



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

GENESIO MUGAMBI KATHURI.....1ST ACCUSED

SAMUEL MUSYIMI MUTEMI.....2ND ACCUSED

JUDGMENT

1. The accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and the particulars of the offence were that on the 8th day of March, 2017 at Kanthenge village, Mbeere North sub-county in Embu County jointly assaulted and caused the death of Marclus Fundi Njiru who died on the 10th March, 2017 at Karira Hospital while undergoing treatment.
2. The accused persons pleaded not guilty to the charge and the matter proceeded for hearing wherein the prosecution called a total of nine (9) witnesses in support of the case. Upon the close of the prosecution's case, the accused persons were placed on their defence and they both gave sworn statements and called no witnesses.
3. The prosecution's case as can be gathered from the evidence on record is that on the 8th day of March, 2017 at 8.00 pm the deceased and PW1 (Peter Kariuki Nyaga) were on their way home from Mlachake market when they met two men whom PW1 identified as the two accused persons in this case. According to PW1, the deceased had a torch which he flashed at the two men who were armed with sticks. The 2nd accused hit the deceased with a stick and the 1st accused followed and also attacked the deceased with his stick.
4. That PW1 escaped from the scene and stood about 200-300 metres and decided to go back to the scene and found the deceased lying at the scene with injuries on the head and on other parts of the body. He lifted him up and he was able to walk with him up to the main road about 100 metres away where he got a motor bike to take him to Kings and Queens hospital, at which, they were directed to obtain a P3 form at Siakago police station which he did. He then proceeded to the sub-county hospital at Siakago where he was referred to Embu Level 5 Hospital. He informed the sister of the deceased of the incident but on the following day, he learnt that the deceased had passed on.
5. The wife to the deceased (PW2) testified of how she was called by her sister in law who informed her that her husband was in a critical condition after he was beaten up. She travelled home from Nairobi on the following day and reached home at around 4.30 pm. She found the deceased had a bandage on the head and had blood on the face which had dried up. She talked to him and he told her that he was beaten by Mugambi and Musyimi and that they beat him for no apparent reason as he had not quarrelled with any of them. His condition worsened and they took him to Tenri Hospital on 9th March, 2017 at night and the following day he was referred to Karira Mission Hospital where he died the same day. That, on the 20th March, 2017 she identified the body of the deceased to the doctor who performed the post mortem.
6. A cousin of the deceased namely Alfred Muriithi Nyaga (PW3) testified that on the 8th March, 2017 he was at cheers pub when he saw the deceased with PW1. The deceased had been beaten and was bleeding, he got one Peterson Muiru a boda boda operator who took him to hospital. That he talked to the deceased who said that he had been beaten UP by Musyimi and Mugambi.
7. Evalyne Wanyaga Njiru who is a sister to the deceased testified as PW4. It was her evidence that the 1st accused is her neighbour but that the 2nd accused was not known to her. She stated that, on 8th March, 2017 at around 9.00 pm she was at home when she learnt that her brother Marclus had been assaulted. She proceeded to Kings and Queens Hospital where the deceased was, and he had injuries on the head. The deceased told her that he was beaten by Musyimi and Mugambi.
8. On his part, Martin Kariuki Njeru (PW5) told the court that on the material day he was at Kabutiri Bar in Makunguru area when the deceased and PW1 went to the bar in a motor bike. The deceased was bleeding profusely from a deep cut on top of his head. He joined the

deceased cousins who were in the bar namely Martin Muriuki and Peter to remove him from outside the bar where they cleaned him of the massive blood on the face. The two cousins took the deceased to hospital while he went to inform his parents. He further stated that before he was taken to hospital, the deceased said he had been assaulted by Mugambi and Musyimi who are the accused persons in this case.

