. I will find accused 1 guilty of the lesser offence of manslaughter under Section 202 as read with Section 205 of the PC and convict him accordingly. Accused 2 is set at liberty forthwith unless otherwise lawfully held.

**DATED SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF OCTOBER, 2015.**

**R. V. P. WENDOH**

**JUDGE**

**2/10/2015**

**In the Presence of:**

Mr. Mulochi for State

Mr. Mutwiri for both accused

Faith/Ibrahim, Court Assistants

Both Accused