



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 126 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JULIUS MWETERI KANYIRI.....ACCUSED

JUDGMENT

1. **JULIUS MWETERI KANYIRI (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 22.10.2018 at Gikurune village, Athwana Location, in Tigania Central Sub-County within Meru County, unlawfully murdered Sammy Mithika Baibere

PROSECUTION CASE

2. The prosecution called five (5) witnesses in support of its case. According to PW 3 Verano Thiringi Jacob, he was at his shop at Athwana on 14.09.2018 when he heard **Sammy Mithika Baibere** insulting the Accused. That a fight ensued between accused and Sammy and he saw accused hit Sammy on the head with an object and Sammy fell and started to bleed from the nose and ears. PW1 Felix Gitonga Barbere, found his brother Sammy in hospital and he informed him that he had been assaulted by the Accused. Sammy who had an injury to the head succumbed to the injuries on 22.10.2018. PW2 Tom Ndungaru Benard on 06.11.2018 identified Sammy's body to the doctor that conducted the postmortem. According to Dr. Wambugu, Sammy died of severe head injury caused by a blunt object as a result of assault as evidence by a postmortem form PEXH. 1. PW5 PC Stanley Kipchumba received Sammy's report of assault against accused on 14.09.2018. When Sammy succumbed to his injuries, Accused was arrested and charged with murder.

DEFENCE CASE

3. In his sworn defence, accused denied seeing deceased on the material date or fighting him. Accused's two witnesses confirmed that they saw deceased on the material date bleeding from head and mouth and he said he had been assaulted. They later received information that Sammy had died.

ANALYSIS AND FINDINGS

4. I have considered the evidence on record and submissions filed on behalf of the Accused. The essential ingredients of the offence of murder required to be proved by the prosecution 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 his brother PW1 Felix Gitonga Barbere, cousin PW2 Tom Ndungaru Benard, the investigating officer PW5 PC Stanley Kipchumba. Their evidence was buttressed by a postmortem form PEXH. 1 which reveals that the deceased died of severe head injury caused by a blunt object as a result of assault.

(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 PW 3 Verano Thiringi Jacob, who testified that he

saw accused hit deceased on the head with an object subsequent to which Sammy fell and started to bleed from the nose and ears. Accused's two witnesses confirmed that they met deceased on the material date bleeding from head and mouth and he said he had been assaulted. The injury to the head was confirmed by the doctor to have been the single blow that caused deceased's death.

7. Accused was well known to PW3. The incident happened at about 4.00 pm and there was no possibility that Accused could have been mistaken with another person. From the foregoing, I find that Accused has been identified as the one that assaulted the deceased and his defence that he was nowhere near the scene of crime is rejected.

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

8. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

9. 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.....

10. There is evidence that the deceased insulted the Accused as a result of which a fight ensued in which the deceased was fatally injured. 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.”

11. 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 against the Accused person. 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 -Mr. Riungu Advocate

For the State - Ms. Mbithe