



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 17 OF 2009**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**CHARLES KALUNGE ..... ACCUSED**

**JUDGMENT**

By an information dated 17/2/2009, **Charles Kalunge**, the accused herein, was 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 18/1/2009, at Kibera Trading Centre, Amuathi Sub Location, murdered M M. The accused denied the offence. The prosecution called a total of 6 witnesses. When called upon to defend himself, the accused testified on oath, but did not call any other witness. Mr. Musyoka, Learned Counsel appeared for the State while Mr. Igweta appeared for Accused.

**PW1 IMM** testified that on 18/1/2009, when on his way from Mutuati, a lady whom he did not know informed him that his son had been beaten. He went home and found that his son M M had been taken to hospital at Laare. He went there and transferred him to Chogoria Hospital where he remained for 3 days and died. He was informed that the deceased had been beaten by one Charles Kalunge (Accused). He knew accused but did not know of any relationship between the deceased and accused; that deceased was a primary school child.

**PW2 Steven Muenda**, testified that on 18/1/2009 about 5.00 p.m. he was heading to his home with one K who is now deceased. When near Kibera, he saw Charles Kalunge with his brothers Kinoti and Kibundu. He saw Charles hit M with a club on the head and M fell and that Charles and the brothers ran away. PW2 said that he called Zakayo Kobia and informed him of the incident and Zakayo arrived and assisted to take M to hospital. PW2 said he knew the accused before. He later learnt that M had died. PW2 said that the accused's brothers were armed but did not touch M. He said that Charles and M had disagreed there before over *miraa* but he denied knowing the nature of the disagreement.

**PW3 Zakayo Kobia**, recalled that on 18/1/2009 about 5.30 p.m., he received a call from Steven Mwenda (PW2) who informed him that M had been assaulted and injured on the head. He ran to Kibera, and together with PW2, took M to Hospital. M condition worsened and next day he was taken to Chogoria Hospital where he died on 21<sup>st</sup>. He only got information that it is Charles and his brothers who assaulted M and that the accused was arrested but the others escaped. PW3 was aware that M and accused had disagreed there before over *miraa*, because M had been hired to guard a *miraa* farm and that Charles had

fought with M there before.

**PW4 Charles Ntonjira M'Arabi** recalled that on 18/1/2009, a Sunday about 4.00 p.m. he was at a canteen at Kibera Trading Centre buying sugar when he saw Charles (Accused) fighting with M. He said the shop was only 6-7 metres away; that M was coming from the farm and had a *panga*. He said that it is Charles who started beating the deceased and the brothers joined. He said that as M tried to defend himself, Charles hit him at the back of the head and that Kinoti cut M on the hand. PW4 said that when Charles met Morris, he told him they had to fight because of *miraa* but Morris said the *miraa* was his. PW4 said he went between them and told them to stop fighting but that accused went round him and hit the deceased. He warned accused but he hit deceased a second time on the head; Morris fell, and they all ran off; that deceased became unconscious on falling but after first aid he came back to; that accused was armed with a fork *jembe* handle while his brothers had *pangas* and they went away with the weapons. PW4 said that M had a *panga* because he was coming from his *shamba* but he did not use it. PW4 said that he knew both accused and M before. He said that it is after accused hit M that the brothers came out of their small house they had rented. He said that accused's brothers have since disappeared. He denied that M ever used the *panga*.

**PW5 Lydia Kageni** is a Clinical Officer at Chogoria Hospital. She produced a post mortem report prepared by Dr. Irene Biondo. The Doctor found that the deceased sustained a fracture on the left side of the scalp, and there was contusion on the left side and she formed the opinion that the cause of death was cardio pulmonary arrest secondary to severe brain injury due to brain contusion caused by a fracture on the skull.

The **Investigation Officer** in this case is **CPL Robert Amke (PW6)**. He testified that on 23/1/2009, one I M went to the station with three other people and reported that on 18/1/2009, his son MM was attacked and assaulted by Kalunge – accused and that the victim was admitted at Chogoria Hospital and succumbed to the injuries on 21/1/2009; PW6 proceeded to the scene on 25/1/2009 where he met one of the witnesses Ntonjira who informed him what happened, that it is accused who injured M.

