



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 6 OF 2013

REPUBLIC

VERSUS

BENSON THAIRU WANGUL.....1ST ACCUSED

MICHAEL MAINA NJOROGE.....2ND ACCUSED

JUDGMENT

1. The accused persons were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. They are accused with others not before the court of having murdered **DAVID NDEGWA GATIMU** on the night of 9th day of March, 2013 along Karunda - Gate road in Thego Location within Nyeri County. Both accused persons had a mental assessment test conducted by Dr. M. Ricu Mwenda of Nyeri PGH and the reports were produced and marked as '**PEXh.19 and PEXh.20.**' The accused were both found fit to plead and to stand trial; the accused entered a plea of not guilty to the charge.

2. At the hearing hereof the 1st accused was represented by Learned Counsel Mr. Gathiga Mwangi and the 2nd accused was represented by Learned Counsel Mr. Makura whereas Ms. Gicheha was the Prosecuting Counsel for the State. The prosecution called a total of twelve (12) witnesses to buttress its case. Upon the prosecution closing its case this court found the accused had a case to answer and they were placed on their defence. After their rights were explained to them they elected to give sworn statements of defence. Hereunder is a narration of the State's and the accused's respective cases.

THE PROSECUTION'S CASE

3. The prosecution submitted that it had the burden of proving the key elements of the offence of murder which are the facts of death, the cause of the unlawful death, that the accused persons participated and caused the unlawful death of the deceased and lastly that in committing the unlawful act they had malice aforethought.

4. On fact of death and cause of death, the prosecution relied on the evidence of George Mwangi (**PW5**) the Assistant Chief and Dr. Obiero Okoth (**PW10**); The evidence of **PW5** was that on the fateful night he received a call from a boda-boda rider informing him that a body had been found along the Karunda; when viewing the body of the deceased at the scene he saw injuries to the head and hands. He stated that the injuries to the head looked like the head had been crushed by a stone and he described the face as having been disfigured by the injuries.

5. The body of the deceased (David Ndegwa Gatimu) was identified to **PW10** by **PW3** Jedida Wairimu who was the wife of the deceased. **PW10** confirmed that he conducted the post mortem examination on the body of the deceased and produced the Post Mortem Report into court as **PEXh.17**. The body of the deceased had injuries to the face and hands and **PW10** formed the opinion that the cause of death was a '**head injury due to blunt trauma.**'

6. The case law relied on was the case of **Uganda vs Lydia Draru alias Atim HCT-OO-CR-SC-0404** where it was held that '**in every homicide, it is presumed to be unlawful unless the circumstances make it excusable.**' In this instance the evidence adduced by **PW5** and **PW10** showed that the deceased did not die from a natural death but pointed to an unlawful killing leaving no doubt that this was an unlawful death.

7. The prosecution submitted that it had therefore proved the fact and cause of the death of the deceased to the desired threshold of beyond reasonable doubt.

8. **On whether the accused persons participated in the commission of the unlawful act that led to the death of the deceased;** the prosecution relied on the evidence of **PW4, PW8 and PW9**. Robert Nganga Mungai (Force No.242446) (**PW4**) his evidence was that on the fateful night at about 11pm two persons were brought to the police camp by members of the public who accused the two suspects of having killed a man who hailed from Kirichu area. The suspects clothes had spatters of blood and though they had been beaten up by the irate

members of public they only had swollen bruises and were not bleeding. He informed the OCS who later came and arrested them and placed them in the office of the Deputy OCS.

9. The evidence of Henry Kiptoo Sang (**PW9**) the Government Analyst was that the blood samples recovered from the boots of the 2nd accused and the blood sample from the cap and shoe of the 1st accused matched the DNA profile of the deceased; he produced the Government Analyst Report dated 30/07/2015 as an exhibit '**PEXh.16**'.

10. The question that arose is how did the accused persons come into contact with the deceased's blood; Nicholas Wanyike (**PW8**)(Force No.233717) a police officer testified that he boarded the scene of crime vehicle together with the accused persons and they were transported to Nyeri Police Station using this vehicle whereas the body of the deceased was transported to the mortuary using the station vehicle driven by PC Mwachia; he stated that at no time did the accused persons interact with the body of the deceased from the time they were picked up from the AP camp to the time they were transported to Nyeri Central Police Station. This evidence dispelled any doubts of any interaction that the accused persons may have come into contact with the body of the deceased when being ferried between the two police stations.

