



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 48 OF 2016

REPUBLIC OF KENYA.....PROSECUTION

VERSUS

1. ROSE WANJIRU MBUGUA alias WAMARION....1ST ACCUSED

2. JAMES MBUGUA NGOTHO.....2ND ACCUSED

JUDGMENT

1. This is a most disturbing case. Two young men, **Peter Paul Muchai** and **James Ndichu Mburu** were brutally murdered on the night of 3rd and 4th January, 2016 at Kwa Maiko Trading Centre, Ngewa Location of Githunguri. Their extensively wounded bodies were on the morning of 4th January, 2016 found lying within the vicinity of a bar known as **Wamarion's bar**. The bar was located at Kwa Maiko Trading Centre and was operated by **Rose Wanjiru Mbugua alias Wamarion** [1st Accused]. **James Mbugua Ngotho** [2nd Accused] worked as a guard at the said bar. Following the discovery of the bodies by residents, there was a protest which at some point involved the hurling of projectiles such as stones in the direction of Wamarion's bar. The surging and angry crowd allegedly hindered initial police inquiries.

2. At the conclusion of investigations, the Director of Public Prosecutions (DPP) arraigned the two Accused before the court. The information contains two charges of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in each count stated that on the night of 3rd and 4th January, 2016 at Kwa Maiko Trading Centre, Ngewa Location of Githunguri, jointly with others not before the court, the Accused murdered Peter **Paul Muchai** and **James Ndichu Mburu**, respectively. The Accused denied both counts. They were represented by Mr. Momanyi and Mr. Ng'ang'a, respectively.

3. The gist of the prosecution case through its eleven witnesses is as follows. The 1st Accused owned the bar known as Wamarion's bar located at Kwa Maiko Trading Centre. During the material period, there were seven employees, namely, one **Njuguna**, the 2nd Accused (guard), **Anne Wanjiru Wambui** (PW1), **Wambui**, **Catherine Wairimu** (PW3), **Margaret Wangechi** (PW4) and one **Joyce**. There is contention as to whether or not PW1 had been dismissed by the 1st Accused prior to 3rd January, 2016.

4. On that date, PW1 and Wambui were allegedly attending customers at the front part of the bar where liquor and bottled beer were sold, while PW3 and PW4 were attendants in the back room counter where keg beer was served. At 10.30 pm the two deceased persons entered the back room bar and ordered drinks, but the attendants declined to serve them as they were allegedly preparing to close at 11.00pm. One of them, PW4 having latched the counter left the room. Apparently PW3 also left or was leaving the room when she heard the counter being unlatched.

5. She called out to PW4. The two realized that the backroom counter had been unlatched, and the two men were missing and so were some bottles of beer from the counter. A search revealed that the two men were hiding within the compound. An alarm was raised by PW3 and several people, including the front bar attendants, their customers, **Njuguna** and the 2nd Accused responded amid shouts of "thief! thief!".

6. According to PW3 and PW4 the 1st Accused was in her house and did not join this crowd. Two bottles of beer were snatched from the alleged thieves. The testimony by PW3 and PW4 concerning the material night ended with their locking up of the bar and going home but did not narrate to conclusion what happened eventually to the two deceased on the material night. However, PW1 stated that the two men were severely assaulted in the backroom by the 1st and 2nd Accused and that the room or corridor leading thereto was splattered with blood. The testimony of the female bar attendants PW3 and PW4 resumed with events of the next day when the two bodies of the would -be customers were found lying in a spot some short distance from the bar.

7. The night incident was apparently reported by the 1st Accused to **PC Onyango** (PW8) of Ngewa Police Post. She claimed that there had been a theft at her bar and that the thieves were killed by a mob. The matter was relayed to the officer -in -charge of the Police Post **Sgt. Omar M. Roba** (PW9) who mobilized the local **Chief James Gitau Kimani** (PW2), **CIP Saka** of scenes of crime (PW7) and others to visit the scene where a hostile crowd had gathered.

8. PW7 documented the scene but allegedly, it was impossible to view the insides of the bar due to the hostile crowd which threw projectiles at the police officers. By 5/01/2016 when the Investigating Officer **IP Otieno** (PW11) visited the scene, the scene had been completely destroyed and the bar itself vandalized. Having wrapped up his inquiries PW11 had recommended that an inquest be conducted.

