



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R.MWONGO, J)

CRIMINAL CASE NO. 14 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MUCHERU MURAYA.....1ST ACCUSED

JOHANA GATONI WANJIRU.....2ND ACCUSED

DOUGLAS GICHUHI NGUGI.....3RD ACCUSED

JUDGMENT

Background

1. The accused persons are charged with the offence of murder contrary to section 203 as read with **Section 204** of the **Penal Code** it is alleged that on 25th April 2016 at around 12:00am at Njogu-ini village, within Nyandarua County, they jointly murdered Stephen Muigai Karumia. The victim was in the company of others who had attended a circumcision ceremony at the home of DW1 whose son had been recently circumcised. The ceremony went on into the night within the 1st accused's homestead. The actual celebrations took place in the house of the 1st accused's son.

2. According to the evidence availed, there were about forty young men in the compound and about twenty were in the room during the celebrations which were held at night on the material date. Sometime in the night, the lights went off and there ensued a scuffle. Some young men in the room cried out for help and there was a tumult as the beatings went on. According to the evidence, the 1st and 3rd accused intervened to quell the scuffle that saw the victim sustain an injury to the head as he and others in the room tried to flee. The deceased was trampled on and fell. He was taken to hospital but passed away two days later.

3. **Section 203 of the Penal Code** defines murder in the following terms:

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

Further, **Section 206 the Penal Code** provides that 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 flight or escape from custody of any person who has committed or attempted to commit a felony.”

4. Given the above provisions on the ingredients of the offence of murder, this court has to establish the following:

- i. Whether the cause of death of the deceased has been established.
- ii. Whether accused person's act or omission gave rise to the cause of death to the deceased,
- iii. Whether the accused persons intended to kill the deceased or to cause him grievous harm;
- iv. Whether the accused persons had knowledge that their action would probably cause death or grievous harm to the deceased; and
- v. Whether the accused persons simply intended to commit a felony.

5. Dr Ngulungu PW 9, testified that he carried out the post mortem of the deceased who was identified by his father Simon Kariuki Ndungu, PW 1. According to Dr Ngulungu, the deceased exhibited multiple bruises on the right hand side of the head measuring 50mm which was irregular and associated with fractures on the back of the head. There was also an injury in the brain which was swollen with epidural haematoma. He concluded that the cause of death was severe head injury attendant to skull fracture and brain injury. The Neither the death nor the cause of death have been contested.

Whether the cause of death is attributable to any act or omission of the accused persons

6. The best evidence is that of the eyewitnesses. From the record, the only eyewitnesses to the incident were: PW2 Daniel Ngugi, a student and classmate of the deceased, and PW7 Joram Muoria Macharia, grandson of the 1st Accused.

7. PW2 testified that on 23rd April 2016 at 6.30pm he left home to attend a circumcision ceremony at his uncle Mucheru's (Accused 1) home. The ceremony was for his cousin Muraya, whom he found being escorted by some men to hospital. They returned at about 11.00pm and he ate supper with the large group of about celebrants in the house. Later, some men ordered him and the young men to kneel and they were whipped and beaten until they screamed. There was disorder as some men were asking them to pay a fine for trespassing by attending a ceremony in that area.

8. At some stage, the hurricane lamp went off and in the darkness the beatings turned into a scuffle and a melee. According to PW2: ***"When the light went off, it became a free for all. Blows were exchanged all round in darkness"***. PW2 ***"did not see Accused 1 armed"***. When the door finally opened, there was a stampede as the occupants of the room fled out. PW2 saw some men with sticks attacking them, but did not know what happened to the deceased. He found that he was bleeding on the face and ran to the safety of the main house, where Accused 1 wife took him in.

9. The other eyewitness PW7, Muoria, testified that he went to his grandfather's house to prepare for the initiation celebrations. He found six young men in the room including the second and third accused. Eventually food was served, and some people were fined for being in the area without permission. Then a disagreement arose, leading to a fight. Accused 1 heard screams and came to the house but it was locked and he demanded that the door be broken.

