



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 20 OF 2018

REPUBLIC.....PROSECUTION

-VERSUS-

KIOKO NZUVI NG'ONYO.....RESPONDENT

JUDGMENT

1. **Kioko Nzuvi Ng'onyo** the accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 22nd day of December 2012 at about 1900 hours at Kiongwani market, Kiongwani sub-location, Kitaingo location in Mukaa sub-county within Makueni county murdered **James Ndavi Mutua**.

The accused denied the charge and the case proceeded to full hearing with the prosecution calling six (6) witnesses to prove its case.

Pw1 **Cosmas Musomba Mutua** a brother to the deceased was on 22nd December 2012 at 6:00 pm called by one **Mutuku Ndongye** who informed him that the deceased had been hit with a stone at Kiongwani market. He gave him the accused's name as the assailant. He took a motorbike and rushed to the scene. He found the accused who was on top of the deceased hitting him with a stone. The informant and others were there just watching.

2. On seeing Pw1, the accused took off. He said the deceased had injuries on the head, stomach and legs and was bleeding. He took the deceased home and only took him to Tisyano hospital Sultan Hamud the next day because of the hospital strike. The deceased died at the hospital. The witness picked the stone (EXB1) which the accused had used in assaulting the deceased and took it to the police station. The matter was reported and police taken to the scene. He said the accused disappeared for some time but was later arrested.

3. In cross examination he said he would not know if there was a problem between the accused and the deceased. He further stated that it was him and his brother Joseph Mutua (Pw2) who carried the deceased home. He also said that the accused had threatened to kill him as he did to the deceased if he continued following him. He reported the same to Salama police station. That the accused was a brewer and he was arrested for that though this murder case was pending waiting for him.

4. Pw2 **Joseph Munyai Mutua** is a brother to the deceased. He testified that on 22nd December, 2012 he was at Kiungwani market when he heard noises. He followed the noises and found the deceased lying on the ground unconscious and bleeding. The accused was present throwing stones at the deceased as people chased him away. There were about twenty (20) people present. When his other brother (Pw1) arrived they took the deceased home as he bled from the head and limbs.

5. They did some first aid and he was taken to hospital by Pw1 where he died the next day, and the police were notified. The accused disappeared from but was later arrested. Both Pw1 and Pw2 confirmed that a post mortem was conducted on the deceased's body. Further that the issue of the recovered stone was not in any of their witness statements.

6. Pw3 **Ikalalu Ndambuki** was in his shop at the market waiting to watch television on 22nd December, 2012. He went out and found the accused beating the deceased using a stone. There were youths at the scene. He left as he feared being killed. He later went to the police post to record his statement. He identified EXB1 as a stone similar to what the accused had used to hit the deceased.

7. In cross examination he said he knew both accused and deceased and they were never relating well for reasons unknown to him. He insisted that he found the two fighting and the deceased was drunk. He heard the accused say he wanted his money. He confirmed that the market was full of people. The court found this witness though very old to be very alert and active.

8. Pw4 **Dr. Simon Wambu Mueke** is the one who conducted the postmortem on the deceased's body. He found him with several injuries including fractures. He found the cause of death to be *severe head injuries with fractures of the right mandible and temporal bone*. These were blunt injuries. He produced the postmortem as EXB2.

9. In cross examination he said the injury on the temporal region can be caused by a fall.

10. Pw5 **No.49778 PC Urinalis Nyaanga** accompanied the deceased's family members to the mortuary for the postmortem only. Pw6 **No. 58486 Snr. Sgt. Francis Okungu** was assigned investigative duties of this matter on 4th September 2018. The accused had been arrested on the same day for being in possession of liquor. He recorded statements from the witnesses and had the accused charged with this offence. He produced the stone used to injure the deceased as EXB1.

11. In cross examination he said he was not the original investigating officer and no record was handed over to him. He said he was not aware of any ill motive in the commission of this matter. He confirmed that the first report was made on 23rd December 2012 and the accused went into hiding.