9. In their defence, both Accused gave unsworn statements. The first Accused testified that on the material period, she operated Marion's Bar and Marion General Shop at Kwa Maiko. That while she operated the shop, she left the operations of the bar to Wangechi (PW4) and Njuguna. That on the material date, she closed the shop at 10.30pm and retired to her house located behind the shop and did not go to the bar. Shortly, PW4 brought her the days' proceeds and as they took accounts, there was screaming from one of the bar attendants she identified her as Wairimu (PW3). She dispatched PW4 to go and inquire, and despite the persistent screaming to the effect that some thieves had stolen alcohol, the 1st Accused did not go outside but instead called PW9 who apparently did not offer help. She directed that the bar be closed.

10. At 6.30am on the next day, as PW9 and others were at the scene a crowd gathered and ransacked the shop and bar and destroyed goods. She said she never saw the bodies of the two deceased men but contended that her co-Accused was a watchman at her bar in the material period.

11. The 2nd Accused stated that he worked for the 1st Accused as a guard at the bar and shop in the material period. That he was on duty on the material date and presently heard PW3 and PW4 screaming inside the bar. He then saw people leave the bar and run behind the bar, using a side path. He did not leave his post as his duty was to guard the bar and shop. Despite the said commotion at the back of the building he did not go there to inquire. He, like the bar attendants PW3 and PW4, asserted that PW1 had already been dismissed and was no longer working at the bar as at 3rd January, 2016.

12. Parties subsequently filed written submissions. The prosecution submitted that it had proved the essential elements of the offence of murder. That whereas the fact and cause of death were not disputed, there was evidence adduced through PW1 to implicate the two Accused persons in the unlawful act causing death and that malice could be inferred from the facts. The DPP submitted, citing Section 21 of the Penal Code and the case of **Wanjiro d/o Wamario v Republic 22 EACA 521** that the prosecution had established the respective roles of each Accused in the prosecution of the unlawful purpose herein.

13. For their part, the Accused attacked the evidence of PW1 stating that it was not corroborated and was discredited by PW11 himself. Moreover, the defence submitted that there is no evidence to connect the Accused person with the unlawful acts leading to the death for the deceased.

14. There is no dispute that the two deceased persons had on the night of 3rd January, 2016 visited the 1st Accused's bar and made an order for drinks which PW3 and 4 declined, and that soon after, an alarm was raised first by PW3 and taken up by PW4, that the two men had stolen alcohol from the counter at the back room of the bar. It appears from the evidence of PW1 that she came into the scene much later as she does not report having heard the screams but was allegedly attracted by groans of a person apparently in pain. There was hardly any contest concerning the death of the two men whose bodies were found lying some metres from the bar on the next morning.

15. The cause of death is well documented in the postmortem reports **Exhibits 3 and 4** produced by PW10. Concerning the deceased in the first count, **Peter Paul Muchai**, Exhibit 4 records multiple head injuries including a depressed skull fracture, lacerations to the abdomen including a laceration to the liver, with bleeding. The cause of death is stated to be multiple injuries due to blunt force trauma consistent with homicide. Exhibit 3 in respect of the deceased in the second count, **James Ndichu Mburu** documents multiple injuries to the head, including a depressed skull fracture, and a stab wound from the posterior of the chest penetrating to the aorta, accompanied by massive bleeding. The cause of death is stated to be chest hemorrhage due to the stab wound. These injuries are shown in part in the photographs marked **Exhibit 1C, 1D, 1E, 1F and 1G** taken at the scene on 4/01/2016 by PW7.

16. PW10 when questioned with regard to Exhibit 3 stated:

“Death (was) due to excessive bleeding due to stabbing (penetrating). Weapon must have been long, narrow, pointed, and sharp. Back stab also penetrated right up to the aorta. [shown exhibit 4] the injuries are consistent with blunt trauma.”

17. Looking at this evidence, there can be no doubt that whoever inflicted the injuries on the two deceased had intended to cause death or grievous harm and based on the location and extent of injuries, the probable weapon and force used to inflict them, malice aforethought can readily be inferred.

18. Thus, two key ingredients that is the fact of death and malice aforethought are not in any dispute. The sticking point in this case was whether the two Accused persons jointly committed the unlawful act causing the deaths of the two deceased persons. The prosecution evidence on the whole was characterized by prevarication by key witnesses and especially PW3 and PW4, and even PW11, who was the investigating officer. The record of proceedings in respect of the testimony of PW3 and PW4 contains cautions administered by the court to the witnesses on this score. It was evident from the testimony of PW3 and PW4 that they witnessed far more concerning this gruesome murder than they cared to disclose in their evidence. And instead, took refuge in including the emergence of a so-called crowd that allegedly responded to their screams and went after the alleged thieves.

