



**Director of Public Prosecution v Ikiao (Criminal Case 20 of 2018)
[2023] KEHC 2942 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 20 OF 2018
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

STEPHEN KINYUA IKIAO ACCUSED

JUDGMENT

1. Stephen Kinyua Ikiao (Accused) is charged with two counts of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*.

Count 1- On 30th November 2012 at Kabari village, Mbaranga Location in Tigania East Sub-County within Meru county jointly with others before the court murdered Godffrey Mutuma.

Count 2 - 30th November 2012 at Kabari village, Mbaranga Location in Tigania East Sub-County within Meru county jointly with others before the court murdered Alex Munene.

Prosecution Case

2. PW1 Joses Muteithia who was 16 years old when he testified in 2018 recalled that on 30th November, 2012 at 6:00pm, he went with Godffrey Mutuma (Mutuma) and Alex Munene (Munene) who were his neighbors and age mates to the home of one Rahab; fetched water and each returned to their respective homes. That at about 9:00pm Rahab, Mwika, Salesio and Gaturuku who had torch lights went to their home and Rahab claimed that him and the other boys had stolen Kshs. 16,000/- from her home. The five urged him and his mother to accompany them and they went to the home of Mutuma and Munene and the three of them were taken to the home of Rahab where there was electric lighting and after chasing away their parents set upon him and his two friends beating them senseless. The witness stated that it was accused herein who was Chief of Thuuria Location that beat him with a cane causing him



- injuries. The witness later learnt that Mutuma and Munene had succumbed to the injuries sustained during the beating.
3. PW2 Peter Kalema, Mutuma's father was at home at about 09.00 pm on 30th November, 2012 when Rahab, Gaturuku and Jeremiah Mwika in company of Alex and his mother went to his home. That Rahab asked to see Mutuma and when Mutuma went out Rahab asked him that he had stolen 16,000/- from her house which he denied. The witness and his son Mutuma joined the team and they proceeded to the home of Munene and Munene and his mother accompanied the team to the home of Accused herein who was the area assistant chief and they found him with one Salesio Miriti. That Accused ordered the boys to undress together with Salesio, Gaturuku and Mwika started beating the boys. That Accused them directed Salesio, Gaturuku and Mwika to throw them into a place full of stinging thistle plants where they beat them up with the stinging thistle plants after which they escaped leaving them for dead. The boys were subsequently taken to hospital where unfortunately Munene and Mutuma succumbed to their injuries.
 4. PW3 Christine Katunge, mother to Munene testified that on 30th November, 2012 at about 8:00pm she was at home when Mutia, Gaturuku and Rahab went to her home and asked for her son Munene who had with other boys allegedly stolen money from the house of Rahab. That they dragged out her son and she followed them to the homes of Godfrey and Mutethia where the two boys were picked and all of them proceeded to Rahab's home. That Mutia and Gaturuku took away the children allegedly to interrogate them and after sometime, she heard the boys screaming and she went to check on them found Salesio, Mutia and Gaturuku beating the boys but they went away leaving the boys naked, unconscious and seriously injured. That she screamed and people went to the scene and helped her take her son to hospital where he later died.
 5. PW4 Lucy Kawira testified on 30th November, 2012 at about 8:00pm Rahab, Gaturuku, Mwika, Salesio, Katunge and Munene went to her home and said that her son Peter Muteithia and other boys had stolen money from Rahab's house. That she followed them after they took her son away and they passed by the homes of Mutuma and Munene who accompanied them together with their parents. They met Accused who was an assistant chief on the way and they proceeded to Rahab's house where Accused interrogated the boys concerning the allegedly stolen money and beat them up. That Accused and the other men took the boys away and they could hear the boys screaming and wailing. That later, Salesio was sent to call her and the other boys' parents and they found the boys lying on the ground naked and seriously injured and Mutuma had already died. The other two boys were taken to hospital where Munene also died.
 6. PW5 Dr. Sammy Githu Wachira on behalf of his colleague Dr. Michael Kariuki who had gone back to school for further studies produced post mortem reports for 11-year-old Godfrey Mutuma and for 10-year-old Alex Munene as PEXH. 1 and PEXH. 2 respectively The report for Godfrey Mutuma revealed sub conjunctival hemorrhage on both eyes which were swollen, bruises on the trunk each measuring 1x1 cm, bruises on trunk posteriorly each measuring 1x1 cm, penile skin was overstretched, had a crushed trachea bone and hyoid bone which demonstrated he was strangled and there was evidence of brain oedema. An opinion was formed that the deceased died of cardiopulmonary arrest due to asphyxiation. The report for Alex Munene revealed protruded eyes with extensive sub conjunctival hemorrhage on both eyes, bruises on trunk each measuring 1x1 cm, bruises on trunk posteriorly each measuring 1x1 cm, fractured hyoid bone and bleeding through the nasal cavity, sub scalp bruise frontal area and bleeding on the left side of the brain. An opinion was formed that the cause of death was cardiopulmonary arrest due to asphyxiation and head injury caused by a heavy object.
 7. On 24th December, 2012, PW6 Kenneth Kimathi a clinical officer examined 12-year-old Joses Mutethia Kirema (PW1 herein) who had a history of having been assaulted by people known to him. He had



tenderness on neck region, bruise and swelling on both knee joints and gluteal regions caused by a blunt object. The degree of injury was assessed as harm as evidenced by the P3 form as PEX3.

8. PW7 SSgt Abdul Muhamed recalled that on 01st December, 2012 about midnight, 2 cases of assault were reported by Mutuma and Munene who were accompanied by their parents. That he asked the parents to take the boys to hospital and the following morning on 02nd December, 2012, the parents reported that the boys had died while undergoing treatment. He subsequently arrested Accused person after he was alleged to have failed to prevent the beating of the boys.

Defence Case

9. In his sworn statement, Accused who is assistant chief Thumbuku Sub-Location denied the offence. He stated he got information about the murders herein on 01st December, 2012 and was arrested on the same day and subsequently charged. He stated that the first report of murder did not contain his name. His witness Rahab Kananu stated that some 16,000/- was stolen from her house on 30th November, 2012 and he suspected Joses Mutethia, Mutuma and Munene who had gone to her house to fetch water. That in company of Gaturuku and Mwikia, they went for the boys from their homes and she left them being interrogated and returned home only to learn the following morning that two had died.

Analysis and Determination

10. Section 203 and 204 of the *Penal Code* under which the accused is charged provide for the offence of murder and the punishment for it. It requires that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

11. The issue for determination is whether the prosecution has proved their case beyond reasonable doubt. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the Court of Appeal stated the three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction being: -
 - (a) the death of the deceased and the cause of that death;
 - (b) that the accused committed the unlawful act which caused the death of the deceased and
 - (c) that the Accused had the malice aforethought.

(a) The death of the deceased

12. There is no dispute that the two boys Mutuma and Munene died. As detailed hereinabove, Mutuma suffered sub conjunctival hemorrhage on both eyes which were swollen, bruises on the trunk each measuring 1x1 cm, bruises on trunk posteriorly each measuring 1x1 cm, penile skin was overstretched, had a crushed trachea bone and hyoid bone which demonstrated he was strangled and there was evidence of brain oedema. He died of cardiopulmonary arrest due to asphyxiation. Alex Munene suffered protruded eyes with extensive sub conjunctival hemorrhage on both eyes, bruises on trunk each measuring 1x1 cm, bruises on trunk posteriorly each measuring 1x1 cm, fractured hyoid bone and bleeding through the nasal cavity, sub scalp bruise frontal area and bleeding on the left side of the brain. He died of cardiopulmonary arrest due to asphyxiation and head injury caused by a heavy object.



(b) Proof that accused committed the unlawful act which caused the death of the deceased

13. Our Criminal Law recognizes the sanctity of life by prohibiting the unlawful killing of another human being. The right to life is entrenched in Article 26 of *the Constitution*.
14. At the trial, the burden is on the prosecution to prove that Accused's action/s was a significant contributing factor of the deceased's death.
15. In the instant case, the PW1 stated that Accused was with Rahab, Mwika, Salesio and Gaturuku on the night he and his two friends were assaulted, resulting in the death of his friends. Whereas he did not state that he saw Accused assault the deceased boys, he singled him out as the one that assaulted him, causing him injuries as evidenced by the P3 form marked PW3.
16. On his part, PW2 identified Accused as the one that ordered the boys to undress, beat up PW1 after which Salesio, Gaturuku and Mwika started beating the other two boys. He also faulted Accused for directing Salesio, Gaturuku and Mwika to throw the boys into a place full of stinging thistle plants where they beat them to a pulp using stinging thistle plants. PW4 similarly stated that Accused had interrogated the boys and beat them up.
17. I have considered the evidence on record and I find the Prosecution case that Accused was at the scene of the crime well corroborated. And even if the court was to believe that Accused did not assault the boys, his action of ordering the boys to undress and handing them over to Salesio, Gaturuku and Mwika who beat two of them to death reveals a common intention that led to the commission of the offences charged and he cannot escape blameworthiness. (See Section 21 of the *Penal Code*).
18. In *Njoroge v Republic*, [1983] KLR 197 at p. 204, the Court of Appeal stated that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”
19. Concerning proof of common intention, the predecessor of the Court of Appeal referring to its earlier decision in *R v Tabulayenka s/o Kirya* [1943] EACA 51 and stated that: -

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”
20. Common intention does not only arise where there is a pre-arranged plan or joint enterprise and can develop in the course of the commission of an offence. The Court of Appeal in *Dracaku s/o Afia v R* [1963] E.A.363 where there was no evidence of any agreement formed by the appellants prior to the attack made by each held that:

“it is not necessary if an intention to act in concert can be inferred from their actions” like
“where a number of persons took part in beating a thief.”
21. The same scenario applies to this case. I find that the prosecution has proved beyond any reasonable doubt that Accused and others participated in assaulting Jose Muteithia (PW3) and committing the unlawful acts which caused the death of Mutuma and Munene.



c) Malice aforethought

22. The offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the Penal Code evidence proves 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 who has committed or attempted to commit a felony.”

23. In the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that:

“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack”

24. Accused and others dragged the boys aged 8-11-years from their homes at about in the night. They stripped them naked and beat them up using stinging thistle. The parents of the boys were not allowed to intervene on behalf of the boys and were denied an opportunity to repay the money the boys had allegedly stolen.

25. The description of the injuries suffered by the boys is heart-wrenching. It is hard to imagine the amount of pain and degradation these children went through at the hands of the Accused person and others. By the time the assault stopped, the boys lay semiconsciously in a heap on the ground, immobile and had to be carried away subsequent to which Mutuma and Munene died. The grief, anguish and distress that the parents of the young boys went through when the boys wailed and screamed for help and upon losing the two boys is unimaginable.

26. From the foregoing, I find that the attack on the boys shows the maliciousness and heartlessness on the part of Accused person. The 10 and 11-year-old boys did not have to die as painfully as they did. That there was an intention to kill the boys is explained by the breaking of their neck bones among other serious injuries inflicted on them. I therefore find Accused guilty of the two counts of murder and convict him accordingly.

DELIVERED AT MERU THIS 30TH DAY OF MARCH 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present



For the Accused - Mr. Muriuki Advocate

For the State - Ms. Rita (PC 1)