9. PC Tobias Odiwul Odege who testified as PW8 stated that on the material day, he was on duty at Siakago police station together with PC Masesi when the deceased, Marclus Fundi, in the company of Everlyne Wanyage and Martin went to the station. The deceased had two (2) deep cuts on his forehead and some other injuries on his other parts of the body. He was bleeding but he was on his feet. The deceased reported that on the same day at around 20.30 hours he was heading home at Kanthenge village in the company of PW1 from Mlachake market when they found Samuel Musyimi and Genesio Mugambi while standing beside the road armed with pangas and wooden objects who confronted and attacked him. He booked the report in the Occurrence Book, O.B. No. 43/08/2017 and issued him with a treatment note. He arrested both the accused persons on the 13th March 2017 and he handed them over to PC Kimtai who continued with the file.

10. PW9, PC Sudi Similu took over the investigations from PC Evans Kimtai. The evidence that he gave was as per the investigations that had been done by the former investigating officer. He stated that he did not visit the scene.

11. When they were put on their defence, the first accused in his short sworn statement stated that he did not know anything about the death of the deceased.

12. On his part, the 2nd accused in his sworn statement testified that he spent the whole day at his place of work where he left at 5.00 pm after he finished selling chicken. He went back home and slept at around 9.00 pm after he had his supper and woke up the following day and reported to work at Kiritiri. That his wife later told him that a person had been beaten in a club and that some people had been arrested in connection with the murder and that the police had said they would arrest more people and on the 11th March, 2017 he was arrested in connection with the death of the deceased and taken to Siakago police station. He stated that he did not know who beat the deceased.

13. At the close of the defence case, parties relied on the evidence on record.

Analysis and Determination

14. To sustain a conviction on a charge of murder under Section 203 of the Penal Code the prosecution is required to prove beyond any reasonable doubt the following elements of the offence: -

a. The fact and cause of death.

b. That the death was caused by unlawful act of commission or omission on the part of the accused person.

c. That it was committed with malice aforethought on the part of the accused person.

15. On the first element of the fact and cause of death, Doctor Phyllis Muhonja testified that she conducted a post mortem on the body of the deceased Marclus Njiru at our Lady of Lourdes, Mwea Hospital Karira mortuary. She formed the opinion that the cause of death was the massive head injury due to blunt force trauma to the head which caused sub-dural haematoma and inter cranial pressure. The fact of death was confirmed by PW1, PW2 and PW4. PW2 is the one who identified the body of the deceased to the doctor who performed the post mortem report. It is therefore clear that the fact and cause of death were proven beyond any reasonable doubt.

16. On the second element on whether the death was caused by unlawful act of omission on the part of the accused person, PW1 is the only witness who is said to have witnessed the incident and later escorted the deceased to the police station to make a report. In his evidence he stated that it was around 8.00 pm and it was dark but the deceased had a torch that he flashed at the two men who were both armed with sticks. They both hit the deceased with a stick in turns. As rightly submitted by the counsel for the 1st accused person, the prosecution did not lead evidence as to the intensity of the light from the torch that the deceased had, and the position of the assailants from the torch light and for how long the torch light was directed on each of the accused person's faces to enable the court determine whether there was sufficient time within which the deceased and PW1 could recognize the assailants.

17. Further, on the identity of the assailants, the evidence adduced by PW1 was that the 2nd accused was not known to him and that he only knew him by name. In his evidence in chief, he stated that the 1st accused is his neighbour but in cross examination it was his evidence that they are not close neighbours with the 1st accused and that he came to know him after the incident. There is no evidence that PW1 and the deceased knew the two accused persons or any of them well before this incident which evidence was necessary to the court in determining whether it was a case of recognition or identification.

18. Still on the second element that the death was caused by unlawful act of commission or omission on the part of the accused person, apart from the evidence of PW1 there is also the evidence of PW2, PW3, PW4, PW5 and PW8. They all stated that the deceased said he was assaulted by Mugambi and Musyimi who are the accused persons in this case. PW8 is the officer who was on duty at Siakago police station when the deceased made the report of the alleged assault.

19. In law, the evidence of these witnesses is what may amount to a dying declaration and is provided for under **Section 33 of the Evidence Act, Cap. 80 Laws of Kenya**. It states:-

Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –

Relating to the cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question.