11. The evidence in regard to their participation was strengthened by the deceased's matching DNA profiles analyzed from the blood found on the accused persons items of clothing and shoes and there were no other co-existing circumstances that displaced this fact; the only reasonable explanation for the presence of the deceased's blood on their clothes and shoes was that they participated in the unlawful act that led to the death of the deceased.

12. On the last ingredient counsel submitted that Section 206 of the Penal Code provides the definition of malice aforethought; and it reads as follows;

' 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;'

13. The injuries sustained by the deceased as described in the Post-Mortem Report were severe. The actions were deliberately targeted to the deceased's head leading to a crushed skull. The nature of the injuries sustained are sufficient evidence that the accused persons inflicted them deliberately with the intention of causing the death of the deceased. Malice aforethought can therefore be inferred from the nature and severity of the injury inflicted by the accused persons upon the deceased.

14. In conclusion, the prosecution submitted that it had adduced evidence on the circumstances of the case and the evidence was not in any way discredited by the defence and that it had discharged its burden of proof to the desired threshold. In the premises counsel urged the court to find the accused persons guilty and convict them as charged.

THE 1st ACCUSED PERSON's CASE

15. The accused gave a sworn statement of defence on the circumstances of that fateful night; that he had hired a boda boda to go to attend a matanga for funeral preparations. It was his submission that this evidence was not dislodged.

16. He had intended to call one witness but due to the ongoing Covid 19 pandemic he was unable to access his witness.

17. The accused also filed final submissions wherein he submitted that the prosecution had failed to prove its case beyond reasonable doubt; the entire case was based on suspicion. It did not prove that the accused committed the unlawful act as there was no evidence that he knew or even had any quarrel or disagreement or wrangles or altercations with the deceased person. There was also no evidence of anything having been taken away.

18. The ingredient of malice aforethought must be express or implied. The circumstances under which malice aforethought is proved are as proscribed under Section 206 of the Penal Code. The accused submitted that malice aforethought either implied or express was not proved beyond reasonable doubt.

19. The prosecution was duty bound to prove the circumstances and did not satisfy the court beyond reasonable doubt that no other inferences could be drawn. Case law relied on was; **Republic vs Kipkering Arap Koske and Another**. He urged the court to acquit the accused under Section 306 of the Penal Code.

THE 2ND ACCUSED PERSON's CASE

20. The accused person made a sworn statement of defence and his evidence was that on the fateful night he and others had used a motor cycle operated by **PW12** to attend a funeral. It was the prosecutions' case that they tried to escape using this motor cycle after committing the offence; **PW12** was forced to identify his passengers to the other boda boda operators who then beat them up and marched them to Kirichu Administration Police Post where he was arrested and later charged with murder.

21. All the evidence adduced by the prosecution was circumstantial as there was no direct evidence or eye witnesses who stated that they had

seen him killing the deceased. There was also no corresponding match from the DNA profiles generated from the items recovered from him when compared to the DNA generated from the deceased. Even if the deceased's blood was found on his clothes (which is denied), evidence was adduced that he was forced and compelled to handle the bloodied body of the deceased and ordered to load the deceased's body onto the Land Cruiser.

22. The circumstantial evidence was not water tight to pin-point the culpability of the 2nd accused person. The evidence was based on suspicion; which no matter how strong cannot provide the basis of inferring guilt which must be proved beyond a reasonable doubt through evidence. In order to sustain a conviction it was incumbent upon the prosecution to demonstrate a chain of events that led to the murder of the deceased. Case law relied on was; **Sawe vs Republic [2003] eKLR**.

23. None of the elements of malice aforethought as set out in Section 206 of the Penal Code were proved by the prosecution to the required standard. The prosecution failed to also demonstrate how the accused formed a common intention to murder the deceased.

24. In conclusion it was the 2nd accused persons' submission that no sufficient evidence was adduced to prove that he had formed a common intention to murder; that he was merely charged on the basis of suspicion; he therefore prayed that he be found Not Guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and he be set free forthwith unless otherwise lawfully held.

ISSUES FOR DETERMINATION

25. After the full hearing of the case and the hearing of the final submissions made by both the prosecution and defence counsel this court has framed the following issue for determination:-

(i) Fact of death of the deceased and the cause of death;

(ii) Whether the accused caused the death of the deceased by either an unlawful act or omission; Whether the facts and evidence brought forth by the prosecution are sufficient to enable an irresistible inference of guilt to be drawn as against the accused persons; and

(iii) Whether the accused in causing the death had malice aforethought.

