



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 7 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

D M K

N K MACCUSED

JUDGMENT

D M K and **N K M** hereinafter referred to as the first and second accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:

“On the 11th day of February, 2012 at [Particular withheld] village Jibana location Kilifi County the two jointly murdered CHARO MGUTE KUGO”.

The prosecution in this case called nine (9) Witnesses to testify.

S U M (PW 1) is a son of the Deceased **C M**. He testified that on the 11th day of February, 2012 at about 9:30 p.m. He was in his house when he heard a commotion at his fathers house.

He rushed there and found the door open. He saw two men one armed with a panga and another armed with a metal bar cutting and hitting the Deceased who was lying on the ground. He recognized the one who was armed with a panga as **D M** (the first Accused) and the other one who was armed with a metal bar as **N K** (the 2nd Accused). When they saw the Witness they rushed out into the darkness outside. He further testified that he managed to see them with the aid of light from a torch which he had. The two Accused persons were also armed with a torch which they abandoned in their hurry to escape.

K U (PW 2) a minor was asleep in the same house with his father but in a different room when he heard the main door being forcefully opened, two men who were armed with a panga and a metal bar and who got hold of his father and threw him down from the bed and proceeded to cut and hit him. When **S** (PW1) entered into the house the two men rushed out. He also told the Court that he managed to recognize them as **D M** and **N K** by means of light coming from their torches.

The Doctor who carried out the postmortem examination of the Deceased found that he had;

Deep cut-wounds on the head

Deep cut – wound on the forehead

Deep cut wound across the left side of the forehead involving the ear.

Deep cut wound elbow joint

Deep cut wound left upper chest

He formed the opinion that the cause of death was cardiac pulmonary arrest due to head injury following repeated assault on the head. In their defence each of the Accused persons denied having committed the offence of murder stating that they were attracted to the scene after they were informed that their uncle was lying unconscious after he was attacked by unknown people.

Counsel for the first Accused (Mr. Mushelle) has submitted that the conditions obtaining at the time of the attack were not favourable for identification purposes. After the incident the Accused persons did not escape but made arrangements in taking the Deceased to Hospital.

Learned State Counsel Mr. Jami has submitted that identification was by recognition. That the two Accused persons were step brothers of PW 1 and PW 2.

The Law.

Section 203 of the Penal Code defines the offence of murder in the following words,

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Malice aforethought under Section 206 of the Penal Code is 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, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous 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 to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In the present case, the attackers were using a panga and a metal bar to injure the Deceased.

From the evidence of the Doctor who examined the Deceased for postmortem purposes, the Deceased suffered deep cut wounds on the head, deep cut wounds on the left elbow joint, Deep cut wound left upper chest. These massive wounds go to show that the attackers intention was to kill.

Identification.

There is uncontroverted evidence to the effect that the two Accused persons were related to prosecution Witnesses Number 1 and 2 as step brothers. It is not in dispute that this incident took place at night. PW 1 did testify that he saw the two Accused persons clearly by use of torch light which he had. PW 2 also testified that the two Accused persons were also armed with a torch which they left behind as they fled. This torch was produced in Court as exhibit Number 2. The two Witnesses PW 1 and PW 2 were able to

see and identify the weapons each of the Accused was armed with. The first Accused D M was said to have been armed with a panga whereas the second Accused was armed with a metal bar. There was no indication as to the existence of a grudge between PW 1, PW 2 and the two Accused person during cross-examination of the Witnesses and in their unsworn statements. The two Witnesses therefore had no reason to frame up the Accused persons for an offence they had not committed. I am satisfied that PW 1 and PW 2 did clearly recognize the two Accused persons as the persons who caused fatal injuries on their father.

In conclusion I do find that the prosecution has proved its case beyond reasonable doubt. The Accused persons are found guilty of murder contrary to section 203 as read with Section 204 of the Penal Code and they are Convicted accordingly.

Judgment delivered dated and signed this **14th** day of **March, 2014**.

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M. MUYA

JUDGE

14TH MARCH, 2014

In the presence of:-

Learned counsel for the State Miss Mwaura

Learned Counsel for the defence Miss Odhiang for 1st Accused holding brief Mushelle for 2nd Accused.

Court clerk Musundi