



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 38 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BRIAN MWANDIKI.....1ST ACCUSED

JAIRUS JUMA.....2ND ACCUSED

J U D G M E N T

he Accused **Brian Mwandiki (1st Accused)** and **Jairus Juma (2nd Accused)** are jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that on the 16th day of November, 2018 at Miti Mbili Village in Bungoma North Sub-county within Bungoma County jointly murdered **Laban Watoka**.

The case for the prosecution is that on 15th November, 2018 **PW 1 E N** went to a disco matanga at the home of Joel. She was with D, K, R, J and D. They went there at 9 p.m. and stayed up to midnight. They started going home. On the way she heard people fighting ahead of them. She went there and found 1st accused and 2nd accused beating Laban. 1st accused was armed with a club and 2nd accused was armed with a Panga. She went to call D. When she went with D to the scene, they met accused on the way. She then went home. The next day she received information that Laban had died.

PW 2 RM minor aged 15 years old testified that on the material night he, DS, JM, KW, J and E went to a disco matanga at home of Joel where he stayed upto 2 a.m. when he left. On the way he saw people fighting. He saw 1st accused Brian armed with a rungu. He saw 1st accused hit a person who fell down. 1st accused then left and came to where he was. He asked 1st accused why he had done so and 1st accused replied the person has slept and would wake up. 1st accused hid the club in a farm. They then went home. The next day he learnt that the person who was hit had died. He showed police where 1st Accused had hidden the club which was recovered.

PW 3 DS a minor aged 15 years was with R, J, K and DL when they went to a disco matanga. He stayed there up to 2 a.m. when he left. On the way at the road he met people fighting. The next day he received information that a person had died. He had seen 1st accused at the disco matanga. He testified he did not see 1st accused assaulting anybody. In cross-examination he testified that he was with E.

PW 4 JS was at the disco matanga with D, R, D, K and they left at 3 am. While going home 1st Accused and 2nd Accused joined them. They saw a person lying down on the road and thought he was a drunkard.

PW 6 Maurice Britain Inzala the Chairman of Community Policing was also at the funeral when he escorted Violet at 3 a.m. On the way he noticed a person lying down on the road. He called other people from the funeral but none of them knew the person. He informed police at Brigadier who came. The person was identified as the deceased by his father. He was informed that 1st accused Brian was a suspect. He arrested him. On interrogation 1st accused mentioned 3 others who were arrested.

PW 8 PC John Saina the investigating officer received information by the DCIO Mr. Chilo of the report of murder. He visited the scene and drew a sketch map. He recovered stick suspected to be the murder weapon. He found the suspect had been arrested and found that there was a fight between the deceased and Accused over a girl.

The accused gave sworn evidence when put on their defence. 1st accused Brian Mwandiki testified that on the material day he went to the disco matanga with J, D, D, K. On the way home they saw people fighting. He did not know them nor did he join them. He went home. The next day he received information that a boy had been found dead. He did not know him. He was later arrested by community policing members. He denied recording a statement admitting he had hit a person.

2nd Accused Jairus Juma testified that he went to a funeral with Brian, J, K, J whom they met with while going home. On the way he ahead a person hit another with a whip. He did not know the people fighting. He denies as the evidence of E that he had hit the deceased.

At the close of both the prosecution and defence, counsel for all parties filed written submissions. Mr. Wamalwa Robert for 1st accused submitted that there is no contention that indeed the deceased died. He submitted that the prosecution only adduced evidence that there was a fight among a large group of individuals who were coming from the funeral. He then submits that the prosecution must from the cause of death and existence of malice aforethought. He submit that Section 203 provides:-

"Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder."

Malice Aforethought is deemed to be established by evidence proving any one of the following circumstances:

Section 206

(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 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 happen.

(c) an intent to commit a felony

(d) an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.

From the provisions above, the Prosecution is under legal duty to establish beyond reasonable doubt that it was indeed the Accused person who inflicted injury to the deceased, the deceased died from the said injuries and the accused had the necessary intention to cause death or grievous harm to the deceased at the time of inflicting the injury"

Ms Wakoli for the 2nd accused submitted that none of the prosecution witnesses testified having seen the 2nd Accused Jairus Juma commit the offence. Counsel submitted that it is common ground that it was dark and no source of light was indicated by PW 1 E by which she was able to see the assault.

Mr. Thuo for the state submitted that the post-Mortem report produced showed deceased had multiple injuries and found that the cause of death was due to fractured cervical spine with a moderate head injury. He submitted the identification of the accused as the persons who inflicted the injuries was satisfactory, as the witnesses knew the Accused. The exhibit used was also recovered and produced. Mr. Thuo finally submits that malice aforethought was demonstrated by the prosecution by showing that the accused was armed and that the defence of accused places them at the scene of crime.