20. In the case of Philip Nzaka Watu Vs Republic [2016] eKLR, the court stated the following on admission and reliance on a dying declaration.

Under Section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence.

“Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his deathwhile it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe”.

21. The principles on admissibility of the evidence of a dying declaration are well illustrated in the case of R Vs Andrew [1987] AC 281 where Lord Ackner laid down the following tests;

1. Can the possibility of concoction or distortion be disregarded.
2. To answer this, ask if the event was so unusual, startling or dramatic that it donated the thought of the victim causing an instinctive reaction without the chance of reasoned reflection on conditions of approximate but not necessarily exact contemporaneity.
3. To be sufficiently spontaneous the statement must be closely connected with the event causing it.
4. There must be no specific features making concoction or distortion wisely.
5. There must be no special features likely to result in error for example drunkenness.

22. In the cases of R Vs Muyovya bin Musuma [1939] 6 EACA 128, R Vs Premananda [1925] 52 Calcutta 987, the Court of Appeal in emphasizing the need of caution cited the principle from the 7th Edition on Evidence by Field as follows;

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them”.

23. The court went on to state;

that particular caution must be exercised when an attack takes place in darkness when the identification of the assailant is usually more difficult than in day light. The fact that the deceased told different persons that the appellant was the assailant is evidence to the consistency of his belief that such was the case, it is no guarantee of accuracy although there is no more rule of law that to support a conviction there must be corroboration of such statements. It is generally recognized that it is very unsafe to base a conviction solely on them.

24. In the case herein, as I have already noted, the deceased was in the company of PW1. It was at 8.00 pm and it was dark and though the deceased had a torch which he flashed at the attackers, the prosecution did not lead evidence as to the intensity of the light from the torch, the position of the assailant from the torch light to enable the deceased and PW1 sufficient time to identify the assailants.

25. On his part, PW8 did not tell the court if the deceased gave all the above details when he reported the incident at Siakago police station. It is also not clear from the evidence on record whether the deceased knew his assailants before the date of the alleged attack or not.

26. In view of the foregoing, I do not find it safe to rely on the dying declaration that was given by the deceased. The only other evidence which could have corroborated his evidence is that of PW1 and as I have already found, the circumstances surrounding the attack and the identification of the assailants were not conducive for clear and proper identification for this court to base a conviction on.

27. The court also notes that there is material contradiction in the evidence of PW1 and that of PW8, PC Tobias Odiwul Odege on the alleged murder weapons. According to PW1, the accused persons were armed with sticks but the court was not told the size of those sticks to enable the court determine if they could inflict fatal injuries. On his part, PW8 who was the investigating officer testified that the report that was made by the deceased at Siakago police was that the two accused persons were armed with pangas and wooden objects. It was also his evidence that it was at night and it was dark. He further stated that both accused persons had pangas though he did not tell the court how many pangas they had. On further cross examination he admitted that he did not mention wooden objects in his statement or in the O.B. This evidence clearly contradicts that of PW1 who stated that the accused persons were armed with sticks and there was no mention of a panga(s) in his evidence and yet he was the only eye witness.

28. PW8 in his evidence testified that he could not tell the role played by each of the accused persons in the commission of the offence and yet he was the investigating officer. He did not even visit the scene of crime. No murder weapon was recovered and the evidence of PW1 and PW8 was contradicting on the murder weapon that was used to inflict the fatal injuries that killed the deceased.

29. On the malice aforethought, under Section 206 of the Penal Code, malice aforethought shall be deemed to be established by evidence proving any one, or more of the following circumstances; -

“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 the 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 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”

30. The court having found that the death of the deceased was not caused by unlawful act of omission or commission on the part of the accused persons, it then follows that this element of malice aforethought cannot hold.

31. Having taken into account the evidence tendered by the prosecution and the submissions before me, I am satisfied that the prosecution has failed to prove all the ingredients of the charge of murder against each of the accused persons. The court finds them not guilty and hereby order that they shall be set free forthwith unless otherwise lawfully held.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent