



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 14 OF 2018**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTION**

**VERSUS**

**MUSEMBI MUSYOKA MUSEMBI.....ACCUSED**

**J U D G M E N T**

1. The accused Musembi Musyoka Musembi is 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.
2. The particulars of the offence are that Musembi Musyoka Musembi on the 4<sup>th</sup> day of April 2018, at Mwamutsefu Village, Mwereni Location, Lungalunga Sub-county within Kwale County murdered Musyoka Musembi Mutune.
3. PW 1 the mother to the accused and wife to the deceased testified that the Accused came back in the evening and insisted that he wanted to talk to her on the incident that happened during the day. PW 1 told him that they will talk over the issue the next day and the deceased also told the accused to wait and talk to his mother the following day. That when the deceased stood to the verandah to go to the bathroom the accused followed him and beat him using a jembe handle. The accused person brother snatched the jembe from the accused and grabbed the deceased and took him to the house. The accused person however follows him to the house and wanted to cut the deceased with a panga but again the granddaughter of the deceased pushed him and the panga fell.
4. That the accused pushed the deceased his father against the wall where a plough had been placed and he got injured. The accused person brother pulled outside the house where he continue insulting the parents who were remained in the house. While PW 1 with the deceased and the granddaughter remain in the house, the deceased told PW 1 that he was feeling thirsty and wanted some water. PW 1 called the village elder called Baya Mbui who came in accompany of one Murina Gari and an aid and they tied the accused person with a rope.
5. When they went to check where the deceased was sited leaning against the bed he found was already died and was forming from the mouth. The village elder called the police who came to the scene and took the body of the deceased to Msambweni District Hospital Mortuary after which PW 1 went to record a statement at Lungalunga Police Station.
6. In her cross examination PW 1 said that she recorded statement that the accused hit the deceased with a panga twice. She also said the accused person had been working at Likoni but before this incident, had been at home for 3 months since December 2017. She said she had no disagreement with her husband. PW 1 said she had no love affair with Baya Mbui and the deceased also did not have difference with him.

7. PW 2 Mathew Muli Musyoka, reiterated that when the accused returned home after they had finished having dinner he insisted in talking to PW 1 the mother and PW 1 told him they would speak the next day, PW 2 heard the deceased tell the accused to go and sleep as he looked drunk and the accused question whether the deceased had bought for him “mnazi”. PW 2 had the deceased asking why the accused had bitten him and he got out of the house and found the accused and the deceased struggling. He grabbed a jembe handle from the accused and asked the accused why he was speaking rudely to his parents.

8. PW 2 took the deceased to the house, and the accused pushed PW 2 and he fell while threatening to kill all of them. Inside the house the accused pick the panga to cut the deceased but PW 2 hit his hands and the panga fell. When the panga fell the accused pushed the deceased against the wall and PW 2 got the opportunity to grab him and took him outside the house. That PW 1 called Baya Mbui and Murina who came and tied the accused person with robes that when they entered the house they found the deceased had died while seated against the wall. Police from Lungalunga came to the scene and took photographs arrested the accused and put the body of the deceased to Mswambweni District Hospital Mortuary. PW 2 identified the body of deceased for post-mortem.

9. In cross-examination PW 2 said that the deceased had a lung and heart problem and was taking medicine for ulcers. He said that he was the one who snatched the panga from accused person. He also said the accused had lived with them since December 2017 prior to the incident herein. PW 2 said that the relationship between PW 1 and the deceased was Ok.

10. PW 3 Alice Musyoka testified that on 4<sup>th</sup> of April 2018 at 8.30pm, the accused who is her uncle returned home and wanted to talk to PW 1 the grandmother of PW 3 that the deceased had told the accused that they can talk the next day since he was drunk and he should go to sleep. PW 2 said she was some distance away and she saw the accused assault his father the deceased herein using a rungu. That her uncle known as Muli intervened and the deceased entered into the house and PW 1 called the Chairman came and apprehended the accused and tied him with a rope. That when he entered the house to find his grandfather he found he had died. That the police came from Lungalunga police station to collect the body which was taken to Mswambeni District Hospital Mortuary.

11. PW 3 said that their chairman known as Baya from Mwatsefu A came instead of B.

12. PW 4 Beatrice Muthini testified that on 4<sup>th</sup> April 2018, at 8.30pm she had notice at her neighbor Musembi Musyoka’s home that she heard Mather Muli Musyoka saying “wacha nao wasamehe hawa ni wazazi “: That when she moved closer she saw Musembi and his brother Muli pushing each other. That later when she saw the Chairman Baya Mbui she decided to go and see what was happening. She found the accused had been arrested and tied with a robe and when the Chairman entered the house to see where the accused person’s father was they found he was seated on the floor and the head was off the bed. When they called him out he did not respond they saw he was forming from the noise and confirmed he had died.

13. Police from Lungalunga was called and collected the body and took to Msambweni District Hospital mortuary after arresting the accused. PW 4, in cross examination said that Baya Mbui is a chairman of Mwasemfu A and the incident happened in Msafwetu B. She said she had never seen Baya Mbui in the deceased homestead before and was not aware of the difference between the deceased and the wife,

14. PW 5 P.C Simony Guto, testified that on 4<sup>th</sup> of April 2018 at 11pm he received a call from Rashid Chairman Mwasemfu Village who reported a murder case and in company of Insp. Mangwana they proceeded to the scene and they found the deceased had died and was forming from the mouth and noise. That PW 1 told them that the accused hit the deceased once again pushed him on a plough which was against the wall.

15. The rungu and panga which were used by accused were collected by PW 5 and the accused who had been apprehended was rearrested and taken to the police station as the deceased body was taken to Msambweni District Hospital Mortuary where post mortem was conducted. With consent of the defense counsel PW 5 the Investigator produced the postmortem report as EXP 4.

16. PW 5 in cross examination, said he was not aware that the accused was staying with same home with the deceased that he was saw the house at the home which included PW 2’s house and the deceased house. He said he was not aware that the deceased and the wife were staying separately. He also said that he didn’t established if the deceased and the wife had differences. He said that the village chairman Mr. Rashid sent one Balozzi who testified on his behalf. The Investigating Officer was not aware that the family of the deceased wanted to withdraw the charge against the accused.

17. The accused was put on his defence and gave a sworn statement and said that on 3<sup>rd</sup> of April 2018 he was at his place, approved Likoni, when he received a phone call from his father who wanted him to go home. That since his father was ailing he suspected his health has been deteriorated and wanted him to go home. But when he enquired from his mother why his father was calling him the mother told him not to bother about what the father would tell him.

18. He proceeded to Lungalunga by matatu and on arrival he found his mother with 3 neighbours together with his sister-in-law and a niece at home. He was told that the father had gone to graze in the field and he followed him to grazing field and helped him drive his cows back home. That when he met his father the deceased told him what was happening between him and his mother PW 1. That he wanted to raise the issue after supper to see if he could resolve it that when he raise the issue after supper, he realize that the deceased and his mother PW 1 had differed because of the father's mistress. He said as a result the mother PW 1 had moved out had put out a house within same compound and move out of the main house. When he told the mother her conduct was unbecoming he warned him to steer off her life and that he cannot plan her life that she swore to teach him a lesson. That the deceased commented since PW 1 could not listen to the accused he would find alternative means.

19. That he and PW 2 went to sleep but before 45 minutes could pass he had a knock at the door and when he opened he saw 6 men standing outside while armed with pangas and rungas while a person stood at PW1s door. That he heard Baya shouting "msimpige mfungeni Kamba". He said Baya had an affair with his mother, but when the deceased heard that the accused was being tied he questioned why and PW1 told him he'll find the accused at the Chairman's place.

20. That he was led to the Chairman's home and at 11.30am, a police landcruiser came and was chafed and told he was going to be charged with the offence of murder. The accused said that his brother PW 2 told him the father died because of high blood pressure. He said he has been in custody since 2018 for the offence of murder which he did not commit. He said PW 2's wife recorded the statement but she did not testify because she differ with PW 1 over accused person's arrest. The accused said he had not differed with PW 1, PW 2, PW 3 & PW 4.

21. Upon close of the defence case the accused person's advocate was given time to file submission but as at the time of writing this judgment no submissions are in the file.

22. In consideration of the prosecution evidence on record and on the defence case the issues for this court determination whether the ingredients of the offence of the murder as provided for under Section 203 of the penal code have been proved beyond reasonable doubt by the prosecution.

23. The elements of the offence of murder were set out in the case of Antony *Ndwega Ngare vs Republic [2014]eKLR* to include:-

**i. Fact of death**

**ii. That the death was caused by an unlawful act or omission**

**iii. That the accused person directly or indirectly participated in the commission of the alleged unlawful act or omission**

**iv. That the malice aforethought**

24. It is not in doubt that the deceased herein Musyoki Musembi Mutune died from exhibit P4 postmortem report which was produced by consent of the defence counsel the cause of death was blunt injury to the head. Although there is no indication that any examination whether external or internal was done on the head to establish the alleged blunt injury.

25. PW 1, PW 2 & PW 3 all testified to the effect that the accused hit the deceased with a jembe handle when the deceased told him that he looked drunk and he should go to sleep and discuss whatever he wanted to discuss with PW 1 the following day. They also said that the accused followed the deceased into the house and wanted to cut him with a panga but PW 2 hit his hand and the panga fell, it was also the prosecution evidence that the accused pushed the deceased against the wall where a plough had been placed. It was after the accused hit the deceased on the head with a jembe handle and later pushed him against the wall in the house that the deceased was found died while seated on the floor leaning against the bed while foaming on the mouth and the nose.

26. The act that led to the injuries sustained by the deceased were unlawful and they were directly committed by the accused person herein.

27. Whether the accused had malice aforethought or not this court has noted that the prosecution evidence of PW 2 indicates that the deceased told the accused to go and sleep as he looked drunk and he could talk to this mother the following day and the accused person is drunken stupor questioned why the father was telling him he was drunk as if he had brought for him 'mnazi' and then went ahead to beat the father. In consideration that there is evidence that the accused was drunk at the time he assaulted the deceased, this court finds that he was not in the right state of mind for this court to conclude that he was actuated with malice aforethought sufficient to commit offence of murder. In the circumstances this court finds that the accused person is guilty of the offence of manslaughter for which he is convicted.

28. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT, THIS 31ST DAY OF MARCH 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel - Court Assistant

Ms. Kambaga for the State

Mr. Paul Magolo Advocate for accused

Accused – present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**Ms. Kambaga**

Accused may be treated as a 1<sup>st</sup> Offender.

**Mr. Magolo Advocate**

I pray for adjournment.

**Order**

Further mention – 2/6/2022 for Victim Impact Statement mitigation and sentence. Production Order to issue.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**



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