



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 82 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHAT MURIERA M'MWONGO.....ACCUSED

J U D G M E N T

1. **JOSEPHAT MURIERA M'MWONGO** ("the accused") has been charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code, CAP 63 of the Laws of Kenya*. The particulars of the offence are that, on the 18th of August, 2013 at Kirindine Sub-Location, Igembe South District, within Meru County jointly with others not before court, the accused murdered **LEONARD MWITI** ("the deceased"). The accused denied the charge and the prosecution called four witnesses to establish its case.
2. **PW1 LUCY KARIMI**, mother to the deceased told the court that on the material day, at about 8.00am, the accused went to her house. He told her to warn the deceased to leave his water or else he would kill him. Later in the evening, after she had prepared dinner, she noticed that the deceased was not in his house which was 20-30 meters away from her house. When waiting for him to give him the accused's message, she heard a big stone hit a yam plant that was near her house and fall. She opened the window from her kitchen and saw the accused come where the deceased had fallen. She asked the accused if he had carried out his threat and the accused replied that he would kill five people who were disturbing him over water. The next day, she went to the sub-chief who accompanied her to where the deceased was. On arrival, they found the deceased in his house bleeding from his nose and mouth. He was also unresponsive. They confirmed that he was dead and they called the police.
3. **PW2 PAULINA KAREMA** was an aunt to the deceased. She recalled that on the material day, the deceased went to her home, ate super and said that he was going to check on his miraa. The next day, she went to the miraa farm and her sister's children told her that the deceased was killed after he had left her house. The children showed her the shelter where she found the body of the deceased lying on the side with blood oozing out from his nose. She went to **PW1** and found that she had already reported the incident to the authorities.
4. **PW3 NO. 67342 PC ANDREW AKOLO** was the investigating officer. He told the Court that on 19th August, 2012 he was instructed to investigate the matter. He visited the scene and found the body of the deceased in a structure made of banana leaves where the deceased used to sit when guarding miraa. There were no visible injuries on the body. **PW1** informed him that she heard a loud bang from outside, opened her window and using her flash torch, she saw the accused and others standing next to the structure. She also told him that the day before, the accused had a quarrel with the deceased because the deceased had denied the accused access of his, water pipes through his, the deceased's farm for irrigating miraa.
5. **PW4** was **DR. SIMON MUNYOKI**. He produced the postmortem report carried out on 27th August, 2013, by Dr. Kihumba. He stated that the body had bruises on the forehead and clotted blood on the nostrils and in the mouth. There was massive blood right sided (haemothorax). The cardiovascular system was normal. The digestive system had blood in the system (hoemodileterium) and there was intracranial hemorrhage in the head. The established the cause of death to be severe head injury and massive right sided haemothorax.
6. When put on his defence, the accused testified that he knew the deceased's father who allowed him to get water pipes through his land. That **PW1** had disagreed with the father of the deceased and married elsewhere and that she only came back after her husband died and told the deceased not to allow the accused to get water from his father's land. He stated that he and the deceased were good friends and he did not know anything about his death.
7. According to him, he was in his home with his wife and children on the material day and time. He denied threatening the deceased.
8. The Parties were to file and exchange written submissions within 14 days of the close of trial on 11th July, 2017. As at the time of writing this judgment, none had filed submissions.

9. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows: -

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

10. The four ingredients of the offence which arise from the above definition and which require to be proved by the prosecution beyond reasonable doubt are: -

a) the fact of the death of the deceased;

b) the cause of such death;

c) proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and

d) proof that the said unlawful act or omission was committed with malice aforethought.

11. On the fact and cause of death, **PW1** stated that he saw the accused standing next to the deceased as soon as she heard a loud bang outside her house. Further, the post mortem report produced by **PW4** as **PExh.1**, showed that the body had multiple injuries both on the head and upper abdomen. The established cause of death was the severe head injury and massive right sided haemothorax. The court is satisfied that the prosecution proved these two ingredients of the offence to the required standard.

