



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 11 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN NGUNJIRI WACHIRA.....ACCUSED

JUDGEMENT

1. The accused faces a charge of the offence of murder contrary to **Section 203 of the Penal Code as read with Section 204** of the Penal Code. It is alleged that in the night of 20th September 2018 at Kinaiyu Village in Karima Location, in Nyeri South sub county within Nyeri County, jointly with others not before Court murdered Charles Weru Kabua. The accused pleaded not guilty to the charge. The prosecution presented evidence of twelve witnesses in this case.

2. At the hearing the accused was represented by Ms. Wambui Mwai whereas Mr. Ondimu was the prosecuting counsel for the state.

3. This case was heard by Judge Mumbua Matheka up to the close of the prosecution's case. I took over the case upon taking directions under Section 200(3) of the Criminal Procedure Code and heard the defence case.

The Prosecution Case

4. Precisely the case of the prosecution was made up of twelve(12) witnesses PW1,PW2,PW3 and PW10 testified that they were at Watalii Bar in Othaya town on the 20/09/2018 between 7.00 to 10.30pm taking refreshments. The accused and the deceased were also present in the bar having come at different times. The accused sat on one table with PW7 and PW9 who had called him to join them at the bar while the deceased was on another table.

5. As the witnesses enjoyed their drinks, the accused went to greet some friends. The deceased held his hand and refused to release it. This led to an altercation between the two where bitter words were exchanged but it stopped after a short while.

6. The patrons left the bar at different times. As the accused left, he was followed by the deceased and the two went out as they exchanged threats to each other again. The following day the body of the deceased was found on the side of the road at a place known as "keep left". He had head injuries and at the scene lay a blood stained stone which was believed to be the murder weapon. The exhibit and a blood sample of the deceased was taken to the Government chemist for analysis.

Defence Case

7. **DW1, Stephen Ngunjiri Wachira**, the accused said he runs business of a motorcycle operator in Othaya sub-county. He testified that on the 20/09/018 around 7.15pm, he was called by PW9 to pick him up at Watalii Bar. He states that he arrived at the bar at 9.30pm and found PW9 and PW7 there. PW9 told him to pick him up the next day at 4.00am to take him to Othaya town. He added that he had a drink and when he was just about to leave the bar, David Kanyoni who was seated with the deceased, called him "kihii" which means "uncircumcised boy". The accused testified that at the time he was insulted he was greeting the deceased who would not let go his hand. The two pulled each other accidentally knocking the table with their drinks. He added that PW1 who was seated on the same table with the two men told them to stop the commotion. The accused said that he then left the bar at around 10pm together with PW7 and PW9. He dropped PW7 to his home first about 6km from Gaturi and then dropped PW9 whose home is about 400 metres from PW7's home. He added that he used Kiragu-Mutitu junction.

8. The accused testified that after dropping PW9 home, he went to his home which is around 300 metres from that of PW9. He arrived home at 10.47pm and slept. The next morning he picked PW9 at his home at 4.00am as earlier planned and took him to Othaya town. He was later arrested as the suspect in this case.

9. The accused denied being at the scene of crime on the fateful night.

10. Both the prosecution and the state filed written submissions.

The Prosecution's Submissions

11. The prosecution relies on **section 107(1) of the Evidence Act** and the cases of **Woolmington vs DPP (1935) AC 462 and Miller vs Minister of Pensions (1947) 2 All ER 372 at 373** and submits that it is upon the prosecution to discharge the burden of proof beyond reasonable doubt. Failure to which such doubt ought to be decided in favour of the accused and a verdict of acquittal returned.

12. Relying on **section 203 of the Penal Code** and the case of **Republic vs Mohammed Dadi Kokane & 7 Others (2014) eKLR** the prosecution submits that the ingredients which constitute the offence of murder are:- that there was death; that the death was unlawful; that the accused person participated in or caused the said death and that the accused had malice aforethought.

13. The prosecution submits that it had proved that the accused caused the death of the deceased was confirmed by PW4 who produced the post mortem report. PW6 identified the body of the deceased to PW4 who conducted the post-mortem.

14. The evidence of PW4 was that the cause of death was as a result of a head injury secondary to an assault due to blunt trauma. PW6 testified that he saw injuries on the back of the head of the deceased whereas PW11 stated that he saw the body of the deceased which appeared to have been hit with a stone on the head and it was bleeding. PW12 testified that the deceased had a head injury on the back of the head.

15. On the issue of intent, the prosecution relies on **section 206 of the Penal Code** and the case of **Republic vs Mohammed Dadi Kokane & 7 others (2014) eKLR** and submits that the accused and the deceased were both in a commotion, a fact that is confirmed by the accused. The said commotion triggered by the deceased calling the accused an uncircumcised boy. Several witnesses inside the bar being PW1, PW2, PW3 and PW10. PW10 further testified that he saw the stone next to the deceased's body with blood stains whose analysis was done by PW8 and found to match the blood sample of the deceased.

16. PW5 further testified that on the fateful night he saw the deceased on the roadside while drunk and the accused was standing near him. He heard the deceased telling the accused to leave him alone and he later learnt that the deceased had died. All these testimonies confirm that the deceased and the accused were engaged in an altercation in the bar and later in a fight as the deceased walked home on the roadside.

The Accused's Submissions

17. The accused challenged the prosecution witnesses testimonies for instance PW7 Gabriel Kibui and PW9 Linus was in the company of the accused when the deceased is said to have been murdered. The accused said he was dropping off the two witness and they parted at 10.45pm. The accused's version was that he had left the bar with the two witnesses when PW5 James Wambugu Nderitu claimed to have witnessed the incident about 9.30pm.

18. PW4, testified that he was at the scene of the murder at around 9.30 PM on 21st September 2018. This raises doubt as to his credibility because the alleged killing took place on the night of 20th September 2018. The said date also contradicts the date on the post mortem form and the statement from the investigating officer, who stated that they collected the deceased's body from the scene of the accident on 21st September 2018 at 7.00am.

19. Counsel further submits that the evidence of PW4 raises further contradictions because he states that he was on his way home on 21st September 2018, at around 9.30PM, when he found the deceased sitting by the road drunk and the accused had parked his motorbike next to him in the middle of the road. The exact location was at the junction of the road going to Kiragu and the other to Mutitu village. However on cross examination, he stated that he did not know the accused's motorcycle, colour or its registration number. This raises the question of how was he able to identify the accused at the scene, yet he could not identify the accused's motorcycle.

20. He also testified that it was dark at the scene and there were no street lights, which raises the question of how was he able to recognize the accused's motorbike in a place with no adequate lighting and at 9.30PM, which time of the night it is expected to be pitch dark. This fact is confirmed in his statement whereby he indicated that ahead there were two people along the road whom he could not recognize. This goes to show that if he was at the scene at a time that it was dark to the extent that he could not recognize anyone at the scene.

21. PW5 further testified that when at the scene he heard the voice of the deceased only. The accused poses the question as to how PW5 was able to positively identify the accused and place him at the scene if he only heard the deceased speak. Counsel for the accused submits that PW5's statement is not truthful and that it is evident the accused was not at the scene. Notably PW4 also stated in his statement that the deceased was murdered at Kiragu Mutitu junction yet PW11, the investigating officer indicated that the deceased was murdered long Gatugi/Witima junction where his body was also collected. This also casts doubt to the credibility of PW4's evidence.

22. It was further submitted that the defence of the accused stood unshaken as it was clear that at the time of the alleged murder he was not at the scene and that he had left the deceased at the bar. The accused submits that he did not commit the offence neither was he at the scene and thus prays that the court returns a verdict of not guilty.

Issues for determination

23. The issues for determination in this case are as follows:-

- a) Whether the accused unlawfully killed the deceased.

b) Whether the prosecution have proved existence of afore thought on the part of the accused.

The Law and Analysis

24. It is trite law that the burden of proof is on the prosecution to establish that the deceased death on 20th September 2018 was as a result of the unlawful act of the accused. In the offence of murder, the prosecution must prove the primary ingredients of the offence namely that the deceased died; that his death was caused by the unlawful act of the accused and that the accused had malice aforethought.

25. As for the death of the deceased, PW4, Dr. Kimathi produced the post mortem report showing that the cause of death was a severe head injury secondary to trauma secondary to assault. Additionally, PW6 confirmed that he attended the post mortem and identified the body to the doctor.

Whether the accused unlawfully caused the death of the deceased

26. The evidence of the prosecution was circumstantial in that there was no eye witness at the scene of murder. The principles applicable to circumstantial evidence shall therefore apply. It is trite law that circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364** where the court held:-

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

27. From the evidence of PW1, PW2, PW3 and PW10 who were with the accused and the deceased at Watalii Bar, there was an altercation that caused the accused and the deceased to push each other. The evidence of the four(4) witnesses is clear that the commotion did not develop into a fight inside the bar. The accused in his defence said that there was an exchange of unfriendly words between them that was followed by a commotion between the two and that the deceased insulted him calling him an uncircumcised boy. Although the accused felt aggrieved due to the insult, one Maina intervened and the altercation stopped. The accused was on the table next to that of the deceased while the accused shared a table with PW9 and they continued drinking till 10.30pm when they left the bar. PW7 and PW9 were said to have been ferried to their respective homes by the accused, using his motor bike.