ANALYSIS

26. In a charge for murder the prosecution has to prove three main ingredients of the offence. It must prove the fact of death, the cause of death and that the accused caused the unlawful act or omission that caused the death. Lastly, it must prove that the accused person had the intention to cause death.

Fact of death; the death of the deceased and the cause of death;

27. On the fact and cause of death; The body of the deceased (David Ndegwa Gatimu) was identified to Dr. Obiero Okoth (**PW10**) by **PW3** Jedida Wairimu who was the wife of the deceased; **PW10** confirmed that he conducted the post mortem examination on the body of the deceased and produced the Post Mortem Report into court as **PEXh.17**. The body of the deceased had injuries to the face and hands and **PW10** formed the opinion that the cause of death was occasioned by a **'head injury due to blunt trauma**.

28. From the medical evidence of **PW10** on the cause and fact of death of the deceased and the Postmortem Report which was prepared by this witness and admitted into evidence(marked as **'PEXh.17'**), this court is satisfied that this ingredient was proved by expert medical evidence as required by Section 48 of the Evidence Act.

Whether the accused caused the death of the deceased by either an unlawful act or omission; Whether the facts and evidence brought forth by the prosecution are sufficient to enable an irresistible inference of guilt to be drawn as against the accused persons.

29. The prosecution's entire evidence was based on circumstantial evidence as to what actually transpired before and up to the moment of the killing. It relied on circumstantial evidence of **PW4**, **PW8** and **PW9** to prove this ingredient as there was no direct evidence or eye witness to the murder incident. It is trite law that where a case rests entirely on circumstantial evidence this evidence must be examined in the light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364**. The court held as follows;

"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"

30. The prosecution's inference of the 1st and 2nd accused persons' guilt is based on the following circumstances. **PW1** stumbled on the body of the deceased lying off the Karunda - Gatei road where he then called the chairman of the boda boda operators who sent out calls to the other operators to be on the look-out for any suspicious looking persons. The inference of guilt is also the proximity of where **PW12** a boda boda operator picked the two accused persons as passengers to the site where the deceased's body was found. **PW12**'s evidence was that he was in the vicinity of the Karunda - Gatei road where the body was found, when he received the look-out call and the persons being sought fitted the description of the 1st and 2nd accused. He broke his journey and surrendered them to the boda boda operators who then frog-marched them to Kirichu Administration Police Post and they handed the two over to **PW4**.

