



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

PATRICK MUTUKU WAMBUA.....ACCUSED

JUDGEMENT

1. Patrick Mutuku Wambua hereinafter referred as the accused was charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge are that on the night of 25th and 26th December, 2014 at Kivani village, Katheka Kai Location in Machakos sub-county within Machakos County murdered Ken Mutie Musau alias Mutinda Musyoka (hereinafter referred to as the deceased).

2. The accused pleaded not guilty to the charge. He was represented at the trial by Miss Gichuki and the prosecution was conducted by Mr Machogu. The prosecution called a total of ten (10) witnesses to prove the ingredients of the offence beyond reasonable doubt constituting the following:

(1) The death of the deceased.

(2) The death of the deceased was unlawful.

(3) That in causing death there was malice aforethought on the part of the accused.

(4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.

3. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was **Boniface Kisilu Muturi**. He testified that he used to live with the deceased and on 25.12.2014 he left him in the house and on return he found the deceased was not at home and he was informed that the deceased was spotted at the home of the accused person and when he went to the accused's home he found the deceased there already dead. On Cross– examination, he testified that he did not know how the deceased died.

4. **PW2** was **James Kioko Mutiso** who testified that on 25.12.2014 the deceased visited his bar together with the accused and they began chewing Miraa then the following day he heard the deceased had died.

5. **PW3** was **Musau Kyenzi** who testified that the deceased was his son and that he received a call on 26.12.2014 that the deceased had died.

6. **PW4** was **Ruth Mueni Kivuvo** who testified that that the accused was her brother in law and that on 25.12.2014 she heard the accused quarrelling with his wife and another voice pleading with the accused not to beat him. She testified that the other voice was that of the accused and armed with a lantern she rushed to the accused's house together with her mother in law and found the accused and the deceased scuffling and heard the accused saying that the deceased had snatched his Kshs 5,000/- and that the deceased said that he only took Kshs 200/-. She testified that they went out to look for the money and didn't find it and when they went back they found the deceased lying on the ground outside the deceased's house and the following day found out that the deceased had died. On cross-examination, she testified that both the deceased and the accused were drunk.

7. **PW5** was **Beth Wambua** She testified that on the night of 25.12.2014 she heard noises within the compound and realized that the deceased and the accused were brawling over money and the following day found the deceased lying near a tree. She recalled that the previous night she tried to intervene and advised the deceased to go to his home. The accused was arrested and the body of the deceased was taken away.

8. **Pw6** was **Harun Galana Ali** who testified that on 26.12.2014 he was at the AP Camp when Patrick Wambua was brought and who reported that two persons fought at his home and one of the combatants was tied to a tree and in the morning he failed to wake up. He

testified that he visited the scene together with Patrick and found the body of the deceased that had bruises on the left side of the hip. He also found a Kshs 1,000/- note and a 100/- note that was torn in pieces together with an ID card in the names of Mutunda Musyoki.

9. Pw7 was **Cpl Mohammed Abdi Hakim** who testified that on 26.12.2014, Patrick Wambua reported to him that a colleague had died and that he went to the scene and found the body of the deceased lying next to a tree and the body had bruises. He also found a Kshs 100/- and 1000/- note. On cross-examination, he testified that the accused informed him that he and the deceased scuffled after a drinking spree.

10. Pw8 was **Dr Waithera** who testified on an autopsy that was carried out on 30.12.2014 on the deceased. The body had strangulation marks and formed the opinion that the cause of death was asphyxia due to hanging or strangulation. She tendered the report as evidence and the same was marked Exh 12.

11. Pw9 was **CIP Justin Mwaniki Nyagah** who testified that on 3.1.2015 the accused was presented to him by the investigating officer and he recorded a statement from him and after cautioning him and inviting his mother as a witness, recorded what was a confession dated 3.1.2015. The accused person confessed that there were differences between him and the deceased and that they scuffled and that he tied the deceased to a tree using a rope. The accused signed the confession. On cross-examination, he testified that the accused told him that the scuffle was over the refusal of the deceased to handover Kshs 1,000/- and that the accused claimed that he tied the deceased on the hands and neck onto a tree.

12. Pw10 was **Cpl Peter Wafula** who testified that on 26.12.14 he was instructed to accompany the DCIO and the OCPD to Kitanga and on arrival at the scene he found the body of the deceased and noticed that there were injuries on the neck, chest and pelvis regions and that there was a sisal rope. Inside the accused's house he recovered a mutilated Ksh 100/- and 1000/- note. He was informed that the accused and the deceased were together the previous night and had a bottle of beer together and chewed Khat and later a disagreement arose between the accused and his wife that the deceased had tried to intervene. He testified that the accused recorded a confession and he organized for the post mortem.

13. The court found that the accused had a case to answer and placed him on his defence. Dw1 testified that he was drunk at Eviani bar and he had earlier drunk at Sunshine Bar. He testified that the deceased was also drunk. He testified that the deceased accompanied him to his home and that his wife aimed a beer bottle at him but he dodged the attack. It was his testimony that his wallet fell down and the deceased picked it up and later the deceased attacked him prompting a fight whereupon the accused tied up the deceased and he admitted that the rope suffocated the deceased. He testified that he had no intention to kill the deceased. On cross examination, he testified that he was not too drunk as he was able to walk home and he was angered by the deceased who had asked him why he was beating his wife. He testified that he was angered by the loss of his money and suspected that the deceased had stolen the money. The defence closed its case and the parties canvassed the case vide submissions.

14. The defence counsel submitted that the deceased was the aggressor in the ensuing fight and that the accused had no intention to kill the deceased. Learned counsel urged the court to consider the defence of intoxication and in that regard, there was no malice aforethought. Counsel cited the case of **Abdalla Omar Mwangeshi v R (2019) eKLR**.

15. In reply, counsel for the state submitted that the evidence of Pw4, 5 to 9 established that the deceased was assaulted by the accused who tied him with a rope and that he had the intention to inflict injuries that led to his death. Counsel urged the court to find the accused person guilty of murder.

16. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

17. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. The pathologist who conducted the autopsy formed the opinion that the cause of death was asphyxia due to strangulation or hanging. This ingredient of the offence was duly proved by the prosecution.

18. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

19. The deceased in this case was found to have died from asphyxia due to hanging or strangulation. It was upon the prosecution to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable. I cannot at this stage presume that the death was unlawful as the accused has imputed that the defence of intoxication was available to him.

20. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge.

21. The learned defence counsel suggested intoxication as negating malice aforethought since the accused was too drunk to form the specific intention required. It is trite law that the court is required to investigate all the circumstances of the case including any possible defences even though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence (see **Abdalla Omar Mwangeshi v R (2019) eKLR**).

22. Under section 13 of The Penal Code, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Since in the instant case there was no suggestion that the condition of intoxication the accused was labouring under was caused without his or her consent by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he or she was doing since by reason of that intoxication he was insane, temporarily or otherwise.

23. Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had if he or she had not been intoxicated, unless it is shown that the substance which intoxicated him or her was administered to him or her without his or her knowledge or against his or her will. Alternatively, that by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law was aptly summarized by the House of Lords in **Director of Public Prosecutions v. Beard [1920 AC 479]** thus:

“There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.”

24. The defence of intoxication can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.

25. Although the accused adduced evidence that he had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 13 of The Penal Code. In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his or her actions when he or she is in such a state and will likely have no memory of them the next day. To the contrary, in his defence the accused gave a detailed account of his version. He narrated how a fight broke out and he went to the rescue of the deceased. He also explained how he even tied the deceased up and went to look for a village elder. In cross examination, he testified that he was not too drunk as he was able to walk home. That conduct is not consistent with a person so drunk as to have lost the capacity of moral judgment. He carried out purposeful actions both before and after the incident. His conduct before and after the tying up of the deceased demonstrated an awareness of the consequences of what he was doing. This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the incident.

26. The evidence taken as a whole clearly shows that the drink the accused had consumed had not impaired his judgment in any way. The fact that an accused copiously took various amounts of alcohol at different venues cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity within the terms of section 13 of The Penal Code. Merely drinking alcohol does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions (see **Kongoro alias Athumani s/o Mrisho v R (1956) 23 EACA 532**). The defence of intoxication is therefore not available to him.

27. Despite the absence of direct evidence of intention, on the basis of the circumstantial evidence, I find that the accused in killing the deceased had the malice aforethought. It is instructive that the accused pushed the deceased outside and then tied him up with a rope onto a tree within his compound and retired to bed. He woke up in the morning and found the deceased already dead and stiff. That is when he decided to go out in search of the clan elder and local administration. These were not actions of a person who was too inebriated. The defence of intoxication is not plausible in the circumstances.

28. In the result it is my finding that the prosecution has proved the charge of murder contrary to section 203 as read with section 204 of the Penal Code against the accused beyond any reasonable doubt. I find the accused guilty of the said offence of murder and is convicted accordingly.

Orders accordingly.

Dated and delivered at Machakos this 30th day of January, 2020.

D.K. Kemei

Judge