



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 31 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

EVANS WAFULA MUTORO.....ACCUSED

J U D G M E N T

The accused **EVANS WAFULA MUTORO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **EVANS WAFULA MUTORO** on the 17th July 2020 at Matunda village in Butonge sub-location of Bungoma West Sub-County within Bungoma county murdered **WILLIAM MABAKU KITUYI alias "WILLY"**.

The case for the prosecution is on 17.7.2020 **PW2 Stephen Wafula Wanjala** was with Oscar Simiyu at the home of Alex Bwire together with Evans Mutoro (the accused) and Anthony Simiyu. While there Maraku (the deceased) came and started quarrelling with Oscar Simiyu. Seeing the commotion, Alex Bwire closed the selling of changaa to the group. The group then left and went to the home of Benjamin looking for more changaa. Juma refused to sell to them. The witness, Oscar Simiyu and Laban started going away with accused who was armed with a jembe stick hitting the iron roof of Arnold Kundu, and destroying maize belonging to the Chief. He then left accused on the road and when they came back they found accused assaulting the deceased using a jembe stick. They tried to intervene but were unable to stop the accused assaulting him. He then left. He was able to observe that accused was hitting deceased on the head. He then left. On 18.7.2020 he received information that deceased had been killed. He and others were arrested and later released.

On being cross-examined by Mr. Olonyi for accused he confirmed that when they saw accused assaulting deceased he tried to restrain him but he threatened them and they left and was still beating deceased. He stated that he was able to identify accused from his voice.

PW2 Oscar Simiyu testified that on 17.9.2020 at 7 p.m. he, Laban Simiyu went to the home of Alex to drink changaa. He found accused and Stephen (PW1) already there. They had changaa and then went to the home of Peter Wekesa where they had more changaa. After drinking the changaa, the witness, and accused started going home. On the way accused started making noise and hitting the roof of Arnold and destroying the Chief's maize. They left and on coming back to the road he saw accused assaulting the deceased, using a jembe stick. The deceased appeared drunk. He left them and went home. The next day he received information deceased had died.

On being cross-examined by Olonyi the witness stated that accused had told him not to tell anybody that accused had assaulted deceased. He confirmed in re-examination that he saw the accused hitting the deceased.

PW4 Benson Juma Kai testified that he was at his home when Oscar and Laban came to his home and asked to be sold changaa, at 7 p.m. He told them to leave. He then slept. At 10 p.m. his wife informed him that deceased had been beaten and was at the road. He went there and found deceased lying down with injuries on the head. The deceased was taken to hospital. He and the village elder arrested accused and took him to Bukokholo police post. He confirmed on cross examination by Olonyi for accused that deceased was found 30 meters from his (witness) house. He however confirmed he did not see who killed the deceased but was informed by village elder that accused was a suspect.

PW5 Joseph Kalubenga Kituyi the brother of deceased was informed on 18.7.2020 at 6 a.m. by Gladys Nanjala that deceased had been injured. He went and found deceased had injuries. He took him to Sirisia hospital where he died while undergoing treatment. He confirmed he did not know who killed him.

PW6 Antony Simiyu went to the home of Benson Juma to drink Changaa and he bought changaa for Kshs 80. He stayed there up to 8.p.m. where he went to the home of Alex for more changaa, and then later to the home of Peter Wekesa. At the home of Peter Wekesa he found Stephen (PW2) Oscar (PW3) and Evans (accused). The rest left earlier than him. When he was on his way he met accused who wanted to attack him. He (witness) ran to the home of Peter who escorted him to his (witness) house. The next day he received information that deceased had been beaten and was in critical condition. He later learnt that he died.

On being cross examined by Olonyi for accused, he stated that he knew accused well and that he normally stays in Nairobi and had only been at home for one month. He admitted he did not know what happened to the deceased.

PW8 Alex Juma Barasa was at his home when deceased, accused and Stephen (PW2) and Ferdinand came and bought changaa, Laban and Oscar also came, but they appeared drunk and he did not sell them changaa. The deceased drunk changaa. He closed the sale at 8 p.m. and Laban and Oscar who were the last ones left. The next day he received information deceased had been killed.

PW10 No. 219333 Supt of police Joseph Bahati Keunga took an out of court confession from the accused in the presence of accused's father Patrick Mutoro. He informed him of the charge and administered the usual caution and were communicating in Kiswahili Language. He produced the statement that there being no objection from Mr. Olonyi for accused as prosecution Exh. 2.

PW11 No.225254 Copl Bernard Mulubi the Investigating officer received the report of the murder. He visited the scene and was informed a suspect had been arrested. He recorded statements of witnesses and informed DCIO that accused intended to make a confession. The OCS recorded accused's statements and later caused accused to be charged with present offence.

