



**Republic v Meraba (Criminal Case 43 of 2018)
[2022] KEHC 10665 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 43 OF 2018
RB NGETICH, J
MAY 26, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

STEPHEN ONDICHO MERABA ACCUSED

JUDGMENT

1. The accused Stephen Ondicho Meraba was charged with the offence of murder contrary to section 203 as read together with section 204 of the *penal code*. Particulars are that, on 18th August, 2015 at Kamwaura area in Kuresoi North sub-county within Nakuru County he murdered Gerald Musioma Nyangau.
2. The charge and its full particulars were read over and explained to the accused on 19th September 2018. He pleaded not guilty. He was granted bail on his recognizance of Kshs 300,000/= with one surety of a similar amount on 20th September 2018. In the trial, the prosecution called 7 witnesses.
3. PW1 Caroline Bosibori testified that on 17th August 2018, she was at home waiting for her husband (Jared Musyoma). She said when he arrived, he reached the door and requested her to hold his hand to help him get to the house. She said the deceased went straight to bed instead of going to the kitchen first as has been his practice.
4. PW1 said she noticed mud on his leg and cleaned her legs. She also noticed a wound on the hand of the deceased and when she inquired what had happened, the deceased told her Ondicho had finished him. PW1 went out to call PW3 (Derrick) the deceased's brother and the deceased also told PW3 Ondicho had injured him. PW1 said she called the deceased's mother PW2 who gave him pain killer to ease the pain.



5. PW1 stated that when she went to accused's house to inquire about the injuries, the accused told her he wanted nothing to do with the deceased. She said the deceased was taken to hospital by PW2 and PW3 where he died on 18th August, 2018. She said Ondicho is accused whom she identified in Court.
6. On cross-examination by Ms. Mugweru for the accused, she stated that the deceased had no dispute with the accused before the fateful day and the deceased only mentioned Frida. She further stated that the deceased was drunk but was walking. She said the deceased and accused were friends and neighbours and at times they would work together. She stated that she never witnessed accused injure the deceased.
7. PW2 Milka Nyaboke Nyangau testified that on the night of 17th August 2018, she was in the house when PW1 called and informed her that Musyoma (deceased) had been injured. She went to the deceased's house and found him in bed complaining of pain. She said the back of his head was swollen and the next day she went to see the deceased. She found his wife PW1 had gone to confront the accused in his house.
8. From PW2'S evidence, the deceased was unable to talk in the morning as he was injured in the throat. She said they called a neighbour by the name Frida who had been seen walking with the deceased and on inquiry Frida said her in-law Ondicho who is the accused herein hit the deceased.
9. During cross-examination, PW1 said she had known the accused for 2 years and the accused and the deceased used to walk together. She however said she was not aware of any conflict between them. She said the deceased never said anything else and he never talked again.
10. PW3 Frida Chepkoech Langat testified that on 17th August 2018 the accused passed by her home with his brother-in-law and asked for a pump for spray. She said he appeared drunk and that he went back shortly and told her deceased had insulted him and that he hit the deceased twice at the stage near the shop. She said she knew the accused as he was her friend and they worked together. She asked his brother-in-law whether what he was saying was true and he said yes.
11. PW4 Lemek Nyanga testified that on being informed by PW1 that the deceased was injred by the accused, he went to see him and and together with PW2 they massaged and applied rob on the deceased to ease the pain. He said the deceased informed them that he was injured by the accused.
12. During cross-examination, he stated deceased and accused were friends and did casual jobs together.
13. PW5 Dr. Kibiru Ngari performed postmortem on the deceased's body at St. Joseph's Nursing and Maternity Hospital and filed postmortem report on 23rd August 2018. He confirmed there was evidence of external injuries on the head; that there was evidence of massive bleeding on the brain extending from the front to the backside caused by blunt trauma. The entire right side of the head had bled; the conclusion was that the patient had a head blunt injury and with such injury if there is no intervention, the patient succumbs.
14. PW6 Cpl. Martin Mutta Chokwe testified that Stephen Ondicho Meraba was arrested for assault of Jerald NzumaNyangau on 18th August 2018. He said the report was made by the family of the deceased. Later Kimwele received a report from the family that the victim succumbed to the injuries. The suspect was charged with murder report of the death of the deceased.
15. PW7 CPL Jacob Ndingira confirmed that he rearrested the accused from the officers at Kamwaura Police Post for assault and issued a P3 form to accused's mother.
16. The prosecution then closed its case. A prima facie case was later established to have been made and the accused was placed on this defence. The accused opted to give unsworn testimony but did not call any witnesses to support his case.



17. On being placed on his defence, the accused Stephen Ondicho Mareba testified that on the 17th day of August 2018, he went to work from 6.00 am until 1.30 pm and went to a centre called Sitoito and had some drinks with some friends. He said he started going home from around 6.00/7.00 pm. He said on the material day he was not with the deceased neither had he seen the deceased 4 days prior to the 17th of August 2018. He denied attacking the deceased and was not aware that the deceased was attacked. He said the deceased was his friend and a colleague; further that the family of the deceased was a pivotal pillar in their lives as they used to offer manual jobs to the accused and his wife.
18. The defence Counsel Ms. Mugweru for the accused filed written submissions while the prosecution choose to rely on the evidence on record.