10. Finally, some men opened the door. At that point PW7 heard someone crying. He went out with a torch and saw a man lying down: he was all muddy and couldn't stand. PW7 took the man – who turned out to be the deceased – to hospital with two others: one John and one Mbogo. Thereafter, they took the deceased to his father's place and explained what had happened. A few days later he heard that the victim had died.

11. In cross examination PW7 said that the room they had been in had about 50 people squeezed inside, though some left after having dinner. The deceased was in the room, and he, PW7, was his chaperone. The room had an inner room and a kerosene lamp was on. It was when Accused 2 and one Ngugi were fined and ordered to be beaten with a stick that a fight broke out. Accused one came to the room when screaming began and the light had gone off. When Accused 1 came PW7 heard the youth rushing out. He however said: ***"I did not see anyone assault the deceased"***. In cross examination he stated that ***"Accused 3 was not present when fighting took place"***.

12. What is the evidence of other witnesses who were not present to see the unfolding events?

13. PW10, Chief Inspector Suleiman Majondo, was the investigating officer at the time and also in charge of Haraka Police station. He testified that he together with Chief Inspector Kavoo and PW 6 Police constable Masinde they conducted investigations on 28/04/2016 after learning of the demise of the victim on 25/04/2016. PW10 stated that upon questioning of DW1 he established that there was a circumcision rite of passage party that stretched into the night and DW1 then retired at midnight. Further, that DW1 informed him that at 1:00am he heard the young men calling and yelling, ***"Uncle kuja tunapigwa"***; That DW1, with a rungu, then left his house in the company of DW3 to attend to the matter; That the yelling was coming from a house in the homestead about three metres from where DW1 lived; That despite his request to open the door, the boys inside refused and DW1 broke the door. That the first person to leave the door was the deceased. The other boys ran out in different directions. DW1 having been informed by a Mworria that the deceased had fallen in the mud and was injured. He then ordered Mworria to pick the deceased and take him to hospital.

14. PW6 PC Andrew Masinde, testified that he learnt whilst interviewing DW1 that a fight erupted in room where a party was happening and he, DW1, took a rungu to intervene; and that the deceased fell down and was trampled upon in a stampede. DW1 denied assaulting the deceased. PW6 stated that he also attended the post mortem conducted by PW9, and contends that during the post mortem it was established that no other bodily injury was noted on the deceased save for the head injury. PW6 further stated that the rungu caused the head injury, and further postulated that if indeed there was a stampede there would be other injuries-which were absent- on the body of the deceased. He together with PW10, collected the alleged rungu on the day they visited the scene, and produced it as MFI-1.

15. PW2 in his testimony stated that he was in the company of DW2 at the house of the initiate's house within DW1's homestead. PW2 and DW2 after identifying themselves in the gathering were told that they were intruders and had to pay a fine of either money or cigarettes or receive a beating of strokes of the cane. The men then started whipping PW2 and DW2 who screamed loudly alerting DW1 who knocked on the door. PW2 testified that he knew the deceased as among the group that escorted the initiate to hospital. PW2 testified on cross examination that he and DW2 had suffered facial injuries after the men attacked them after failing to pay the fine.

16. PW4 testified that after learning of the demise of the victim, he proceeded to Haraka Police station and thereafter to DW1 homestead. He testified that DW1 told him that there was a party as his son had been circumcised. That there was a commotion and that DW1 hit the door where the party was with a rungu. That the first to jump out of the house was the deceased and who was trampled on by other fleeing celebrants. PW4 testified that DW1 showed him the stick with which he banged on the door in an effort to stop the commotion. In cross-examination he stated that he told the police that he they were not shown any piece of wood[sic]. PW4 stated that all he could say is that DW1 showed them a piece of wood like the one in court.

17. PW5 stated that while on his way to church on a Sunday he met a boda-boda rider with the deceased on the pillion seat in a bad state and asked for PW5's help to prop him up to get him to the clinic. They were joined PW1. PW5 heard the deceased say, "**That is it**". PW 5 noted that the deceased had a huge swelling on the back of the head.

18. PW 8 John Marigi was the boda-boda rider called by PW 7 to take the deceased to hospital at Rwanyambo. He thereafter took the deceased to PW1's home. He knew nothing else of the incident.

19. Bernard Njenga, PW3 was the clinical officer at Pine view Hospital at Rwanyambo. He stated that he received a call at 12:30am to attend to a patient. He got up, opened the clinic and found three men supporting the deceased on a motorcycle. He performed first aid and noted that the deceased had a swelling on the right side of the ear and had no other injuries. He gave him an injectable painkiller and oral painkillers and gave his handlers painkillers to administer when and if the victim stabilized. They left and came back the next day. He noted that the deceased looked very ill, so he prepared a referral letter to Naivasha district hospital where PW3 later learnt that the victim passed on.

20. PW1, Simon Kariuki the deceased father, PW1 testified that in the morning of a 24/04/2016 at 3:00am PW7 knocked on his door stating that he had escorted the deceased home where he met PW8 and Rubugo with the deceased having come back from the clinic.

21. DW1 was the owner of the homestead. He stated that decided to investigate what was going on when he heard screaming coming from the initiate's house. He stated that after the door opened and he ordered the boys out, there was a stampede. In the end the victim was found lying on the ground and vomiting where the compound fence. He submitted that his intention of investigating the scuffle from DW1's son's house fails to show that he had an intention to kill or to cause grievous harm as it only elucidate that he was responding to a distress call from a nephew (PW2) to himself as the uncle.

22. It is unclear from the evidence whether the victim died of a stampede and what was the source of or who or delivered the fatal blow. The scuffle began inside the house; the fatal blow could have been dealt within DW1's son's house by the men who demanded money/cigarettes or by a kick when the victim fell down. As the men who caused the fight have not been arraigned in court, the cause of the blow remains mere speculation.

23. What is indisputable from both the prosecution and the defence witnesses that a vicious fight occurred in DW1's son's house. The prosecution has attempted to infer that DW1's rungu was the cause of the blunt head injury to the deceased. However, neither PW2 nor PW7, the two eye witnesses testified that there was a rungu used or seen at the scene. None of the eyewitnesses identified any of the accused as having hit the deceased, but both are agreed that fighting took place at the scene, and that there was a stampede. PW2 stated that he knew one of the people who beat them as Ndungu. That person was not arraigned in court.

24. According to PW7, Accused 2 and 3 were among those in the room being beaten. Accused 2's screams caused his uncle, PW1, to rush to the house and ordered the door to be broken. After the stampede, it was Accused 1 and 2 who PW7 called to help him with the fallen deceased.

25. Ultimately, the evidence concerning the alleged rungu is from the investigating officer. It a mere assertion with the probative value of hearsay as none of the witnesses corroborated his assertion.

26. It is clear that even if the principles of liability on circumstantial evidence were to be applied in this case, the state failed to prove murder. In the case of the grounds put forward **in Joan Chebii Sawe vs Republic 2003** and **in Abanga alias Onyango vs Republic**. There was neither the inference of guilt from which cogent evidence was drawn, nor was there definite tendency unerringly pointing towards the guilt of the accused, nor was there an unbroken chain of events with the inescapable reality that the accused committed the crime.

Disposition

27. There lies a broken chain of events that the prosecution sought to impute on the accused persons as the missing link. But that is speculation at best. The eyewitness evidence is weak and indefinite about how the deceased died.

28. Ultimately, the prosecution decided not to file any submissions, and sought to rely solely on the record. The record does not support a case for conviction for murder.

29. Accordingly, all accused persons are found not guilty, and are hereby acquitted. They shall be set free forthwith unless otherwise lawfully held.

Administrative directions

30. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

31. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

32. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Ms Muriithi for the 1st Accused
3. Mr. Karanja for the 2nd and 3rd Accused persons
4. Accused persons: 1, 2 and 3 Present in open court.
5. Court Assistant – Quinter Ogutu