12. In his unsworn defence the accused stated that on 22nd December 2012 he was up at 9:00 am and untied his cattle and left for grazing with his son. At the field he left the cattle with his nephew as he went to check on a grader. On missing it he went home. He went to the club at 2:00 pm and found the deceased among others drinking and the drinking went on. The barman came to inform him that the deceased wanted him to buy him a drink. He wondered why as they were not friends. He all the same, bought him Karubu/changaa worth Kshs.50/=.

13. Later him and the deceased met behind the house at the club on the deceased's initiative. The deceased told him about a table he was selling which was not even available. After drinking he notified the deceased of his departure and told him he was still open on the table issue and they could meet at the market. He then left. At the market water place, he met the deceased who demanded for money and slapped him.

14. Both of them fell down and the deceased held his leg and they struggled. In the process he explained to the deceased where the money was which he took and ran away. That he screamed and people responded. The deceased then fell near water as he followed from behind. He was chased away by those present. He had Kshs.175/= with which he bought cigarettes and alcohol and took them. He went home at 8:00 pm. He later learnt of the deceased's hospitalization and death.

15. He said he was home between 23rd – 30th December, 2012 and left for his aunt's place in Maasai land on 31st December 2012. He was there for only five days and on 5th February 2013, elders came to his home and informed him they were going to Mbai's (*deceased's father*) to see what was going on as Mbai wanted compensation for his son. He denied killing the deceased who he says fell down and was knocked by a stone.

16. Mr. Mathenge for the accused filed written submissions asking the court to acquit the accused under section 306 of the Criminal Procedure Code since the prosecution failed to prove motive, preparation conduct and guilt act by the accused. It is his submission that Pw2, Pw3 and Pw4 arrived at the scene when the accused and deceased were already fighting and so did not know the cause of the fight. They did not also bother to find out what had caused the fight.

17. It is his further submission that there was no proof of malice aforethought. Relying on the cases of **Rex –vs- Tubere S/O Ochen 12 EACA 63 and Cuncliffe –vs- Goodman (1950) I ALL E R** counsel submits that there existed no intention to harm the deceased on the accused's part. He argues that Pw2 to Pw4 could not explain what caused the injuries that led to the deceased's death. i.e. whether it was the fall or an object inflicting the injury.

18. They could also not state whether the accused and deceased were in their normal senses when the incident occurred. Mr. Mathenge contends that independent witnesses should have been called to answer the unanswered question on the occurrence. There was no evidence of bad blood between the accused and the deceased.

19. He also argues that the accused never used a stone to injure the deceased and the stone produced was just a fabrication. He wondered why the crowd present never bothered to separate the two who were fighting as they watched them. It is his contention that the accused and deceased were both charged as they had consumed an unknown quantity of alcohol. He therefore submits that the accused acted out of provocation by the deceased. That his action that led to the death of the deceased was purely in self defence and the death occurred in the heat of passion; caused by the deceased provoking the accused to act.

20. He refers the court to sections 207 and 208(1) of the Penal Code on provocation. He contends that the prosecution has failed to disapprove that the accused was provoked by the deceased, and acted in self defence. He relies on the case of **R –vs- Ali Duale (2012) eKLR** where Stella Mutuku J stated as follows:

*“Having found that the crime defined as murder has not been proved by the prosecution and taking into account that the deceased died as a direct consequence of a vicious fight with the accused, and having found that the accused was provoked and also that he acted in self defence without the intention to kill the deceased, I will now consider the provisions of section 207 of the penal Code which provide as follows: **When a person who unlawfully kills another under circumstance which, but for the provisions for this section, would constitute a murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only**”.*

21. Counsel has also referred to the case of **R –vs- Martin Kinyua Nancy (2016) eKLR** where Justice F. Muchemi in passing the verdict stated thus:

“I am of the considered view that the defence of provocation is supported by the evidence on record. The accused has shown that he acted on the heat of passion on being attacked by the deceased.”