28. It is therefore clear that the scene of crime was not inside Watalii Bar. PW5 testified that he knew the accused by his names since they are from the same area and are members of the same clan. On 20/09/2018 around 9.30pm PW5 was going to his home, when he found the deceased seated on the roadside and the accused standing near him with accused's motorcycle parked at the same place. The deceased was telling the accused, "leave me alone, go away". PW5 did not talk to the deceased or to the accused. He passed them and went home. The following morning, PW5 learnt that the deceased had died near the place where he had found him the previous night.

29. On cross-examination, PW5 said that there was moonlight which enabled him to see the deceased and the accused. On further cross-examination PW5 said he could not have mistaken the identity of the accused or of the deceased because he knew them well and was assisted by the moonlight to see them. Despite tough question's on identity, the witness was adamant that the night was not dark due to presence of moonlight. Concerning the identity of accused's motorbike, PW5 said he identified it by seeing it but did not know the registration number.

30. The evidence of PW1, PW3 and PW10 was that the accused and the deceased left the bar together and that none of them came back to the bar. The following morning, PW10 heard that the deceased was found dead at a place called "Keep left" on the roadside. He went to the scene and found a crowd there. As this witness and others were talking at the scene pondering over the what had happened to the deceased, the accused passed on the road riding his motor bike. He went past the scene and did not stop which made PW10 wonder why he did not get concerned. At the scene was found a blood stained stone which was taken as an exhibit.

31. PW2 testified that he is the one who accompanied deceased to the bar on the material day at around 7.45pm and that they sat on one table and started drinking. The accused came to the bar and greeted them and went to another table. The deceased was quite drunk and later exchanged unkind words with the accused. Then the two men later left the bar. The following day, PW2 learnt of the death of the deceased and joined the crowd at the scene.

32. PW1 said he was with his friends at Watalii Bar drinking. He witnessed the altercation between the accused and the deceased. He said later the accused, PW7 and PW9 left the bar followed by the deceased. On cross-examination PW1 confirmed that the accused, deceased, PW7 and PW9 left the bar together. As they left, the deceased and the accused were threatening each other saying "get out and I will show you".

33. PW3 the bar attendant said the deceased was already drunk at the time he came to Watalii Bar and did not take any beer there. The accused was not drunk when he came to the bar and he took very little alcohol therein. After the altercation between the accused and the deceased, they left the bar at around 9.30pm.

34. The accused denied the offence and said he had an altercation with the deceased who held his hand as he greeted him and refused to release it. The deceased insulted him by calling him "kihii" meaning uncircumcised boy." He stated that when he left the bar with PW7 and PW9, he went to drop them to their homes using his motor bike and later went to his home and slept. He was arrested the following day as a suspect of deceased's murder.

35. The defence attacked the evidence of PW5 in that in his evidence in court, he said the incident took place on 20/11/2018 while in his

statement he said the date of the offence was 21/09/2018. As for this contention, the evidence of PW5 in his testimony was correct as to the date of offence. In the statement, the date of 21/09/2018 could have been an error in that all the prosecution witnesses present in the bar gave the date of 20/09/2018 which was confirmed by the accused himself. The charge sheet has the correct date. The issue of the date of offence is not a contradiction but an error on part of PW5 which is so minor that it does not affect the prosecution's case.

36. The defence further raised the issue of identification of the accused that PW5 did not identify him; he did identify the motor cycle by its registration number and did not identify the two people walking at a distance.

37. PW5 testified that he knew the accused well for he comes from his home area and that there was moonlight that night. As he passed on the road he was able to see and recognise the accused whom he knew before the incident. It is trite law that recognition is more reliable than identification of a stranger. During cross-examination, the defence tried to push the witness to say that the night was dark but he insisted there was moonlight which aided him to see the accused. PW5 also knew the deceased and recognised him too. He also heard him talk telling accused to leave him alone.

38. As for identification of the motor cycle at the scene, it was not necessary that PW5 gives the registration number. I take judicial notice that one may know somebody's motor cycle by appearance but has never bothered to read and note the registration number. Furthermore, what is material herein is the identification of the person at the scene with the deceased and not the motorcycle.