12. The next issue is whether the death of the deceased was as a direct consequence of an unlawful act on the part of the accused. **PW1** told the court that on the morning of the material day, the accused went to her house. He told her to warn the deceased to leave his water or else he would kill him. Later that night between 10 pm and 11pm, she heard a stone hit a yam outside her house and fall. When she opened the window of her kitchen and peeped outside, she saw the accused with others standing besides the deceased. She recognized the accused and spoke to him. She asked him if he had carried out his earlier threat. He replied her that he would kill five others who were interfering with his water.

13. The accused's answer was that on the material night, he was in his home with his wife and children. He denied committing the offence.

14. This case is underpinned on identification. However, the evidence of **PW1** should be taken with caution. This is so because it was at night but she stated that there was moonlight and she used flash light. In the case of **Wamunga V. Republic [1989] KLR 424**, the Court of Appeal quoting **R v. Turnbull (1976) 3 All ER** held that the evidence of *recognition* is stronger evidence than that of identification. **PW1** not only identified but recognized the voice of the accused from the conversation they had. They conversed with each other.

15. Although **PW1** had stated that she used moonlight to identify and recognize the accused, it turned out that in addition, she used a flash light. Her testimony on the earlier visit to her home that morning by the accused and his threats on the life of the deceased remained unshaken. Further, her testimony on her recognition and conversation with the accused that night and his firm response to kill other five people remained unshaken. Her testimony firmly placed the accused at the scene of the incident.

16. **PW1** told the court that she heard a big stone hit a yam and fall next to her house. She saw that stone the following morning and showed it to the assistant chief.

17. One thing is clear, no one saw the accused hit the accused. **PW1** stated that she only saw the accused after the deceased had been hit and was lying down. The evidence was therefore circumstantial in nature. It was circumstantial in that, no one saw the accused assault the deceased. Circumstantial evidence is as good as any other evidence. However, the Court of Appeal has held that such evidence must not only be consistent but must unerringly point towards the guilt of an accused and no one else. **See the case of Kariuki Karanja v Republic [1986] KLR.**

18. In the present case, not only did the accused make threats on the life of the deceased earlier on the material day, but was seen at the scene immediately after the stone hit the deceased and fell down. He spoke to **PW1** at the scene immediately after the incident and made threats that he would kill five others who were interfering with his water supply. To this court's mind, the evidence tendered was consistent and unerringly pointed towards the accused as the perpetrator of the assault on the deceased and none other.

19. Having been firmly placed at the scene, the accused's answer was that he was at his home on the material day and time with his wife and children. When challenged whether he would call them as witnesses, he declined.

20. His allegation that he had a good relationship with the deceased and that there was a grudge between him and **PW1** cannot stand. That was an afterthought as none of that was put to **PW1** when she testified. Indeed, the accused never challenged the testimony of **PW1** that while there was bad blood between him and the deceased, she had no grudge with the accused. Further, he never challenged the evidence of **PW2** that before the material day, he had made threats to the deceased. Sometimes in July of that year. Obviously, there was an issue of the accused's water pipes which passed over the deceased's farm which the deceased and others, according to the accused, were interfering with.

21. In the circumstances, this court is satisfied that the prosecution has proved beyond reasonable doubt that, by his unlawful act, the accused caused the death of the deceased.

22. As to whether there was any malice aforethought, **Section 206 of the Penal Code** provides that:-

“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)

(d)

23. **PW1** told the court that on the material day, the accused went to her house and told her to warn the deceased to leave his water or else he would kill him. **PW2** stated that on 25th July, 2013, the accused sent her to the deceased to tell him to stop playing with water or he would kill him. **PW4** stated that in his investigations, he established that the motive of the attack was due to an argument which arose from the deceased denying the accused access to his water pipes which passed through the deceased’s farm. Further, the accused told **PW1** that he would also kill 5 other people who disturbed him because of water. He must by then have killed one, the deceased.

24. In this regard, the accused clearly demonstrated intent to cause the grievous bodily harm and the death of the deceased. In any event, the serious nature of the injuries inflicted upon the deceased was a clear indication that the accused had intended to cause grievous harm on the accused. Obviously, the accused had malice aforethought.

25. Accordingly, I am satisfied that the prosecution was able to prove its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Leonard Mwiti** and convict him of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya**.

DATED and **DELIVERED** at Meru this 18th day of October, 2018.

A. MABEYA

JUDGE