



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 71 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ASHFORD MWITI M'ARIMI.....ACCUSED

JUDGMENT

1. **ASHFORD MWITI M'ARIMI (Accused)** is charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that

On 01.10.2017 at Kiathati Location, Igoji in Imenti South Sub-County within Meru County, jointly with another before the court unlawfully murdered GILBERT KAARIA

PROSECUTION CASE

2. The prosecution called ten (10) witnesses in support of its case. According to PW2 Jenifer Kawira, PW3 Elysa Kinya and PW4 Nicholas Kimathi testified that **Gilbert Kaaria** disagreed over ownership of a tree that his brothers Accused and Mwenda were laying claim to. It was their evidence that in the ensuing quarrel, Gilbert was attacked by Mwenda who cut him on the leg and by Accused who cut him on the head injuring him seriously that he later died while undergoing treatment. PC Godfrey Ondieki confirmed that Accused who was injured reported that he had been attacked by Gilbert who in turn reported to have been assaulted by Accused and another. Both were referred to hospital for treatment and after Gilbert died, Accused was charged with murder.

DEFENCE CASE

3. In his sworn defence, accused stated that the quarrel concerning ownership of a tree was between his brothers Gilbert and Mwenda and that when he tried to intervene, Gilbert cut him on the face and right hand. He said that he did not have a pangana nad that Gilbert was cut by Mwenda.

ANALYSIS AND FINDINGS

4. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients which are: the death of the deceased; that Accused committed the murder and that he was actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

(a) The death of the deceased

5. That **Gilbert Kaaria** died was confirmed by a postmortem form produced as PEXH. 1 by Dr, Njeri Nderitu. The postmortem form reveals that the deceased died of basal skull fracture causing severe loss of blood and leading to hypovolemic shock.

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

6. In order to establish the accused's culpability, the prosecution relied on the evidence by PW2 Jenifer Kawira, PW3 Elysa Kinya and PW4 Nicholas Kimathi who testified that it was accused that cut Gilbert on the head. From what we have seen, it was the injury to the head that caused deceased's death.

7. That accused was also injured during the incident was confirmed by the investigating officer. Accused that it was the deceased that injured him.

8. There being corroborated evidence that it was accused that cut deceased on the head, this court must determine whether with malice aforethought, the Accused inflicted the injuries which resulted in the death of deceased.

(c) Proof that the said unlawful act was committed with malice aforethought

9. Section 206 of the Penal Code defines malice aforethought as follows: -

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.

10. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....

11. There is evidence that the deceased also attacked and injured the Accused. Section 207 of the Penal Code provides:

“When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter.”

12. From the foregoing analysis, I am satisfied that the prosecution has established beyond reasonable doubt a charge of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The court accordingly finds the Accused guilty and convicts him for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AT MERU THIS 20th DAY OF May 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For the Accused - Ms. Atieno Advocate

For the State - Ms. Mbithe