39. The distance between the two people walking on the road and that of PW5 was not stated. If the two people were far, it may not have been possible to identify them with the aid of the moonlight.

The law on identification is well settled as can be seen from the principles in the case of **James Tinega Omwenga vs R CR Appeal No. 143 of 2011, R vs Turnbull & Others {1976} 3 ALL ER 549, Abdalla Bin Wendo vs R 20 EACA 166. In Anjononi vs R {1980} KLR 59, the Court of Appeal observed that:**

“Recognition of an assailant is more satisfactory more assuming, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form or another.”

40. Following the altercation and commotion in the bar witnessed by PW1, PW2, PW3 and PW10, it is also confirmed by PW1 and PW10 that the accused and the deceased left the bar together. As they left, they were still exchanging, threats, that, “let us go out and I will show you”, then PW5 who was walking on the road near the scene a short while later finds the accused and the deceased on the side of the road. He said he passed them without talking to them but from the way the deceased was talking, he could tell he was very drunk.

41. The defence of the accused is that he never went to the scene which was very close to Watalii according to Sketch plan. PW7 and PW9 who said they were dropped home by the accused at their homes after leaving the bar. It is noted that out of the seven(7) witnesses in the bar at the time of the quarrel between the accused and the deceased, the two PW7 and PW9 are the only ones who said they did not witness the altercation, yet it occurred on the table next to where they were sitted. In my view, PW7 and PW9 fell short of telling the relevant truths about the events in the bar at the material time in an effort to exonerate their friend the accused. Based on the evidence of the two witnesses, who were so economical with the truth, I have reason not to believe their evidence that they were dropped home by the accused after they left the bar though the exact time is not known.

42. From the evidence on record I draw a conclusion that when the accused and the deceased left the bar, the accused must have followed the deceased to “show him” as the two were saying as they left the bar. The quarrel may have progressed up to the time the two stopped on the roadside where PW5 found them. The body of the deceased was found near the said spot the following morning according to PW5. There is evidence from PW12 who drew the sketch plan that the scene was about eight(8) metres from the bar. It is highly probable that if PW7 and PW9 were dropped home by the accused at all, it must have been after the deceased had already been severely assaulted or killed.

43. The accused was placed near the scene of crime with the deceased whom he had been quarrelling with a short while earlier. The accused having not tendered any defence as to what he was doing there at the material time with the deceased puts him squarely as the person responsible for the killing of the deceased. In my view, the accused who was seen had the opportunity to commit the offence.

44. It was held in the case of **Sylvester Mwacharo Mwakeduo & Another vs Republic [2019] eKLR** that:-

“Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng’ Ochieng’ vs Republic, Criminal Appeal 128 of 2006, this Court stated the law as follows:-

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

- a) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;**
- b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;**
- c) 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;**

d) In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."

45. Having considered all the evidence on record, I find that the circumstantial evidence points the guilty to the accused in regard to the killing of the deceased to the exclusion of all others.

46. It is my considered view that the prosecution have proved that the accused caused the death of the deceased through an unlawful act.

Whether the accused had malice aforethought

47. **Section 206 of the Penal Code** stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-

a) An intention to cause the death of another.

b) An intention to cause grievous harm to another.

c) Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

d) An intent to commit a felony.

e) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

48. Notably, what is not disputed is that the deceased insulted the accused, a fact confirmed by the accused who testified that in his community when one is insulted "uncircumcised boy" it is not taken well. If these insults continued outside the bar, it may have vexed the accused to the extent that he decided to attack the deceased. Thus an inference could be drawn that would have formed the intent by the accused to cause grievous harm to the deceased.

49. The prosecution witnesses testified that the deceased was very drunk at the time the accused entered the bar. Some of these witnesses said that it is the deceased who started throwing insults at the accused as he held his hand. It had to take the intervention of one of the customers to get the accused released. As the accused and the deceased left the bar, there is evidence that they were still threatening each other.

50. In my view, the evidence of the deceased being the aggressor and a persistent one for that matter must have provoked the accused to hit back at the deceased and teach him a lesson. This intention is derived from the words uttered as the two men left the bar.

51. As such, I find that the prosecution have failed to prove malice aforethought against the accused.

52. In conclusion, I find that the prosecution have proved a lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I hereby convict the accused of the said offence accordingly.

53. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 25TH DAY OF AUGUST 2021