



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 38 OF 2015**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**THOMAS MBAABU M'MUGA.....ACCUSED**

**JUDGMENT**

1. The accused was charged with the offence of murder whose particulars were given to be that on the 28.4.2015 at Mbironi village, Gikui sub location within Meru County, he murdered one Stanley Kinyua M'Muga.

2. In pursuit of proving its case, the prosecution called a total of six witnesses being SASINTA KATHAMBI, sister to both accused and the deceased, MARTHA NCURUBI a neighbor to both, LILIAN KAARI, DR. FRANKLIN IKUNDA MBURUGU, ENOCK MURANGIRI and P.C WILLIAM KIPRUTO, the investigating Officer. Here below is the summary of the evidence by the witnesses.

3. P.W 1, the sister to both accused and the deceased gave evidence that she was in the house of Fredrick Moebia, also brother when he heard screams and decided to go and check. On reaching there, she saw the deceased fall to the ground and the accused was up and holding a big stone with his two hands and hit the deceased with it thrice. She said that it was clear and could see the happenings clearly as it was just 5 p.m. She then saw blood oozing from the ears mouth and nose of the deceased. She screamed and people responded by coming to the scene. One of the 1<sup>st</sup> responders was P.w 3 who then made a call to P.w 2 who in turn went and reported the matter at the police station. Another person who came to the scene was a child to the accused.

4. The deceased was then taken to St Anne Hospital but because he was not doing well they were referred him to Chogoria Hospital where he died the next day. She then recorded a statement with the police and to her knowledge the fight was over land as the accused wanted the deceased to avail their father's identity card so that he could sell part of his land to help his children. She said that the accused had beaten the deceased before to an extent that the deceased was admitted in hospital.

5. In cross examination she said that the house she was was about 50 meters from the scene and that both deceased and the accused were drunk but the fight was near the house of the deceased. That the accused was accusing the deceased of having hidden their father's identity card thus stopping accused from selling the land. She said that the arguments did not take long and that the stone the accused used was about one foot long which stone was left at the scene when the accused fled.

6. P.w 2 was called to the scene by the P.w 3 by use of a phone with the news that the deceased had been injured on the head and that they should go and see him. She proceeded to the scene and found the deceased lying in his house while bleeding from the mouth, nose ear and eyes and P.w 1 was besides him. She was told that the deceased had been hit with a stone by the accused. The deceased was unable to speak and they assisted him to stand then took him to hospital at St. Anne where first aid was performed and then deceased was then referred to Chogoria Hospital in the hospital motor vehicle where he died the next day. She identified the accused as her younger brother.

7. On cross examination she said that it was Kathambi who witnessed the accused hit the deceased and not her. She confirmed that the deceased and the accused had not been cordial, were always fighting and that the accused had been jailed for 3 months for breaking the deceased's ribs and that the dispute has always been over the father's land. She however denied knowledge if both were drunk.

8. For P.w 3, the evidence was that on the material day she was on her way to the neighbor's home when she heard the accused quarrelling while saying that the deceased should die. She said that the accused was shouting so as he walked towards deceased home. Suddenly she had screams from the deceased's home and when she went there she found the deceased lying down bleeding from the mouth, ears and nose in the presence of PW 1 with a son to the accused called Kimathi and another man whose name she did not know. She was asked to assist carry the deceased to the house but did not assist because she was scared and preferred to call Ncurubi who came with one Kagwiria and took the deceased to the hospital where he died the next day. She was thereafter approached by P.W 6 and the area chief to go and record a statement at the police station. She concluded that the accused was her immediate neighbor and that him and the deceased had an unending quarrel over land over which the accused blamed the deceased for blocking him from selling the father's land.

9. On cross examination the witness admitted that the land belonging to the father was shared among the siblings to the accused while he was in custody and that a portion of it had been sold to raise money for a succession cause. She denied having seen the accused hit the deceased asserting that she only heard him quarrel as she approached the deceased's home and that it was P.w 1 who told her that the accused hit the deceased with a stone.

10. The forth witness Dr. Franklin Ikunda Mburugu attended court to produce a postmortem completed by Dr. Priscila Kushero with whom he had worked for 5 years at Chogoria Mission Hospital. The postmortem report was in respect of one Stanley Kinyua M'Muga and was conducted on 7.5.2015 which revealed that the body had multiple puncture sites on the frontal and zygotic bones with blood oozing from both ears. The injuries were concentrated on the head and the cause of death was isolated as cardio-respiratory arrest secondary to massive depressed skull fracture. He produced the postmortem report as exhibit P1.

11. In cross examination he admitted that the postmortem report was done some 9 days after death hence rigor mortis had set in, that oozing blood was visible, but he could not know the type of object used.

12. Enock Murangiri gave evidence as the 5<sup>th</sup> witness and described himself as son to the deceased, a bodaboda operator and the person who identified the deceased's body for purposes of postmortem. When cross examined he said that the accused was his uncle who never had a cordial relationship with the deceased.

13. The last witness on the side of the prosecution was No. 58649 P.c William Kipruto who was stationed at Igoji police station in the year 2015. On the 28.4.2015 at about 7 p.m. he was at the report office when the accused visited and made a report of having been assaulted by the deceased. He booked the report and directed the accused to go for treatment for his injury on the arm and forehead. A short while later, relatives of the deceased, Nchulubi and her daughter, equally made a report that the accused had assaulted the deceased who had been rushed to St. Ann's Hospital and later transferred to Chogoria hospital. After booking the report he commenced investigations and later learnt that the accused had been arrested by members of the public. The next day he visited Chogoria Hospital with a view to recording a statement from the deceased only to learn that he had passed on and body taken to the mortuary where he later attended and witnessed the postmortem examination.

14. On cross examination he admitted that it was the accused who made the first report and that he indeed had visible physical injuries before the second report regarding the deceased was made.

15. He added that he visited the scene and saw signs of struggle and blood stains but did not gather any signs of drunkenness on the deceased and the accused just like there was no evidence of a fight. He got the indication that the dispute was over land which the deceased wished to sell but the deceased was not keen to allow him sell. At the mortuary he observed the body of the deceased and saw no other injury apart from the head injuries.

16. When put on his defense, the accused chose to give sworn testimony whose effect was that he was cordial with his brother, the deceased and that on the material day both were from a bar headed home when the deceased directed him not to pass through the deceased's land, went to the house came out with a panga, and attacked the accused. He said that shamba had not been shared between the siblings and that the deceased swore that the shamba would only be divided only after people have died. He said further that the deceased attacked him and cut him on his forehead and on the left elbow and he showed the court what he referred to

as the scars from such injuries. He denied any quarrel before that incident said that they had been drinking hard spirits and that he only pushed him to the ground and he fell on a stone then left him lying there as he went to report at the police station and later went for treatment. He added that he was surprised to receive the news of the deceased's death the next day as he had not intended to kill him. He maintained that he had always acknowledged the death, had offered to plea bargain but the prosecution refused the offer. He denied any intention to kill and maintained that had he intended to kill he would have used the panga he snatched from the deceased. He asked for leniency from the court on the basis that he had no intention to kill the deceased.

17. On cross examination he admitted a dispute over his father's land with his other siblings and that on the material day they had differed at the bar but opted to walk home together and the fight erupted when the deceased denied him the right to step on his land. He saw the deceased walk into the house, emerge with a panga, without him moving and only pleaded for a discussion only to be attacked.

18. He alleged having gone for treatment at St Ann's hospital but lost the treatment notes in custody. He admitted pushing the deceased who hit himself on a rock and remained still. He said that he did not seek to take the deceased to hospital because he was drunk and that his relationship with the deceased was cordial save for the issue of the land dispute. In re-examination he once again admitted the deceased died out of the fight with him and that there was no other way to reach his home save through the land of the deceased and that prior to the incident the two had never fought.

19. Pursuant to the directions by the court, parties filed respective submissions on the 14.10.2021 and 9.11.2021 with the defence beginning. In the submissions the defence rehearsed the evidence and underscored the fact that the accused was attacked while drunk, was the first to report to police that there was no evidence of malice aforethought and the accused was willing to plea bargain but was rebuffed by the prosecution.