22. Counsel also submits that the deceased and accused having been intoxicated the accused's action is covered under section 13 of the Penal Code. He goes further to argue that the accused's action cannot fall under section 202 of the Penal Code which provides for the offence of manslaughter because the accused did not commit any unlawful act. On this he relied on section 17 of the Penal Code and the case of: **Palmer –vs- R (1971) 1 ALL E R**. He contends that the accused had a right to defend himself which he did.

23. Further that the consequences of his action were immaterial so long as he acted in self defence. He refers to several foreign and local authorities as:

a) **Beck Ford –vs- R (1987) 3 ALLER.**

b) **Ahmed Muhammad Omar & 5 Others –vs- Criminal Appeal No. 414 of 2014.**

c) **R –vs- Joseph Kibet 2010 eKLR.**

24. He contends that the conduct of the accused was a reasonable response to the circumstances as he perceived them. That the provisions of Article 26 of the Constitution which protects and preserves the right to life expects a greater measure of self-control in situations where the state of a human life is concerned. That the same law accepts and supports use of reasonable force within the limits of self defence to protect self, property or that other person who is in imminent or immediate danger.

25. He finally submits that the prosecution failed to prove both the offence of murder and the lesser charge of manslaughter. He therefore called for the acquittal of the accused person under section 306 Criminal Procedure Code.

26. The State did not file any submissions and relied on the evidence adduced in court.

27. This is now the case before court for determination.

28. The charge of murder faced by the accused person is defined as follows under section 203 of the Penal Code:

Murder

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

Section 204 Penal Code which is the Penal section provides that:

Punishment of murder

“Any person convicted of murder shall be sentenced to death.”

Finally, section 206 Penal Code on what malice aforethought is provides as follows:

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.*

29. To prove a charge of murder the following ingredients must be proved:

i. The fact and cause of death

ii. Actus reus. That the accused's action (omission or commission) led to the death of the deceased person.

iii. The killing was premeditated i.e. there was malice aforethought (mens rea)

The fact and cause of death

30. The evidence on record including that of the accused confirms that indeed the deceased died. Pw1 and Pw2 who are his brothers together with Pw5 attended the post mortem. Pw4 **Dr. Simon Wambu Mueke** who did the postmortem gave the cause of death as: *Severe head injury with fractures of the right mandible and temporal bone and significant hemorrhage intracranial.* As per the postmortem report EXB2.

The fact and the cause of death have therefore been proved.

Whether the accused's action of omission or commission led to the deceased's death.

31. Pw1, Pw2 and Pw3 testified that the incident leading to the deceased's death was committed in broad daylight and at a market place. The said witnesses testified that they saw the accused hitting the deceased with a stone identified as EXB1 all over. The accused has not denied being at the market place and fighting with the deceased. He however states that after they fought the deceased fell near water as he ran away having taken the accused's money. He then went home after taking the alcohol and cigarettes he had bought from the Kshs.175/= he had been left with.

32. Pw4 while under cross examination said the injury on the temporal region can be caused by a fall. This witness mentioned several injuries that caused the deceased's death; the fracture on the temporal region just being one of them. The accused relying on this, says the deceased's fall is what caused his death. The defence has dismissed Pw1 to Pw3 as not being reliable witnesses since they did nothing to save the deceased. It is true that they did not separate the two fighters but that in itself is not reason to dismiss their evidence. They have said they witnessed the fight and they saw the accused hit the deceased with a stone severally.

33. Despite the crowd that was present, the accused continued hitting the deceased unperturbed and only took off upon seeing Pw1. Pw3 is a very old man and he confirmed seeing the accused hitting the deceased with a stone. The mzee left as he feared being killed due to the heavy presence of youths at the said market. He was a very sincere witness. The deceased died the next day from the injuries he had sustained the previous day. These injuries had been caused by none other than the accused person.

