



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC 122 OF 2017

REPUBLIC.....PROSECUTION

–VS–

JOSEPH WAMBUA NGILE.....ACCUSED

JUDGMENT

1. The accused person herein stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of offence are that on 22nd September 2017 at 4:30hrs at Yuamba Village in Nziu Location in Makueni County jointly with another not before court murdered Newton Kyalo Ngile.
2. The prosecution has called nine (9) witnesses in the case. Pw1 Emmanuel Loiposha a doctor at Makueni Hospital prepared and produced the post mortem examination form. His testimony was that he conducted post mortem examination on 4/10/2017 and the deceased was a male African about 27 years old. He noted deep lacerations on the chin, left armpit, scalp, right knee, and right hand. There were also visible burn wounds on scalp, legs, hands, and stab wounds on 1st, 4th and 5th intercostal space of left chest. Cause of death was severe chest injuries which were inflicted by a sharp object.
3. Pw2 was Magdalene Wanza Ngile mother of the deceased Kyalo Ngile. Her evidence was that on 22/9/2017 her employee Mutua Ndeme (Pw7) informed her that people were saying that Kyalo had been killed. She learnt later that Kyalo had been killed at Mikwani bar.
4. Pw3 Stephen Musembi stated in evidence that he went to a bar to play games at 8pm on a date he could not recall. At the bar he saw Joseph Wambua, the accused, but not the deceased. Joseph Wambua (*the accused*) was with Mukuva Kioko and Micah, all being brothers. Micah carried a panga, Mukuva an axe, Wambua a stick, and Kioko carried something he did not describe.
5. According to this witness, he left the bar and went on a motorbike to Mlolongo and phoned the bar owner about the armed men. He later heard screams and proceeded back to the club and informed people about the screams. They then heard sounds of trees being cut and two screams from a woman, and so he phoned the village elder Kithome Mbuvi about the happenings. He later met the village elder and on the way they met Kioko, Micah and Mukuva on a motorbike and Mukuva informed the village elder that their mother had collided with Kyalo and that when they attempted to take Kyalo home he overpowered them, injured Wambua and ran away. However, on noticing blood stains, the witness and the village elder proceeded to the river and saw the body of Kyalo dumped there.
6. Pw4 was Bernard Albanus Muoto whose evidence was that on 22/9/2017 at 9pm, he was on duty at Age Lodge Club as a Cashier when Newton Kyalo (the deceased) came to that club. Thereafter the deceased's brothers Mukuva Micah, Muthiani, Kioko and Wambua came and called Kyalo outside. Next morning he received information that Kyalo had been killed in his father's farm about 1 ½ kilometers away. He did not see the accused Wambua Ngile in the club that night. That night also he heard screams coming from outside Kyalo's home. He clarified that those who came to the club were Mukuva Ngile and Micah Ngile.
7. Pw5 was James Kithome Mbuvi a village elder, whose evidence was that he heard screams at night on 22/9/2017 from Christine Munyiva who told him to go to Mlolongo market because someone had been killed. On proceeding there he found many people and met three brothers Mukuva, Kioko and Mwanthi Ngile on a motorbike and when he enquired what was happening at their home, they said through Kioko that it was a family matter and that Kyalo had ran to their sister (Naomi's) home.
8. Together with the crowd, he followed blood marks to the dried river where they saw the body of Kyalo with several visible injuries and an acid container and a plastic bottle on the stomach. Though Wambua was arrested later, he did not see him that day. He had not seen Kioko and Mukuva thereafter, nor did he know whether they were arrested.
9. Pw6 was Elizabeth Waithera Onyiego a Government Analyst who examined a panga, another panga, a sisal rope, blood sample of the deceased and mouth swabs from the accused. Her report was that the panga (A) and rope (C) were stained with human blood but did not generate DNA. Panga (B) had no blood stains. According to her, the items sent to the laboratory for examination and analysis herein were

mishandled, thus no DNA findings were recorded.

10. Pw7 was Josephat Mutua Ndeme a casual worker of the mother of deceased who in September 2017 worked for Samuel Ngile. According to him, on 21/9/2017 the deceased came home at noon and briefed her mother that he had taken the rope from Musee Kisima Ngile and thrown it into the latrine, because he suspected Musee to be a witch. The two (mother and son) quarreled and the deceased threatened to kill the mother.

11. Then neighbours informed Wambua (accused) about the incident, and a few minutes later Michael and Kioko his brothers joined him and all three asked the deceased why he was not giving people peace and the deceased picked a stick and hit the accused and ran away. According to the witness, deceased was armed with a panga.

12. It was also his evidence that at 11pm the same day, he heard noises from Mlolongo market direction about 1 ½ kilometres away, and though Magdalene (mother of deceased) woke him up and he went to the gate he saw nothing. Shortly after, Magdalene called him again and told him to check as she was seeing lights, and on checking saw a group of people in the vegetable farm who informed him that the deceased had been killed. He saw the village elder Kithome Mbuvi among the group. They then made a report about the incident to the police. According to him, the accused was charged with this offence merely because previously the deceased had hit him with a hoe handle.

13. Pw8 was No. 46623 Sgt. Paul Kiilu of DCI Makueni – who attempted to testify on photographs, but was objected to and stood down.

14. Pw9 was Cpl. Paul Kinga Maina who testified that, together with Cpl. Ombati they proceeded to the scene led by the village elder. At the scene, they retrieved weapon from a pit latrine, which he sent to the Government Chemist for analysis. He stated that 3 people were suspected to have committed the offence. The 1st suspect is the accused herein, and two others were arrested when 7 witnesses herein had already testified. He produced the exhibit memo, two pangas, and a sisal rope as exhibits.

15. Pw10 was No.63937 Sgt Samuel Ombati a Scenes of Crime officer who took photographs of the scene, the deceased and the exhibits. He produced the photographs as exhibits.

16. When put on his defence, the accused tendered sworn testimony denying committing the offence. He stated that on the material day, there was a family disagreement because the deceased had insulted and threatened their mother at around 1:30pm. He with his brothers, proceeded there and held the deceased and then they agreed that each should go to their own engagements. At 9:30 pm again he heard noise from the Mlolongo market direction. According to him, the noise was from his brothers Micah and Mukuva saying that they would kill Kyalo. He then witnessed Boniface Mukuva and Michael (Micah) cutting Kyalo with a panga. He however did not make any effort to report the incident.

17. This being a murder case, the prosecution is required to prove all the elements of the offence beyond reasonable doubt as this is a criminal case. This burden was on the prosecution throughout and never shifts to the accused person.

18. The first element is the death of the deceased. Did the deceased die? The evidence both for the prosecution and the defence is that the deceased died. He suffered many deep cuts and wounds in his body. The medical evidence is clear and conclusive that he died and the cause of death is also clear. It was certainly a violent death as the evidence of Dr. Emmanuel Loiposha (Pw1) was that he had visible lacerations in the chin, left armpit, right knee, right hand and multiple left chest stab wounds. I find that the prosecution proved beyond doubt that the deceased died.

19. The second element is whether the accused caused the death of the deceased. No one testified to seeing the accused kill the deceased. The case is thus a case of circumstantial evidence. Such circumstantial evidence, to sustain a conviction has to point irresistibly to the guilt of the accused and there should be no other reasonable hypothesis than that of his guilt. See **Ahmed A. Mohamed & Anor –vs- R (2018) eKLR and Sawe – vs- R (2003) eKLR**. In the sawe case, the Court of Appeal pointed out that the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

20. There is no doubt from the evidence, that the deceased was a family trouble maker, and continued to do so constantly both to the mother and his siblings who included the accused person. That day also, he had threatened the mother with death. The accused who was also called Musee was seen at the Age Lodge Club that night by Pw3 Stephen Musembi Mutua with his brothers Mukuva, Kioko and Micah and all were carrying weapons. The accused himself said that he was at the scene of the killing of the deceased. He did not however, attempt to report the killing even to his mother.

21. In my view, though the accused put the blame of the killing on his two other brothers, he was proved through circumstantial evidence to have participated in the killing of the deceased. He was a principal offender. Thus in my view, the prosecution proved beyond any reasonable doubt on circumstantial evidence that the accused caused the death of the deceased.

22. Was the death of the deceased caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code, in brief it is premeditation to kill or cause grievous harm. In my view, in the circumstances of this case and based on the evidence on record, the killing of the deceased was not caused with malice aforethought, as he had been continually violent to the family and had consistently deliberately continued to be violent and a threat to the whole family. With the evidence on record, therefore, I find that the prosecution did not prove beyond reasonable doubt that the accused had malice aforethought when he killed the deceased. The offence for which the accused can be convicted of is thus the lesser cognate offence of manslaughter, contrary to section 202 of the Penal Code and I will so convict him.

23. Consequently and for the above reasons, I find that the prosecution has not proved the offence of murder for which accused is charged, but the lesser offence of manslaughter. Accordingly I find the accused guilty of manslaughter and convict him for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code accordingly.

DELIVERED, SIGNED & DATED THIS 26TH DAY OF JANUARY 2022, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE