



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mugo (Criminal Case 01 of 2020)
[2023] KEHC 254 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 01 OF 2020
LM NJUGUNA, J
JANUARY 25, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER MURIUKI MUGO ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence being that on January 20, 2020 at Karurina Trading Centre, at Itabua sub location, in Mbeti North Location within Embu county murdered Erick Gitonga. Upon arraignment in court, the accused herein pleaded not guilty and the prosecution called six (6) witnesses in support of its case.
2. PW1, Phylis Muhonja, testified that she performed an autopsy on the body of the deceased and on the external, the body had a semi-circular fracture. On the top of this fracture, there was extradural hematoma and below it, was a massive extensive global subdural hematoma with blood edema bleeding extending to the occipital region and the brain was swollen. The doctor formed an opinion that the cause of death was severe head injury due to subdural hematoma and due to massive blunt force to the head. Further, she produced the mental assessment report in which, the accused was found mentally fit to stand trial.
3. PW2, James Muriithi Njeru testified that on January 18, 2020 at around 7:30pm he was at Karurina market resting outside a hotel when he saw the deceased and the accused quarrelling because the accused had allegedly taken the deceased's phone. The accused hit the deceased on the legs and he fell down on his back with his head hitting the murrum ground and thereafter, the accused ran away. That together with others, they lifted the deceased and placed him by the road side. He left when the deceased was being attended to, by other people and went to pass the information to the deceased's family.



4. PW3, Lenic Fundi stated that he is a friend to both the deceased and the accused. He stated that on January 18, 2020 at about 7.30 pm while in the company of PW1, he saw the deceased and the accused quarrelling over a phone. The accused hit the deceased on his legs after which the deceased fell and hit his head on the murram road; that although it was at night, there were security lights that enabled him to see well. He was later taken to hospital with injuries on his head and he was bleeding from the mouth and was not talking.
5. PW4, Joseph Gichovi Mwaniki stated that on January 18, 2020, he received a phone call from Irene Wambogo who told him to go and check on the deceased who had been hit. That he went to the scene and found the deceased lying on the roadside bleeding and the accused was also there. It was his evidence that he took the accused to Itabua police station where they reported the case and was given a letter by the police and took the deceased to Embu level 5 hospital. It was his evidence that the deceased died on January 20, 2020 and thereafter, during the autopsy which was conducted at Embu Level (5) Hospital, he identified the body of the deceased. On cross-examination, he stated that he did not witness what happened between the deceased and the accused person.
6. PW5, Irene Wambogo stated that on the material day while at her work place, someone went and informed her that the deceased had been hit. That she went to the scene and found the deceased lying down and was bleeding from the mouth. It was her evidence that she was informed that the deceased had been hit by the accused herein and that people wanted to lynch the accused but she restrained them. Afterwards, they took the deceased to hospital and passed through Itabua police station to report the incident.
7. PW6, PC Bernard Waweru testified that he was the investigating officer in this case and that the deceased reported the case of assault at Itabua police station at around 2140 hrs and the report was booked in the OB. That the deceased complained that he was assaulted by the accused herein at Karurina market who hit him on the legs as a consequence of which, he fell and injured his head. He further testified that on January 20, 2020 he went to check on the deceased at the hospital to issue him with a P3 form and record his statement but found that he had succumbed to his injuries. It was his evidence that there was a mobile phone which had been stolen from the deceased valued at Kshs 1,300/= and the same was evidenced by a receipt. He further stated that he also got information that the accused and the deceased were arguing over Kshs 100/=. Therefore, he recorded the statements from the witnesses and photographs were taken at the scene.
8. At the close of the prosecution's case, the court via a ruling delivered on February 23, 2022, found that the accused person had a case to answer and placed him on his defence.
9. Peter Muriuki Mugo (the accused person) testified under oath that on the material day, he had gone to work, in the company of the deceased and later they went to his house to charge his phone; that they left it at home and went to Hussle 3 bar for some drinks. That at about 7.30 pm they got so drunk and the deceased was disturbing him and so, he left the deceased in the bar and went home as he had wanted to buy swine feeds. That he found the aunt to the deceased in a shop who asked him what had happened between him and the deceased. That the aunt told him the deceased had collapsed and so they went together to check on the deceased and found him lying on the stony murram road. He testified that they took the deceased to the hospital, but he didn't accompany them as he was detained at Mugoya Police Station where he stayed for 3 days before he was released but rearrested on the same day.
10. After the close of the defence case, directions were taken that parties do file their submissions but only the accused person complied with the said directions. He submitted that the prosecution failed to prove the elements of the offence of murder and that, he was used as an easy scapegoat. That, there was no evidence linking him to the death of the deceased save for the fact that he was in company of the



deceased on the fateful day. That, the evidence adduced by the prosecution did not meet the threshold as required by the law. Reliance was placed on the case of *Manyara s/o Malakani v Reginum*. In the end, this court was urged to acquit him.

11. I have considered the evidence presented before this court by the prosecution and the defence by the accused person. For the prosecution to secure a conviction on a charge of murder, it must prove three ingredients against an accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows: -
 - a) the death of the deceased occurred.
 - b) that the accused committed the unlawful act which caused the death of the deceased; and
 - c) that the accused had malice aforethought.
12. As for the death of the deceased having occurred, it is not in doubt that the deceased died. PW1 testified that she conducted autopsy on the body of the deceased and the body was identified by Joseph Gicovi and Joseph Muchangi. Therefore, death was thus proven.
13. On whether the death of the deceased was lawful, under article 26 of the *Constitution* of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by the law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). PW1 testified that the death of the deceased was as a result of subdural hematoma due to massive blunt force to the head. The death of the deceased was definitely caused by acts which are not excusable by law.
14. As to whether the death was caused by the accused herein, I have perused the prosecution's evidence as presented before the court. PW1, PW2 and PW3 testified that the accused hit the deceased on the legs, as a result of which he fell on his back on a murrum road and his head was injured. This was further corroborated by the evidence of PW1 on the cause of death which was due to severe injuries to the head. From the evidence adduced by the prosecution witnesses, it is my considered view that it is the accused who inflicted the head injuries on the deceased and which were the cause of his death. The evidence adduced by the prosecution witnesses places the accused person herein at the scene of the crime.
15. As to whether the accused had malice aforethought, I am guided by the case of *Roba Galma Wario v Republic* [2015] eKLR where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
16. I am also guided by the Court of Appeal decision in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR in which the court stated as follows on prove of malice aforethought;-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR App No 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of



the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

17. This being a murder charge, the prosecution had the onus to prove *mens rea* and *actus reus*. The *actus reus* has been established. The *mens rea* of murder is traditionally called malice aforethought and it connotes existence of culpability or moral blameworthiness on the part of the accused person. In the instant case, could this court infer malice aforethought on the part of the accused herein? In the case of *Joseph Kimani Njau v Republic* [2014] eKLR the Court of Appeal stated:

“In both criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution ...”

In the present case,....we find that *mens rea* for murder was not proved. Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is unlawful act or omission that causes death of another.”

18. From the circumstances of this case, I find that the prosecution did not prove malice aforethought on the part of the accused. I substitute the charge against the accused from murder contrary to section 203 as read with section 204 of the *Penal Code* to manslaughter contrary to section 202 of the *Penal Code*.
19. I find the accused guilty of the substituted charge and I convict him accordingly.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

