



No. 288/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 20 OF 2008
REPUBLIC.....PROSECUTION
VERSUS
MUSYOKI MUSEMBI MALUKU.....ACCUSED

J U D G M E N T

1. **MUSYOKI MUSEMBI MALUKU** hereinafter “the accused” is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on 21st March 2008 at Kaseki village, Musalala Sub-location, Kilungu location in Makueni County, the accused murdered **Dominic Maluku Kimolo**.

2. The facts of the case are that the accused is a son to the deceased. On the 21st March, 2008 the accused assaulted the deceased using a hoe. He hit him severally on the head and he fell down. The matter was reported to the police. The accused was arrested. A postmortem examination was conducted on the body of the deceased. It was confirmed that the deceased sustained a cut wound on the forehead, a shattered right eye ball, a deep cut wound on the parietal scalp; and a fractured skull. The pathologist opined that the cause of death was cardio-respiratory arrest caused by severe head injuries and massive haemorrhage.

3. PW4, **Winfred Mulinda Manuku** testified that she found the accused hitting their father. She raised an alarm by screaming but the accused continued hitting the deceased using the hoe. On seeing her he chased her away. She was rescued by a lady who took her to her uncle’s home.

4. PW5, **Kennedy Maluku** testified that he came from church and found his deceased father in the house. Shortly thereafter he heard a loud sound of something hitting the roof of the house. When they got out of the house, he saw the accused walking towards them with a hoe. He asked the deceased to head back to the house. As the deceased was rushing back to the house, the accused hit him with a hoe on the back of the head causing him to fall and the accused proceeded to hit him repeatedly on the head. He started screaming and PW5, joined him and also screamed. The accused then chased her away with the hoe and he also ran away. On cross examination, he stated that the accused did not say anything prior to attacking the accused and afterwards the accused went back to repair his house.

5. PW 8, **Dr. Magdalene Kuria**, testified that, she performed a post mortem on the body of the deceased and established that he had multiple head injuries, deep cut wound across the forehead with a broken nasal bone, deep cut wound at the back of the head with a depressed skull which exposed brain tissue, the

right eye was shattered and he had a deep cut wound on the left side of the head. She concluded that the cause of death was cardio-respiratory arrest caused by severe head injury and massive hemorrhage.

6. In his defence the accused stated that he quarreled with his father prior to hitting him.

7. It was the submission of counsel for the accused, Mr. Konya that the necessary ingredients of the charge of murder were not established beyond reasonable doubt. Malice aforethought was absent therefore the charge should have been of manslaughter.

8. The learned State Counsel, **Mrs Abuga** on the other hand stated that the fact that the accused hit the deceased on the head severally was proof of his intention to kill the deceased.

9. Per the evidence adduced by the prosecution PW5 Kennedy Maluku was at home with his father (deceased) when he heard a sound like something hitting the roof of the house. They went outside. On seeing them the accused went towards them. The deceased told him to go back to the house. Before he entered the house he saw the accused hit the deceased with the hoe on the back side of this head. He fell down and the accused hit him repeatedly on the head. His sister Winfred arrived.

10. PW1, PW2 and PW3 testified that they were in church when they heard screams from the deceased's homestead and rushed to his house only to find him dead. It is however, PW4 and PW5 who shed light on what transpired as they witnessed the accused assaulting the deceased which led to his death.

11. PW4's evidence which is corroborated by that of PW5 portrayed the events as they unfolded. The accused approached the deceased with a hoe at hand and without saying anything hit him on the head with it and proceeded to further assault him causing his death. PW8 confirmed that indeed the deceased died as result of cardio-respiratory arrest caused by severe head injury and massive haemorrhage. The assault of the deceased on the head by the accused led to his death.

12. It is not in dispute that the deceased died. According to the testimonies of PW4 and PW5, the accused indeed committed the act of killing the deceased. The accused in his defence admitted having hit the deceased causing him to fall down. Save that he alleged that it was because they quarreled. It is the evidence of PW1 that the accused was prior to the unlawful act acting like a crazy person and was on malaria medication given to him when he visited hospital the previous week.

13. The *actus reus* in this case has been proved. The lingering question though is whether the accused had the *mens rea* to commit the act of murder.

14. This is a case where the accused is charged with murder. To prove a charge of murder the prosecution had a duty to prove beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought.

15. Malice aforethought is deemed to be established by evidence providing any one of the circumstances set out in **Section 206 (a) to (d)** of the **Penal Code**. (see **David Mburu versus Republic {2014} eKLR**).

Section 206 of the Penal Code stipulates:

“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, whether that person is the person actually killed or not, 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 to facilitate the flight or escape from custody of any person.”

16. It was stated that prior to the incident the accused had been away from home for ten (10) years. He returned home and did not talk much. After injuring the deceased he continued repairing his house. According to PW5, the accused did not say anything but only went ahead to assault the deceased. Though it was suggested that the accused had been treated for malaria, no medical evidence was adduced to establish if indeed this was the case. Every person is presumed to be of sound mind until the contrary is proved. **(See Section 11 of the Penal Code).**

17. This is a case where no defence of insanity was raised. No medical reports were adduced to suggest that the accused may have had a mental disorder.

18. It is the evidence of the witnesses who were at the scene of the crime that the accused hit the deceased at the back of the head with a hoe and further descended on the deceased assaulting him further. This fact is corroborated by PW8 who on conducting a postmortem discovered that the deceased had multiple head injuries, deep cut wound across the forehead with a broken nasal bone, deep cut wound at the back of the head with a depressed skull which exposed brain tissue, the right eye was shattered and he had a deep cut wound on the left side of the head. The excessive wound inflictions show the presence of mens rea.

19. The accused in the course of assaulting the deceased severally must have known that the deceased would suffer grievous harm or even death. He must have had knowledge that the act would probably cause the death or grievous harm to the deceased, hence presence of malice aforethought. I agree with the learned judge in the case of **Republic V Peter Getange Oeri [2013] eKLR** where the court held thus:

“I find that the prosecution has proved beyond any reasonable doubt that the accused attacked the deceased by stabbing him several times with a knife. That knife was recovered from him the same night of the incident. There is no doubt that it was the accused person who executed the attack on the deceased single handedly. I also find that malice aforethought was proved in the evidence which shows that the accused set upon the deceased with a knife and stabbed him several times on the chest and the back which injuries caused excessive bleeding. The bleeding was the cause of death. By setting upon the deceased with a knife and stabbing him several times, the accused person should have known that doing so would cause the deceased death or grievous harm. Malice aforethought was proved under section 206 (b) of the Penal Code.

20. In the circumstances, I find that the accused did indeed kill the deceased with malice aforethought. The prosecution has proved their case beyond reasonable doubt. The accused is guilty as charged.

21. Accordingly, I do convict him.

DATED, SIGNED and DELIVERED at MACHAKOS this 11TH day of JULY, 2014

L.N. MUTENDE

JUDGE