19. Although evident that a commotion persisted long after the two witnesses had raised an alarm, they claim to have closed the bar and gone home apparently not witnessing anything related to this commotion on their way home. PW3 and PW4 appeared keen to exclude the two Accused from the incident, stating that neither Accused came to the scene of attack. It was clear they had been influenced to testify in a manner to exonerate the two Accused and persisted despite being cautioned by the trial Judge. Indeed, PW4 admitted that she had met with the 1st Accused's daughter on the day she was going to record a statement, which suggests interference with witnesses by the Accused.

20. This leaves the evidence of PW1, which starts at the point when she allegedly heard groans, to fill the gaps left by the testimony of PW3

and PW4. PW1 testified that she noticed blood stains on the floor of the room where the bar at the back was located and that upon entering, she found the two young men bleeding profusely. She stated:

“I followed the trail of blood to the back. I could hear some people speaking. I followed the trail and found my boss Wamarion, and Chake the bodyguard (security of the place) I also found Wairimu and Wangechi and Joyce there as well. There were two men-- they were lying on the floor bleeding profusely. I asked what had happened. One of them said they had stolen beer. I asked the 1st Accused whether it was okay to beat someone like that because of beer..... the two (men) were badly injured. 1st Accused asked if I was the one who had brought them. I even offered to pay. They were all beating them. I saw Chake beating him with a chair which had steel legs. I even offered to go get money from my home nearby.... 1st Accused ... asked Chake to forcibly remove me from the scene. I screamed. No one came to the rescue since it was late. I then left for home across the street and slept until the following morning”.

21. The witness stated further that on the next day, having heard of the finding of the two bodies, she went and confirmed these were the same persons she had seen being assaulted on the previous night. She then reported to police.

22. Surprisingly, although from the evidence describing the bar interior by PW2 and PW9 as well as by the 1st Accused is indicative that the two witnesses entered the bar on the morning of 4/01/2016, none of them refer to any blood stains in the bar. Moreover, while PW7 was able to take many sets of pictures of the external scene, she asserted that she could not access the interior of the bar due to the hostile crowd. Photographs of the interior of the bar could have served as independent corroboration of PW1’s testimony.

23. In my considered view, it is quite believable that the first persons who responded to the alarm by PW3 and confronted the two men in the back-room bar were PW4 and that both Accused were drawn to the scene by screams. Their denials sound contrived. It is not reasonable to believe that the 2nd Accused employed at the bar as a guard sat unmoved, even as screaming was followed by a commotion in the building and persisted. Equally, PW1’s evidence that the 1st Accused was at the bar during the incident appears believable.

24. It is also believable that the initial people to attack the “thieves” were the bar workers, bar owner and the guard. PW3 admits to this. However, it is equally likely, contrary to assertions by PW1 that thereafter, many people other than the bar workers and owner, were drawn to the scene by the screaming and commotion, that from that point onward, these respondents took matters in their own hands and having caught the deceased men, beat them to death, possibly outside the bar building itself.

25. This was no doubt an unlawful purpose in which the two Accused may have played a key role in setting off in the initial part of the transactions. But reviewing the entire evidence, the court is of the view that police officers such as PW9 from Ngewa Police Post which is said to be mere 250 metres from the bar, and the investigating officer (PW11) approached the matter with the mindset that a “mob” killed the deceased because they had stolen from the bar. The alleged stolen goods were not exhibited at the trial despite PW3’s evidence that a recovery was made when the “thieves” were found hiding near the external urinals of the bar.

26. It seems from the testimony of PW11 that he was taken in by the assertion, without solid proof or proper inquiry, that PW1 was an unreliable witness because she had been dismissed by 1st Accused. It does not appear that he tried to trace and question other bar attendants/workers such as Joyce, and Wambui or even bar patrons who had been present in the bar on the material night. No serious investigations were carried out, and I dare say that the report by the Accused to PW8 and PW9 concerning alleged thieves at her bar, seems to have influenced the apparent lackadaisical approach to the gory murder of two young men. Additionally, the 1st Accused appears to have wielded an unhealthy degree of influence on the witnesses PW3 & PW4 and to have enjoyed a rather cozy relationship with the local police at Ngewa.

27. On looking at the entire evidence, and though almost certain that the two Accused herein did in terms of section 213(e) Penal Code play a more central role in the murder transaction than admitted by key witnesses, I must find that there is reasonable doubt as to their culpability. I will therefore resolve the doubt in the Accused’s favor by acquitting both of them at this stage on the two counts preferred against them. The 2nd Accused is to be released forthwith unless otherwise lawfully held.

DATED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF MARCH 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M. KASANGO

JUDGE

In the Presence of:

..... **For Prosecution**

..... **For 1st Accused**

..... For 2nd Accused

Accused 1. - Present

Accused 2. - present

Court Assistant: