



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 93 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MWICHWIRI .....ACCUSED

JUDGMENT

**Initiation turned murder**

[1] The accused person, namely **Jackson Mwachiri** was charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the Offence were that, on 15<sup>th</sup> December 2014 at Kulamawe Area in Isiolo District within Isiolo County in Eastern region murdered, **James Mwiti**. The prosecution called five (5) witnesses to support the charge. The defence called one (1) witness. Although both counsels intimated to court that they will file summing up submissions, none filed. I will nonetheless, evaluate the evidence and apply the law on the facts of the case as I am required by law.

**Elements of Murder.**

[2] According to section 203 of the Penal Code: -

**Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

Thus, to obtain a conviction for murder, the prosecution must prove beyond any reasonable doubt;

- 1. The death of the deceased and the cause of death;**
- 2. That the accused caused the unlawful act or omission which caused the death; and**
- 3. That the accused had malice aforethought as defined under section 206 of the Penal Code.**

**The death of the deceased and cause of death**

[3] **Pw4 Dr. Mohammed Abdikadir Guyo** carried out a post-mortem on the body of the deceased. He compiled a report thereto dated 22<sup>nd</sup> December 2014. In the report, the doctor formed the opinion that the cause of death was cardiopulmonary arrest. This was explained to mean that the heart and the lungs stopped working as a result of multiple injuries and severe blood loss. He testified that the parts that had injuries were head (severe), neck, chest wall and left leg (tibia and fibula). The body of the deceased was accordingly identified. With this evidence, I find that the prosecution proved the death and cause of death of the deceased.

**Who caused the unlawful act which caused the death?**

[4] **PW1 Priscillah Muthoni**, mother to the deceased stated that she committed her children, **James Mwiti ( the deceased herein ) and Erick Muriuki** to the care of the accused person during their initiation and circumcision in accordance with Meru customs. That prior to the demise of the deceased she had been informed by the deceased and Erick Muriuki that the accused person used to beat them severally. At one occasion she warned the accused of molestation of the boys but the accused person continued to beat up the deceased and the other initiate in order to make them eat.

[5] She testified that, on the date of the demise of the deceased, the accused person called her and informed her that the deceased had fainted. They left immediately to Gitonga's residence- the doctor who circumcised the boys. The doctor was not home but they found the wife of the doctor who called the doctor over the phone and was advised by the doctor on the medication to give them. They took the

medicine to give to the deceased but the deceased could not take the medicine. They later on took a taxi but upon their arrival at Isiolo General Hospital the deceased was pronounced dead.

[6] **PW2 Erick Muriuki** testified that the accused person used to beat him and the deceased severally. That he used to whip them so that they could eat. He told the court that some of the friends of the accused, Angu and John had also beaten them at some other time. He was categorical, however, that on the night when the deceased died, the accused person had forced them to eat an amount of cooked rice they could not finish in ordinary circumstances. To avoid being beaten for not finishing the rice, they threw what had remained through the window, and pretended that they had finished the rice. He continued to narrate the events that followed; that the accused person later discovered the rice they had thrown away when he was slashing grass at the backyard. He came back to them and asked them if they had finished the food. They remained silent and so the accused started to beat the deceased with a panga. He also beat him with a 2 by 2 timber stick. He beat the deceased severally. He also used paraffin to burn their buttocks. At the time the radio was on high volume.

[7] The deceased ran to Pw1's house to report the beating. When the accused came back he continued to beat him on the thighs and buttocks using five sticks he had entangled into one big cane. It was his testimony that the deceased fell down during the beating. The accused person continued to beat him up. The deceased could not stand up. They tried to give him milk but he did not respond. PW2 also testified that they tried to administer first aid but it was all in vain. The police came later and took him to the hospital in a wheelchair since he could not walk. He stated that the deceased was bleeding as a result of the beating; and his shirt and trouser were all soaked with blood.

[8] In cross-examination he testified that Angu and John would beat them but this they only did on 13/12/2014 for one minute.

[9] **PW3 Bernard Gitonga** testified that he is the doctor who circumcised the deceased and Pw2. That the accused person had initially come to him asking for circumcision services. He offered the services and the accused on 7/12/14 paid a deposit of Kshs. 1000/=. That on 15/12/2014 he was called by his wife and informed that one of the boys he had circumcised was not feeling well. That from the description of the injuries he prescribed medication to the deceased over the phone. The same was administered to the deceased by his wife. He later learnt that the deceased had passed on.

[10] **PW5 Adrian Kinoti** narrated the course of the investigations. It was his testimony that Pw1 reported that his two sons had been taken for initiation by the accused person herein and that on the night of 15/12/14 James Mwititi had fallen ill and was taken to Isiolo hospital in critical condition. That he accompanied Pw1 but found the deceased had already passed on. Upon his observation of the body he found the deceased had bruises on the leg and one leg looked broken.

[11] It was his testimony that he interrogated the accused person who took him to the house where the deceased resided in Kula mawe estate. He told the court that he found a shirt with vomit and blood stains. He also interrogated Pw2 who informed him that they were thoroughly beaten since they were being initiated. He also informed him that they received the beating through whips and panga. In the course of his investigations he entered the house and retrieved the whips (pexh 2), panga (pexh3) and some tablets (Pexh 4 (a), (b), (c), (d)). On further investigation he was informed that the tablets were prescribed by Pw4. He was also informed by Pw1 that she had tried to warn the accused person against the molestation of the deceased and Pw2. That he also learnt that the deceased had ran from the initiation house to her mother's house but her mother kept quiet presumably held back by Meru customs. That the custom states that if you raise an alarm you are not a man and your child will not heal.

[12] In cross-examination it was his testimony that the deceased was sick arising from the beatings. He suffered assault wounds and grievous harm injuries. The doctor did not also examine the deceased so the diagnosis of malaria was wrong. He also restated that he got the whips and the panga in the house where the deceased and the accused resided.

[13] **Dw1 Jackson Mwicwiri Timothy** testified that on 7/12/2014 he was summoned by Pw1 who told him to take his boys for circumcision. He took the boys to Dr. Gitonga who received a sum of Kshs. 1000/= and the balance was to be paid later. He stayed with the boys at the residence in Kula Mawe and he stayed with them for two days. He later reported to work and Alingini took over from 9/12/14 to the night of 14/12/14. That while he was at work he was called and informed that Mwititi was not feeling well. He went to the house and found the deceased was sleeping. He called Dr. Gitonga but was not home. His wife however prescribed the medication. That they later took Mwititi to hospital but he was pronounced dead upon his arrival.

[14] He stated that he did not hurt the deceased in any way. That he took care of both the deceased and Pw2 and his intention was to train the initiates to eat. In cross-examination he conceded that he only forced the deceased to eat. He denied knowledge of the injuries and stated that if the deceased was injured it must have been by Alingini.

[15] I have considered the evidence of both the prosecution and the defence. I do note that the cause of death was cardiopulmonary arrest due to multiple injuries occasioned to the head, neck and legs. The evidence of: Pw1 to whom the accused reported of the "illness" of the deceased and with whom they went together to Gitonga for medicine; Pw2- who was with the accused and deceased in the same house; and Pw5 on investigation, placed the accused person at the scene of the crime on the fateful day of 15/12/2014. Pw2 stated that he saw the accused person beat up the deceased with a cane of five sticks entangled into one, a panga and 2x2 timber until he fell down. From his evidence, even after the deceased had fallen down, the accused continued to beat him up. When he realized that he had badly injured the deceased he tried with the help of PW2 to administer first aid and to give him some milk to resuscitate him. But, the deceased was not responding. PW2 was an eye witness and was present when all he narrated happened. His evidence was cogent and connected the accused with unlawful acts of assaulting the deceased on the material day. His evidence was also duly corroborated by the evidence of PW1 and PW4. The postmortem report also confirms injuries sustained by the deceased and are consistent with the beating narrated by PW2. The causal link of the injuries sustained by the deceased to unlawful acts of the accused has been duly established by these pieces of evidence. Accordingly, it is safe to conclude and I do find and hold that the accused is the perpetrator of the offence.