31. The evidence of Robert Nganga Mungai (Force No.242446) (**PW4**) was that on the fateful night at about 11pm two persons were brought to the police camp by members of the public who accused the two suspects of having killed a man who hailed from Kirichu area. The suspects had been beaten up by the irate members of public and their clothes and shoes had spatters of blood.
32. The blood stains found on the clothes and shoes belonging to both the 1st and 2nd accused were taken for analysis. Henry Kiptoo Sang (**PW9**) the Government Analyst in his report stated that the blood samples recovered from the left boot (**D1**) of the 2nd accused and the blood sample from the brown cap (**E2**) and right sport shoe (**E1**) of the 1st accused matched the DNA profile of the deceased. He produced the Government Analyst Report dated 30/07/2015 as '**PExh.16**';
33. The evidence of the aforementioned Government Analyst implicated the 1st and 2nd accused and there is no doubt that the accused persons had been in contact with the deceased's body at some point due to the blood stains of the deceased being found on their various items of clothing. The question that then arises is **when** did the accused persons come into contact with the deceased's blood?
34. The 1st accused person's version on how he had gotten the deceased's' blood on his clothes was that when the Land Cruiser arrived at Kiganjo Police Station the body was offloaded and placed on the grass; the two accused persons were ordered to load the body back onto the Land Cruiser with the assistance of the boda boda operators. The explanations given by the accused raises many queries that create doubts in this courts mind on their versions when compared to the prosecutions. Such queries that arise are; firstly, why would the police officers offload the body themselves and then order the accused to load it back on to the Land Cruiser? What would be the reason for offloading and reloading the body back onto the same vehicle?
35. Secondly, did these boda boda operators follow the two vehicles all the way to Kiganjo Police Station? This court wonders out loud as to how irate boda boda operators whilst baying for their blood would assist the accused persons in loading the body onto the vehicle. Lastly, the 1st accused persons' version does not explain how the blood of the deceased person reached his cap which was on his head whereas he had carried the body with his hands; nor does it explain the fact that their clothes only had spatters of blood stains as opposed to the clothes being soaked in blood if they had indeed lifted the deceaseds body and placed it onto the vehicle.
36. Without the evidence of **PW8** on the co-existing circumstances the chain of circumstances relied on would have been weakened. His evidence strengthened the prosecution evidence by dispelling any doubts raised by the accused persons that the mode of transportation had brought them into contact with the deceased's blood.
37. Nicholas Wanyike (**PW8**)(Force No.233717) a police officer testified that the body of the deceased was transported using the station vehicle a Land Cruiser driven by PC Mwachia and the body was transported directly to the mortuary and was only off-loaded there. He further stated that at no time did the accused persons interact with the body of the deceased from the time they were picked up from the AP camp to the time they were transported to Kiganjo Police Station and then Nyeri Central Police Station. He also stated that he boarded the scenes of crime van together with the accused persons and they were transported to Nyeri Police Station using this small white vehicle;
38. The accused persons' evidence tends to verify and confirm the prosecutions' evidence as to the number of police vehicles that arrived and how the vehicles were used on that fateful night. **PW4's** evidence was that two vehicles arrived at the crime scene and both accused persons confirmed that two police vehicles arrived at the scene on that material date. **PW8** goes on to state that the body was loaded onto the stations Land Cruiser. This fact is not disputed by either of the accused persons as they too confirmed that the body was loaded onto and transported in the Land Cruiser; **PW8** informed the court that the accused persons were ferried in the scenes of crime vehicle which was a small white van and that he rode together with the accused persons in this van to the police station. The 2nd accused in his testimony confirmed that they had been ferried in this small van to the police station which confirms **PW8's** evidence that the body once loaded was ferried separately.
39. Therefore, this court is satisfied that the prosecution evidence dispels any doubts raised by the accused persons as to the interaction that the accused persons may have had with the body of the deceased when they were ferried between the scene of crime and the police stations. If it can safely be concluded that on the material night the accused persons were not carried together with the body of the deceased in the same vehicle but were carried in a different vehicle and that the accused persons only contact with the deceased's blood was at time of the commission of the offence.
40. This chain of circumstances relied upon by the prosecution on the accused's participation is strengthened by the evidence of the Government Analyst who after analyzing the blood samples taken from the clothes and shoes of the 1st and 2nd accused found it to be a match to that of the deceased. There being no other co-existing circumstances found that displaced this fact, the only reasonable explanation for the presence of the matching DNA profiles on their clothes and shoes was that it linked the accused persons to the murder and that they participated in the unlawful act that led to the death of the deceased;

Whether the accused in causing the death had malice aforethought

41. The definition of malice aforethought is found at Section 206 of the Penal Code which reads as follows:

"206. Malice aforethought

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.”

42. According to the above section the ingredient of malice aforethought can be express or implied; it can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

43. In this instance, the injuries sustained by the deceased as described in the Post-Mortem Report were severe. The actions were deliberately targeted to the deceased's head leading to a crushed skull. The nature and severity of the injuries sustained is found to be sufficient evidence to establish malice aforethought in that the accused persons inflicted them deliberately with the intention of causing the death of the deceased.

44. This court is satisfied that malice aforethought can be inferred from the nature and severity of the injury inflicted by the accused persons upon the deceased.

45. In conclusion and from the circumstances, it is this court's considered view that the facts and evidence brought forth by the prosecution are sufficient to enable this court to draw any irresistible inference of guilt as against the two accused persons.

FINDINGS AND DETERMINATION

46. For the foregoing reasons this court makes the following findings and determination:

(i) This court finds that the fact and cause of death was proved by expert medical evidence.

(ii) This court finds that malice aforethought necessary to constitute murder has been established.

(iii) This court finds that the circumstantial evidence brought forth by the prosecution to be sound and conclusive and sufficient to enable an irresistible inference of guilt to be drawn as against the accused as it meets the threshold to justify a conviction;

(iv) The accused **BENSON THAIRU WANGUI AND MICHAEL MAINA NJOROGE** are both hereby found **GUILTY** of murder.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 22ND DAY OF OCTOBER, 2021.

HON. LADY JUSTICE A.MSHILA

JUDGE