Accused's Submissions

19. The defence counsel filed written submissions dated 22nd February 2022. She submitted that the prosecution failed to prove the charge of murder against the accused person; that the prosecution failed to investigate the matter as well as call crucial witnesses to assist in their case. She submitted that PW3 Frida stated that Ondicho had passed with shemeji on the night when the fight ensued but the police did not investigate the matter.
20. She further submitted that the prosecution evidence is tainted with several contradictions. Counsel submitted that PW2 contradicted her written statement with what she testified before the court; that in her statement, she had indicted the deceased had told her Ondicho injured him during the trial. She indicated the deceased was not in a position to talk.
21. She further submitted that the evidence of the prosecution is marred with glaring inconsistencies as regards time in that according to PW3, the accused passed by her home from around 7.00 pm to 7.30 pm which was before nightfall and if he assaulted the deceased, people would have witnessed it. On the other hand, the deceased is said to have gotten home past 2300 hours and there is no explanation offered on the deceased whereabouts between 7.00 pm and 2300hours.
22. It is also submitted that the prosecution failed to call witnesses who identified the body of the deceased at the mortuary when the postmortem was being conducted. It is submitted in the absence of proper identification of the body the prosecution failed to prove the alleged Gerald Musioma is deceased and the body is the one identified by Boston and Siebet. Further counsel submits no explanation has been adduced as to why the postmortem was conducted in a private facility, and how the body of the deceased was transferred from the government hospital to the private facility.
23. Counsel further submitted the prosecution has failed to prove the facts alleged to exist; that the prosecution has failed to adduced evidence linking the accused to the scene of the crime.
24. She urged this Court to find that the prosecution failed to prove their case beyond reasonable doubt that the alleged Gerald Musioma Nyangau is deceased and the charges against the accused cannot therefore stand and urged this Court to acquit the deceased.

Analysis and determination

25. I have considered the evidence presented by the prosecution plus the accused's defence and submissions filed by the defence counsel. What I wish to consider is whether the ingredients for the offence of murder were proved by prosecution beyond reasonable doubt. The three ingredients therefore being:-
 - i. Prove that the accused had the malice aforethought
 - ii. Prove that death is caused to the deceased



- iii. Prove that the accused committed the unlawful act which was the cause of death of the deceased.
26. Circumstances under which malice aforethought can be established are provided under section 206 of the Penal code as follows:-

“Malice aforethought shall be deemed to be established by proving any one or more of the following circumstances:-

- a. An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not
- b. The 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.”

(i) Prove of death

27. From the evidence adduced by the prosecution, there is no doubt there was the death of Gerald Musioma Nyangau. PW5 conducted the postmortem on the deceased body and his opinion was massive bleeding on the brain extending from the front to the backside, caused by blunt trauma and he concluded that he died as a result of the external injuries on the head.

(ii) Whether accused did unlawfully act which caused injury to the deceased

28. PW1 and PW2 both said the deceased told them its Ondicho the accused herein who assaulted him. PW3 testified that she had seen accused and deceased prior to the incident as they passed by her house and shortly after leaving, the accused went to her and told her she had hit the deceased twice. Even though the accused said in his defence that he had not seen the deceased for close to 4 days prior to the incident. He never adduced any evidence to explain his whereabouts the day of the incident or to prove where he was for the 4 days. He said on the fateful day he was at Soitio drinking with friends but never called his friends to corroborate his evidence. From the foregoing, there is therefore no doubt that he is the one who unlawfully caused injuries leading to the death of the deceased.

(iii) whether the accused had malice aforethought

29. The guidelines for trial Judges in consideration of malice aforethought were set out in the case of *Rex v Tubere S/O Ochen* 1945 12EACA 63 where the Court held as follows:-

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

30. Further, In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe* CACKA No. 32 of 1990, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008



eKLR and *James Masomo Mbacha v republic* 2015 eKLR the Courts have inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.

31. The external injuries on the head suffered by the deceased, which were evidenced by the massive bleeding are enough evidence to show the deceased was hit with a crude weapon. This is clear evidence of the intention of the accused to cause injury to the deceased.
32. Taking into account the circumstances of this case, I have established there is a clear manifestation of malice aforethought on the part of the accused person. The prosecution have therefore proved malice aforethought on the part of the accused person.
33. From the foregoing I find the prosecution have proved beyond reasonable doubt the accused herein murdered Gerald Musioma Nyangau. I proceed to find accused guilty of the charge of murder contrary to section 203 as read with section 204 of the penal code and convict him accordingly

Final Orders

34. Accused is convicted of the offence of murder c/s 203 as read together with section 205 of the penal code .

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU

THIS 26TH DAY OF MAY, 2022

RACHEL NGETICH

JUDGE

In the presence of:

Kemboi - Court Assistant

Accuse - present

Rita for State

Mugweru for Accused