[16] The alibi that the accused had given the mandate of taking care of the deceased and Pw 2 to a Mr. Alingini is an afterthought and is dislodged by the evidence adduced which show clearly that the two initiates were committed to the care of the accused by their mother and he was in charge of taking care of them. The evidence also show that he was at the scene on the material day and that he is the one who beat

the deceased with sticks, timber and panga until he fell down; and continued to beat him and left him to sleep. PW2 gave a detailed account of the beating by the accused person of the deceased. Evidence show that Alingini also mentioned by Pw2 as Angu only beat them up on 9/12/2014. This was six days before the demise of the deceased. Although the accused has also stated that he did not inflict the injuries and only forced the deceased and Pw2 to eat the food, evidence show that he beat the two and he inflicted the killer injuries upon the deceased. In addition, Pw1 stated that the accused beat up the deceased a number of times and he had been warned about beating/molesting the deceased. The evidence of pw1 was that on the fateful night it was the accused who came for food for the boys. Similarly, the accused is the one who notified her of the "illness" of the deceased and they went together to Gitonga for medicine. The evidence of Pw2 also shows that he not only beat up the deceased but also beat up Pw2. I therefore find that the evidence of the accused person was an afterthought and hereby dismiss it.

### **A cry for our children of Ameru**

[17] Before I move to the next consideration, I feel compelled to say the following: I am perturbed that persons to whom children are committed for care, advice and instruction to manhood should turn into beast. I doubt the Meru Custom would advocate for violence to be visited upon initiates. But, I shudder that the uncouth and unlawful practice of inflicting pain and violence on circumcision initiates is rife in the Meru community such that it may be mistaken for or otherwise confused with being part of the Meru custom. I say so because I have encountered a number of live murder cases as a result of violence inflicted upon initiates in the name of "giving a name" or making a man out of the initiate; alas; some result into loss of the "man" and death ensues. I felt obligated to state these things as a way of removing the heavy congestion from my chest which these matters have created in me as a judge presiding over murder trials in Meru. This is but the headache of a judge! However, I only hope that this beautiful community of Meru will re-engineer itself and curb violence which has become the festering wounds of its society. I am hopeful, when I will be jotting down my memoirs, these things will be of the past. Amen.

### **Did he do it with Malice aforethought?**

[18] Malice aforethought is the *mens rea* to commit the offence. Ordinarily, it takes the form of an intention to unlawfully kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is implied malice. Section 206 of the Penal Code Provides:

**206. 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 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.**

[19] In the case of **Republic v Tubere S/O Ochen** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

[20] In this case the accused person used a whip, panga, piece of wood and sticks (five of them emboldened into one) to beat up the deceased. The accused beat the deceased indiscriminately using such dangerous weapons. He also continued to beat the deceased with the said weapons even after he had fallen down and was not responding. The P3 report indicates that the deceased had injuries to the head (severe), neck and leg. To set upon such a young boy with such weapons is ominous. Looking at the kind of weapons used and the harm caused by the accused person, the accused knew or ought to have known these acts would cause the death of or grievous harm to the person, and in this case the deceased. Therefore, his actions were of malice aforethought and accordingly caused death of the deceased.

[21] In view of the forgoing, the elements of murder have been proved beyond reasonable doubt. Consequently I find the accused person guilty of the offence of murder contrary to Section 203 of the Penal Code of Kenya and accordingly convict him for the murder of James Mwiti under section 322. It is hereby so ordered. Right of appeal, 14 days.

Dated signed and delivered in open court this 11<sup>th</sup> day of March, 2020

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**F. GIKONYO**

**JUDGE**

**In presence of**

M/s Nandwa

M/s Nelima holding brief for Otieno (for accused)

Later Otieno comes in.

Accused - present

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**F. GIKONYO**

**JUDGE**