Whether the accused acted with malice aforethought in the commission of this offence

34. Mr. Mathenge cited three forms of defence under which the accused acted in injuring the deceased. These are self defence, provocation and intoxication. Pw1 was informed of the beating of the deceased on 22nd December, 2012 at 6:00 pm and he rushed to the scene using a boda boda rider. He says it took him 30 minutes to reach the scene. Pw3 also talks of the same time when he came out of the shop to find the accused beating the deceased. The accused stated that he came to the club at 2:00 pm where he found the deceased and others drinking and he joined them. When he was through he left alone and later met the deceased at the market where they fought. Pw3 told the court that the deceased was drunk when he was found fighting.

35. Had Pw1 and Pw2 been sincere they would have mentioned the drunken state of the deceased. The accused has in his evidence said he had been taking alcohol from 2:00pm while the deceased started earlier and even remained at the club when the accused allegedly left. Counsel has submitted that both accused and deceased were too drunk to be in control of their actions. He relied on section 13(4) of the Penal Code in making this submission. The said section provides: -

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence”.

36. He goes further to submit that despite the intoxication he cannot be convicted of manslaughter contrary to section 202 of the Penal Code because all he did was in self defence. Is there evidence to support this submission? The evidence on record shows that both accused and deceased were drunk. There is no evidence from the prosecution or defence showing that either accused or deceased or both of them were so drunk and could not be in control of their senses.

37. Furthermore, the accused in his defence said after his fight with the deceased he bought cigarettes and alcohol worth Kshs175/= which he took before leaving for home at 8:00 pm. The incident took place in broad daylight. It was before 7:00 pm.

38. I therefore find the submission on the accused being too intoxicated not supported by evidence. Pw1, Pw2 and Pw3 found the deceased and accused fighting. They were not in a position to tell the cause of the fight, and none of them inquired about it. In his evidence, Pw3 said in cross examination that during the fight he heard the accused say he wanted his money. The accused in his defence said that as they fought the deceased demanded for money from him and he explained to him where he could get it from his shirt. He took away the money and ran away. If what accused has stated is true, then Pw3 would not have heard him demand for his money as he beat the deceased. According to the accused, the deceased took off with his money, and that was the end of the story.

39. The deceased had been so badly beaten to the extent that he could not move and had to be carried home by Pw1 and Pw2. The Doctor (Pw4) confirmed that the deceased suffered multiple serious injuries and he outlined them.

40. On the submission of the accused acting in self-defence, again the same is not supported by any evidence. The accused testified that the deceased slapped him and both of them fell and the struggle started. Upon being overwhelmed he told the deceased where the money was and after taking it he ran away. What was the danger caused the accused to be fearful? What was he defending himself against? He beat up the deceased so badly causing him fractures and other blunt injuries on the head. The accused did not suffer any single injury not even a bruise.

41. The deceased died the next day as a result of the injuries he suffered and a report was made by the deceased's father the same day. If indeed he was acting in self defence the accused would have told the court what threat the deceased had caused him, what weapon the deceased had and what injuries if any he (*accused*) suffered. He mentions none of this in his defence or even cross examination.

42. The remaining issue is whether malice aforethought has been proved. In the case of **Robert Kinuthia Mungai –vs- R (1982 – 88) I KAR 611** the Court of Appeal held that:

“It is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter. But if the defence is upheld, a conviction for murder cannot be sustained.”

43. I have carefully considered all the evidence on record as well as the submissions by Mr. Mathenge, counsel for the accused person. There is clear evidence that there was a fight between the accused and deceased person. The reason for the fight was known by only the accused and the deceased.

44. There is also evidence that both the accused and deceased had partaken of some alcohol. The level of consumption of the alcohol was not made known to the court. This notwithstanding, the level of force used by the accused against the deceased was excessive and uncalled for. The injuries inflicted caused the death of the deceased.

45. The killing cannot therefore be turned lawful as submitted by Mr. Mathenge. I am therefore satisfied that in the circumstances of this case malice aforethought to support a charge of murder has not been proved. I however find the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code proved and I accordingly reduce the charge of murder to manslaughter and convict the accused of the same.

Orders accordingly.

Delivered, signed & dated this 25th day of June, 2020, in open court at Makeni.

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H. I. Ong’udi

Judge