The accused upon being placed on his defence gave sworn evidence. He testified that on 18.7.2020 one Juma came to him and told him there was a person who wanted to give him casual work at Bukokholo market. He accompanied him to the market. While at the market Juma left saying he was going to buy credit. He sat on a bench to wait for him. Shortly after police officers came and arrested him. He knew the deceased as a bicycle and motor cycle repairer and he never met him.

On being cross-examined by M/s Omondi, he confirmed that Juma is a nyumba kumi official. He stated he did not drink changaa with deceased and that on 17.7.2020 he drunk changaa and went home at 6.30 p.m. He met Stephen (PW2) but stated that it is not true that he assaulted the deceased.

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Sec. 203 provides.

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

The ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- a) The fact and cause of death***
- b) The unlawful act or omission that caused the death***
- c) That it is accused who occasion the unlawful act or omission or inflicted the injuries that caused the death***
- d) That the accused had the intention of causing death or malice aforethought.***

On the fact and cause of death, **PW1 Dr. Harun Ombangi** who performed the post mortem on the body of the deceased found that he deceased a cut wound on the head 7 cm long, defence skull fracture on temporal region, cut wound on left eye, and mild haemothorax on right side. As a result of the examination he formed opinion that the cause of death was due to severe head injury as a result of assault. He issued death certificate No. 1647202. This witness therefore confirmed the fact of death and also the unlawful act that caused the death was due to assault.

The second issue the prosecution must prove is that it is the accused who caused the unlawful act that led to the death of deceased.

PW2 Stephen Wajala Wanjala testified that he saw the accused hitting the deceased. He and others tried to stop accused from continuing beating deceased but was unable. He confirmed accused was using a jembe stick in beating deceased. **PW3 Oscar Simiyu** who was also with accused in the changaa drinking party testified that he saw accused beating the deceased with a jembe stick. The accused made an out of court confession before Mr. Joseph Bahati Kenga a Superintendent of police in the presence of Patrick Matoro his father which was produced as exhibit 2. In explaining what happened the accused stated:

“I can recall very well that on 17.7.2020 at about 9.00 p.m., Laban Simiyu, Oscar Simiyu, Steve Wanjala and I went to drink traditional liquor changaa in the home of one Alex Barasa within Matunda. We took the liquor till 10 p.m. and we all left and proceeded home. We had taken enough and I can say we were drunk. We are all neighbors in the village. As we were walking home, Oscar spotted someone lying on the road side and he alerted us that there was someone lying at the road side. Oscar went near the person and held him. I heard him calling his name as Willy. I realized that it was William Kitui of Bukokholo area. I saw William rise up and slapped Oscar on the face. At this time all the remaining three of us joined in and fought Willy and I left him there while unconscious and we went away. I wish to state that out of the four of us, Oscar had a bottle which was containing some liquor and it's the one he used during the fight, I had a walking stick and it's the one issued. Steve Wanjala had a plastic bottle and during the fight he used blows and punches. Laban Simiyu had no weapon so he used kicks. When we overpowered him, we just left him there and we went away. Today 18.7.2020 at around 8 a.m. while I was at home I saw Benson Juma and Alex Tsakari who came and told me that the person we had beaten last night had been taken to hospital today morning and he had died. They then took me to Bukokholo police post where I was arrested and taken to Malakisi police station.”

From the evidence of **PW2 Stephen Wajala** and **PW3 Oscar Simiyu** and the statement by the accused, it is clear that accused did inflict injuries either alone or with others on the deceased. The deceased sustained the fatal injuries that night and accused is among those who inflicted the injuries according to his statement. These are the injuries from which the deceased died. I am therefore satisfied and do find

that accused assaulted the deceased and inflicted the injuries that caused his death.

The prosecution has to establish that accused had the necessary intention or malice aforethought when committing the offence. Malice aforethought is defined in Section 206 Penal Code as.

Section 206. Malice aforethought shall be deemed to be established by evidence proving 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.

From the evidence of the doctor, the injuries inflicted on deceased were concentrated on the head and neck of the deceased. This are parts of the body that are vital for body function and whose injury is fatal. The accused inflicting the injuries targeted vulnerable part of the body to cause maximum injury or death. This is what happened in this case. The court can therefore infer that the accused did intend to cause grievous harm to deceased or death as it happened in this case. I am therefore satisfied that he possessed the requisite malice aforethought.

After considering all the evidence including defence of accused, I am satisfied the prosecution has proved a charge of murder against the accused. I therefore find the accused **Evans Wafula Mutoro** guilty of the offence of murder contrary to Section 203 as read with Section 204 Penal Code and convict him accordingly.

DATED AT BUNGOMA THIS 29TH DAY OF MARCH, 2022

S.N RIECHI

JUDGE