



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
(CORAM: CHERERE-J)

CRIMINAL CASE NO. 60 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

JOEL MUTEMBEI.....ACCUSED

JUDGMENT

1. **JOEL MUTEMBEI (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 06<sup>th</sup> July, 2018 at Muringene Location, Kangeta Division in Igembe Central Sub-County within Meru, unlawfully murdered NORMAN MUTIA BAARIU**

**PROSECUTION CASE**

2. The prosecution called six (6) witnesses all of whom testified before Hon. Ong'injo J. who was transferred and I took over the case at defence hearing state. **PW1 Charity Nkonyai** stated she had employed Accused to guard her miraa farm. She recalled that on the material date at about 11.30 pm, she was awoken by the Accused who was screaming. She went to her farm where she found a crowd beating **NORMAN MUTIA BAARIU (deceased)** who was suspected of stealing miraa from her farm. **PW2 Ezekiel Mwongera**, chief Muringene Location upon being informed about a body lying on the road called police and **PW3 CPL Wilson Kimondo** visited the scene and removed deceased's body to the mortuary, subsequent to which Accused who was suspected to have killed the deceased was arrested.

3. A postmortem on deceased's body that was identified to Dr. Kariuki by **PW5 Baariu Miringa** and **PW6 Saveri Gitonga** who are deceased's father and cousin respectively was conducted on 27<sup>th</sup> July, 2018. A postmortem form as **PEXH. 1** that reveals that the deceased had multiple bruises on upper and lower limbs, bleeding in the skull and brain and had died of cardiopulmonary arrest due to blunt head injury with heavy object causing bleeding in the brain and multiple bruises with hematoma on forearms and hands was tendered by **PW4 DR. Sammy Wachira** as **PEXH. 1**.

**DEFENCE CASE**

4. In his sworn defence, Accused confirmed that he used to work as a watchman for PW1. He explained that that on the material day at about 11. 00 pm, he went out of his house after he heard people shouting "*thief thief*" and found a group of about 20 men beating a man they claimed was a thief. He said he screamed to raise an alarm as the men continued beating the man and this attracted the attention of her employer PW1 who went to the scene and also screamed in a bid to stop the attack on the alleged thief. That after the beating, the victim was dragged to the road next to PW1 's farm and him and his employer went back to their respective houses where he remained until the following day when police collected the victim's body. He denied that PW1's miraa were stolen or that he assaulted the deceased.

**ANALYSIS AND FINDINGS**

5. 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**

6. That **Norman Mutia Baariu** died was confirmed by all the prosecution witnesses and the Accused. Their evidence was corroborated by a postmortem form dated 27<sup>th</sup> July, 2018 tendered as **PEXH. 1** which reveals that the deceased died of cardiopulmonary arrest due to blunt head injury with heavy object causing bleeding in the brain and multiple bruises with hematoma on forearms and hands.

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

7. In order to establish the accused's culpability, the prosecution wholly relied on the presumption that deceased had gone to steal PW1's miraa that Accused was guarding and that Accused and others set upon the deceased killing him.

8. It is not disputed that none of the prosecution witnesses testified that they saw Accused person inflict the injuries that resulted in the death of **Norman Mutia Baariu (deceased)**. PW1 who was among the first persons to arrive at the scene of crime stated that although Accused was at the scene, he was not among the persons that assaulted deceased.

9. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

10. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

**“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”**

11. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

**It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

**i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**

**ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused**

**iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

12. Even though Accused is not jointly with others before court, this court has taken the liberty to determine if he acted in cahoots with the mob that killed the deceased.

13. **Section 21** of the **Penal Code** defines common intention as arising:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

14. The foregoing provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In **Solomon Mungai v. Republic [1965] E.A. 363**, the predecessor of the Court of Appeal held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

15. In **Njoroje-Vs-Republic, [1983] KLR 197 at p. 204**, the Court of Appeal stated that: -

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”**

16. As to proof of common intention, the predecessor of the Court of Appeal referred to its earlier decision in **R v Tabulayenka s/o Kirya (1943) EACA 51**, and continued to state that: -

**“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”**

17. Common intention does not only arise where there is a pre-arranged plan or joint enterprise and can develop in the course of the commission of an offence. The Court of Appeal in **Dracaku s/o Afia v R [1963] E.A.363** where there was no evidence of any agreement formed by the appellants prior to the attack made by each held that **“that is not necessary if an intention to act in concert can be inferred from their actions”** like **“where a number of persons took part in beating a thief.”**

18. In this case, Accused's presence at the scene has been explained by the fact that the incident happened near his place of work. There is no evidence that Accused took part in the beating and his actions of screaming thereby attracting PW1 who said Accused did not assault

deceased, taken in totality does not form a chain so complete that there is no escape from the conclusion that within all human probability, Accused was part of the mob that killed the deceased.

19. The evidence on record discloses that the deceased succumbed to injuries inflicted severally by different self-appointed executioners and there being no evidence that Accused also assaulted the deceased, I find that the Prosecution has failed to prove that Accused committed the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence.

20. Since the prosecution having failed to prove *actus reus*', it would be futile for this court to delve into the issue of malice aforethought.

21. As a result, I find that the circumstances from which an inference of guilt is sought to be drawn is not cogently and firmly established and that the circumstances in this case are not of a definite tendency unerringly pointing towards the guilt of the Accused. Consequently, I find Accused **NOT GUILTY** and order that he be set at liberty unless otherwise lawfully held. It is so ordered.

**DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF MAY 2021**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Kinoti**

**Accused - Present**

**For the Accused - Absent**

**For the State - Ms. Mbithe**