When called upon to defend himself, accused testified on oath that on 18/1/2009, he went to work on his farm near Kibera. He left the farm about 6.00 p.m., passed by the market at Kibera, met his brother Kinoti and they sat down to talk; that M (deceased) came there and challenged accused to finish with him; that he had a *panga*, which he used to cut him on the forehead, and in turn accused hit him with a stick on the head and he fell and somebody came and intervened between them; that is Ntonjira; that he was with Kinoti and Kabundu's home is near there, so he came there on hearing noises. Accused said that M was his friend and that one day, he had gone to pick *miraa* when M alleged that he had stolen his *miraa*; that this was 3 days earlier and they did not fight. He said on that day, he hit M with a stick but never meant to kill him because it was in self defence so that M could not kill him. Accused said that they fought outside a shop that was closed and a hotel; that Ntonjira (PW4) witnessed the attack and so did Kinoti. He said that each of his brothers had their own homes. He denied knowing where Kinoti is and where Kabundu stays. He denied knowing Steven Mwenda (PW2). He said that M got up, and went to sit in Koome's shop as he ran away. According to accused, it is M who attacked and cut him on the hand, forehead and left leg.

At the close of the defence case, Mr. Igweta submitted that the prosecution had failed to prove that the accused had malice aforethought; that PW4 told the court that he saw deceased with a *panga* and that accused hit deceased on the head which is evidence of a fight and that the Doctor's evidence revealed that accused died of head injury.

To establish a charge of murder, the prosecution has to prove that:

1. The accused committed the act that caused the death (*actus reus*).
2. The accused had an intention to cause grievous harm or cause death (*mens rea*).

Intention to cause death or grievous harm is also known as malice aforethought which is defined under **Section 206 of the Penal Code** as an intention to cause death or grievous harm.

The accused having admitted that he is the one who hit the deceased on the head which injury resulted in his death, the first requirement was disposed of. The only question for consideration is therefore, whether the accused possessed the necessary malice aforethought.

The accused admitted that indeed, PW4 was present at the scene and is the one who intervened between him and M. PW4 told the court that M was coming from the farm with a *panga* and that it is accused who first talked about deceased destroying his *miraa* and that the deceased replied that the *miraa* was his. Contrary to what the accused claimed that M attacked him, PW4 said that M never used his *panga* but it is accused who hit deceased on the head first, M did not fall but his brothers joined accused in assaulting the deceased and when M fell, the accused hit him on the head again. This is despite the fact that PW4 went between accused and deceased. PW4 further said that accused hit the deceased by surpassing him. PW2 also said he witnessed the incident while a few metres away and he witnessed accused hit the deceased. It is PW2 who called Zakayo (PW3) and informed him what happened. I believe he was at the scene. I have no doubt that PW2 and 4 were truthful witnesses and I will believe and find that in fact, it is accused who was the aggressor. It is him who attacked M over an earlier dispute over *miraa*. PW4 who was right at the scene said that the accused hit the deceased twice on the head. Besides, if the deceased had injured Accused by cutting him as he alleges, these injuries would have been evident when plea was taken.

The Doctor who performed the post mortem found that M had a fracture to the skull which was the cause of the death. Even if accused's brothers were present, it seems they never inflicted any notable injury on the deceased because no other notable injury was found on the deceased. This evidence corroborates that of PW2 and 4. I am satisfied that it is the accused who was the aggressor, and that he hit the deceased on a delicate part of the body, the head with a *jembe* stick not once, but twice. I find that the malice aforethought flows from accused's conduct, hitting the deceased on the head twice with a *jembe* stick. His intention was clear, to cause grievous harm to the deceased or cause his death.

I find him guilty of the offence of murder as charged and I convict him accordingly under **Section 322 of CPC**.

**DATED, SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**6/11/2015**

**PRESENT:**

Mr. Mungai for State

Mr. Igweta for Accused

Ibrahim/Peninah, Court Assistants

Accused, Present