The Accused are charged with the offence of murder contrary to Section 203 of the Penal Code which provides:-

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

PW 5 Dr. Patrick Busita who performed the post-mortem on body of the deceased found that the deceased had injuries on lower limbs, defence marks on palms, bruises on chest wall, multiple abrasions on face and fracture of the spine. He formed opinion that cause or death was due to fractured cervical spine. The fact and cause of death was proved by this witness.

The other ingredients of the offence of murder that the prosecution should prove is that the accused either alone or jointly inflicted the injuries from which the deceased died.

PW 1 EN a minor aged 15 years old and in standard 8 testified that she was at the disco-matanga and while going home she saw 1st accused, Brian and 2nd Accused Jarius beating the deceased Laban. 1st accused was armed with a club and 2nd accused was armed with a panga. She informed D that she had seen 1st and 2nd accused fighting with Laban. The accused then came and bragged to her how they had beat the deceased. She testified that there was moonlight and was able to see them fighting.

PW 2 RM also aged 15 years old testified that he was on his way home when he met people fighting on the road. He saw 1st Accused Brian hit a person with a club once and the person fell down. 1st Accused then came to where the witness was and at a shamba he hid the club. He asked 1st accused what if the person had died. 1st Accused replied that he had slept and will wake up. He then went with 1st accused back to the funeral. Later he learnt that the person 1st Accused had hit had died. He was later arrested and led assistant Chief to where 1st accused had hid the rungu (club) which was recovered.

Counsel for the 2nd accused submitted that there was no evidence of any light by which the accused would have been positively identified. However, 1st accused and 2nd accused all agree that they were together going home. 1st accused in his defence agreed that indeed while going home he saw people fighting who were ahead of him. Jairus, the 2nd accused also testified that indeed while going home heard a person being hit by a whip. He inquired and was told there were people whipping others. The 1st accused and 2nd accused while admitting

being on the road where the deceased was found and hearing of a person or persons whipping another, deny that they were the ones fighting or assaulting the deceased. That the Accused were able to see or hear a person being hit and were going home confirms the prosecution witness contention that there was moonlight on the material night to enable them walk home.

Both PW 1 E and PW 2 R testified that they were with accused who are were known to them. PW 2 Robinson testified that he saw 1st accused hit the person who fell down. 1st accused after hitting the person joined PW 2 Robinson and they went back to the funeral. PW 1 E saw clearly that 1st accused Brian was armed with a club and 2nd accused had a panga. She confirmed she saw both accused fighting with the deceased. All these witnesses were well known to the Accused and I am satisfied on the evidence that 1st and 2nd Accused were positively identified as the people who assaulted the deceased. Indeed when accused I was asked by Mr. Wamalwa whether he had stated in his statement to police that he had told police that he was also injured in the fight 1st Accused denied making any such statement.,

Mr. Wamalwa for 1st Accused submits that the 1st accused was attacked which meant that he had to defend himself. He submits that the encounter ended in the deceased sustaining the fatal injuries. He submits that the 1st Accused, therefore, pleads self-defence.

The plea of self-defence is provided for in Section 17 of the Penal Code which provides: -

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

Both the Accused in this defence do not raise the defence of elf-defence. Indeed their evidence is that while they confirm there was a fight, they deny knowing who were fighting and that they were not involved. 1st Accused, however, informed police in his statement that he also sustained injuries. He, however, denied giving police that information.

From the evidence of both the prosecution witnesses and the Accused, the n it is not in dispute that there was a fight involving the deceased Laban in which he sustained injuries from which he subsequently died while the 1st and 2nd Accused deny involvement in the fight. PW 1 E and PW 2 Robinson gave evidence that the fight involved the 1st and 2nd Accused and the deceased. I find that the injuries sustained by deceased were inflicted by both 1st and 2nd Accused in a fight where both 1st and 2nd Accused and the deceased were involved.

For those reasons I find that the prosecution proved a lesser charge of manslaughter against the Accused. I, therefore, find Accused not guilty of Murder Contrary to Section 203 of the Penal Code but find that the Offence of Manslaughter Contrary to Section 202 as read with 205 of the Penal Code has been proved against **Brian Mwandiki** (1st Accused) and **Jarius Juma** (2nd Accused) and convict them accordingly.

Dated, signed and delivered at Bungoma this 27th day July, 2021.

S N RIECHI

JUDGE