20. For the prosecution the position taken was that the totality of the evidence from the 6 witnesses was that the accused attacked the deceased severally on the head leaving him immobilized. There was tress on the fact that P.w 3 heard the accused quarrel the deceased and threatening to kill him for opposing the sale of land while P.w 1 saw the accused hit the deceased severally with a stone and urged the court to find that the case had been proved beyond reasonable doubt.

21. The defence by the accused was described as having admitted the cause of death without denial and that the allegation of a fight was not true just as the allegation of intoxication was an afterthought. Lastly the prosecution asked the court to infer malice from the conduct of the accused disappearing after the incident.

#### ANALYSIS OF THE EVIDENCE

22. That the accused was with the deceased at the scene of the incident and that there was a brawl between them is not in dispute but conceded by the accused. Even the cause of death was unequivocally admitted to have been injuries arising out of the fight.

23. The point on divergence is whether the accused assaulted the deceased or if he was acting in self defence in repulsing an attack by the deceased. The evidence of P.w 2 and 3 assert that the accused was not only heard threatening to kill the deceased over a dispute over a family land but was seen by P.W 3 hitting the deceased with a one foot long stone thrice. In challenging the evidence the accused denies hitting the deceased and put up the defence that it is the deceased who denied him passage through the deceased land, went for a panga from the house, attacked him but he overpowered the deceased and pushed him to the ground where he fell on a rock and got injured. He however said that they had differed at the bar but opted to walk home together.

24. When I look at the two sets of evidence, I find it difficult to believe the account by the accused at all. I find it difficult to believe because there was never an attempt to raise the question of there having been a panga at the scene with P.w 1, P.w 2, & P.W 3 who asserted having been at the scene almost immediately the incident occurred. They however confirmed the presence of the stone P.w 1 said to have been used by the accused to harm the deceased. I find the accused defence to be not one capable of belief. However, the onus is not upon the accused to offer any defence, he is in fact entitled to remain quiet. It is the prosecution to prove its case beyond reasonable doubt.

25. In a case of murder, it is incumbent upon the prosecution to prove that there was an act of commission or omission propelled by malice aforethought that led to the death of the deceased. Here the fact of death is not disputed the only dispute is whether there was unlawful act of omission or commission and if such act was propelled by malice aforethought. I find the evidence by P.w 1 that

he saw the accused hit the deceased, who was then lying on the ground, with a big stone to have been unchallenged and credible. I find it to tie well with that of P.w 3 that she heard the accused threaten to kill the deceased. Even the injuries observed by P.w 1, 2, 3 and 4 all agree that the injuries on the head of the deceased was caused by a blunt object which a stone is. I find that the evidence by the prosecution is believable and proves beyond reasonable doubt that it was the act of hitting the deceased with a stone that inflicted injuries resulting in death.

26. The next question is whether the commission was unlawful or not and if it leads to inference of malice aforethought. It is without doubt that to hit a human being while on the ground with a stone, not once, not twice but thrice, is unjustifiable and cannot pass for self defence but leads to the inference that the intended injury was to result in harm when it results in harm, it cannot be lawful but out rightly unlawful.

27. In his defence and written submissions, emphasis was placed on the fact that the accused never intended to kill his brother. With utmost respect to counsel for the defence, our law defines malice aforethought under section 206 of the penal code in a technical sense and there is no requirement of proof of intention to kill, malice or ill-will against the deceased for the offence of murder to stand proved. On this I find guidance from the Court of Appeal in its decision in **John Mutuma Gatobu v Republic [2015] eKLR** where having reproduced the provision of the Act, the court said: -

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

28. When I relate the conduct of the accused, of hitting the deceased on the head with a huge stone thrice while the deceased was down, with the definition of malice aforethought, I find that that conduct was expected to at least cause harm to the deceased or just constitute a felony. That is in law sufficient proof of malice aforethought.

29. It is therefore the conclusion of the court that the prosecution sufficiently proved the offense of murder against the accused beyond reasonable doubt. The accused is therefore convicted of the offense of murder contrary to section 203 as read with section 204 of the Penal Code.

30. Before I call upon the accused to mitigate, I direct that the probation office compiles and files a report on the social circumstances of the accused as well as the impact of the crime on the secondary victims and the community where the offense was committed.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DECEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**



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