



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO 1 OF 2016

REPUBLIC

VERSUS

ANTHONY KARIUKI MUTHONI.....ACCUSED

JUDGMENT

That accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. According to the information, on the 25th day of December 2015 at Kiangondu village within Mukurweini sub county within the Republic of Kenya, he unlawfully murdered Silas Gathari Mukuni.

He pleaded not guilty to the charge. This was after Dr. Richu Mwenda (PW5) examined him and established that he was mentally fit to take plea and stand trial.

In prosecution of its case, the state called a total of ten witnesses of whom the deceased's mother, Mary Wairimu Mukuni (PW1), was the first to testify. It was her evidence that on 25 December 2015 at about 10:30 P.M. Mama Bernard (PW2) called to inform her that the deceased had been assaulted apparently at a nearby shopping centre where Mama Bernard and her husband operated a retail shop. She, together with her family members, whom she identified as Wahito, her daughter, Gerald Mutahi, her grandson and Jane Wakarimi, her granddaughter rushed to the scene. While on their way, they met the accused who told them that he had assaulted the deceased; this he told her daughter Wahito who was running ahead of her and repeated it to her when she met him. He was staggering and looked drunk.

They found the deceased at the scene where he had been assaulted from; he was bleeding from the head and the mouth. She remained at the scene till morning when his body was taken to the mortuary.

It was her evidence that she knew the accused since childhood and that they both hailed from the same village. The deceased lived in Nairobi but he was at home at that time for Christmas holidays and like herself, he was familiar with the accused or, rather, they were familiar with each other.

Alice Wachu Weru (PW2), whom the deceased's mother called Mama Bernard, testified that she is a shopkeeper and on 25 December 2015, she was behind her shop when she heard a bang-like sound. Her husband who was in the shop at the time told her that the deceased had been hit and had fallen on the ground. He asked her whether she had the deceased's mother's contact. She immediately called the deceased's mother and asked her to hurry and come to the shop to take the deceased to hospital. She similarly called the assistant chief of the area and informed her accordingly. She would have taken the deceased to the hospital but she realised that he was dead, a fact that both his parents confirmed when they arrived. She observed that there was a broken bottle and a rock outside her shop. She testified further that the assistant chief called the police who came and secured the scene.

Upon cross examination, the witness testified that she hadn't seen the state of the deceased when she called his mother but rather relied on what she had heard from her husband; the latter initially restrained her from venturing out when she attempted to go there. She testified further that she heard the accused shout and say that he had assaulted the deceased and he was now on his way home.

The deceased's father, Richard Mukumi (PW3), testified that he had called the deceased and his daughter home so that they could celebrate the Christmas season together. He confirmed that on 25 December 2015, at about 10.30 P.M., his wife (PW1) received a call from Weru (PW2) to the effect that the deceased had been assaulted and was unable to stand. He asked his wife and daughter to proceed to the scene; he couldn't himself go there because his leg had been operated on and had not healed. When they arrived at the scene, his grandson called and asked him to join them at the scene because of the state in which the deceased was. He rode pillion on a motorcycle to the scene. The police joined them. While there, one of the police officers told him that they had arrested the person who had killed his son. When he later attended the post-mortem, he observed that the deceased had sustained a cut wound on his head. It was his evidence that the distance between his home and the shopping centre where the deceased was assaulted was less than a kilometre.

Peter Mwangi Gachago (PW4) lived near the shopping centre where the deceased was murdered and on 25 December 2015, he was at home when he heard some commotion outside. He went to check and found the deceased outside Weru's (PW2's and PW6's) shop. He called the assistant chief who in turn asked him to call the police.

While at the scene, his son came and told him that the accused was at home and he wanted to see him. He went back home and found the accused there. The accused told him that he wanted his assistance because he had assaulted the deceased with a stone and since he had died he wanted him to take him to the police station. He was apprehensive that he was going to be beaten by police. He told him that he had to go back to the scene and inform the police who were already there. He went and came back with two policemen who arrested the accused; they entered their vehicle and together took the body to the mortuary. It was his evidence that he knew the accused before because, like the rest of the witnesses before him, they hailed from the same village.

Upon cross examination, he testified that he found the accused at his home and that he looked drunk.

Stephen Weru (PW6) the husband to Alice Wachu Weru (PW2), testified that on 25 December 2015, at about 10:30 P.M., he was at his shop attending to customers when suddenly he heard a bang-like sound outside the shop. He immediately went out to find out what was happening. He found the deceased lying unconscious. He rushed back to the shop and asked his wife for the deceased's mother's contact. She called her and informed her of the condition of her son. However, they soon realised that the deceased had died. He immediately informed the police who arrived soon thereafter and secured the scene. He noticed that there was a stone close to the deceased's body.

Corporal Nahashon Kipsoi (PW7) testified that he was the officer in charge of Mukurweini police station at the material time and that on the night of 25 December 2015 Inspector Joseph Kamenya, who was the then Deputy Divisional commander told him of an assault case at a shopping centre. He proceeded to Kiangondu shopping centre together with corporal John Kisulu and corporal Douglas Wanyiri who was driving the vehicle in which they travelled.

At the scene, they found the deceased lying in a pool of blood. There was a shop nearby which he established that it belonged to Weru (PW6). There was a rock close to the deceased's body. He observed that the deceased had sustained a deep cut wound on his head and bruises on his forehead.

He got information from Mwangi (PW4) that there was some fight between the accused and the deceased outside Weru's (PW6's) shop; the accused ran away after he assaulted the deceased. He remained at the scene while his colleagues went to arrest the accused.

Corporal Douglas Wanyiri (PW8) testified and confirmed that indeed he was with corporal Kisilu and constable Ahmed on a night patrol when Corporal Kisilu was called and informed of a murder incident at Kiangondu area. They drove to the scene and found the deceased's body lying outside Weru's shop, about a metre from the shop.

Mwangi (PW4) informed them that the accused was in his house which was less than 100 metres behind the shops. He led the officers there; they found the accused hiding in a banana bush. They arrested him and took the body to the mortuary.

Corporal Kisilu (PW9) testified that indeed he received a call from corporal Wanyiri who informed him of the murder incident at Kiangondu. He accompanied his colleagues to the scene where they established that the accused had murdered the deceased and was hiding at Mwangi's home. They recovered a rock at the scene which they suspected to be the murder weapon. The accused himself told them that he had used that rock to hit the deceased. He remained at the scene with Chief Inspector Kipsoi (PW7) as the rest of his colleagues went to arrest the accused.

The last prosecution witness was Dr. Kimathi Paul who conducted the post mortem on the deceased's body. The body was identified to him by Richard Mukuri and Simion Mugo Gathoni. It was his testimony that the postmortem was conducted on 29 December 2015 at 11:00 A.M. The body was of an African male aged 34. Blood was oozing from his mouth and nostrils. There were bruises on the left frontal and temporal regions of his face. There was also a depressed circular comminuted fracture of about six centimetres in diameter. This was at the occipital parietal region from where he was also bleeding. He opined that the cause of death was severe head injury secondary to blunt trauma secondary to assault. He was also of the opinion that the deceased could not have possibly injured himself. He certified the deceased's death.

The accused opted to give a sworn statement when he was put on his defence. He admitted that he knew the deceased because they grew up together in the same village. The deceased was also his friend and that on 25 December 2015, they had been drinking together at Kiangondu shopping centre. However, he could not recall how each one of them went his way because they were too drunk. All the same, he could recall that they parted ways and about 10:00 P.M. and that he went to his home; he did not know how he reached there but he remembered that did not meet anybody on the way.

Even then, he admitted that he went to Mwangi's (PW4's) house because he feared for his life; he was apprehensive that members of the public would kill him. He testified that he found Mwangi's wife at home. He admitted that Mwangi came with two police officers who arrested him and took him to the police station.

In answer to questions put to him during cross examination, he testified that he could not remember whether he met the deceased's mother on his way home. It was his evidence that he went to Mwangi's home for help and not because of what he had done.

The law on the offence of murder is found in section 203 of the Penal Code which, as noted, is one of the sections under which the accused was charged; that section defines what the offence entails; it reads as follows:

203. Murder

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

Section 204 which is to be read alongside section 203 has since been declared to be inconsistent with the Constitution to the extent that it prescribes death as a mandatory sentence (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**). It is thus of no consequence to the present proceedings.

As far as section 203 is concerned, it is necessary that in order to establish an offence of murder the prosecution must prove several things which, by and large, constitute the material elements for this offence. It must prove, first, death of a person; secondly, it must also prove that the death was as a result of an act or omission of another person; thirdly, it must prove that the act or omission was unlawful; and, finally, it must prove that the person who did the unlawful act or omitted to act had malice aforethought.

The deceased's parents, Mary Wairimu (PW1) and Richard Mukuni (PW3) testified that they found their son's lifeless body lying outside the Werus (PW2 and PW6) shop at Kiangondu village on the night 25 December 2015. The Werus themselves corroborated this evidence that indeed the deceased was murdered outside their shop on that particular night. In their testimony, police officers, Nahashon Kipsoi (PW7), Douglas Wanyiri (PW8) and John Kisilu (PW9) further corroborated this fact of death. They were all consistent in their evidence that they not only found the deceased's body at the scene of murder but they took it to mortuary as well. The medical evidence in proof of the fact of death was ultimately given by Dr. Kimathi Paul (PW10) who certified the deceased's death and produced a certificate to that effect.

Thus, there is sufficient proof of the fact of death of a particular person, in this instance, one Silas Gathari Mukuni.

Besides certification of death, Dr. Kimathi Paul opined that the injury to which the deceased succumbed must have been caused by some other person. In other words, the fatal injury was not self-inflicted. In his own words, the pathologist stated as follows:

I formed the opinion that the deceased could not have injured himself.

His evidence was not controverted and neither was there any evidence that could have possibly created any reasonable doubt that the act causing the deceased's death was an act of another person.

No justification ever was given why the deceased was fatally wounded and therefore it is safe to conclude that the act of the other person, causing the deceased's death was unlawful.

The only two other elements that the prosecution needed to prove to tie up its case against the accused is whether the accused was the perpetrator of the unlawful act and if so, whether he had the necessary malice aforethought.

The evidence in respect of the first of these two elements is wholly circumstantial because none of the witnesses who testified for the prosecution ever saw the accused, or any other person for that matter, fatally injure the deceased.

It is not in doubt that circumstantial evidence can found a conviction; it has been held in **Tumuheire versus Uganda (1967) E.A at pages 328 and 331** that:

"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case."

As to how this evidence should be examined, the court said:

"As we said by Lord Normand in Teper versus R (1952) A.C. at page 489:

'Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference'

In R versus Taylor, Weaver and Donovan (1928), 21 Cr. App. Reports at page 20 the principle as regards the application of circumstantial evidence was enunciated in these words:

'Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.'

Narrow examination of circumstantial evidence entails being cautious that the evidence is inconsistent with the accused's innocence or, put differently, it is consistent with the accused's guilt.

It may also be that the circumstances proved are capable of either of the two results: they are consistent with the innocence of the accused or, on the other hand, they are consistent with his guilt. In that event, the accused is entitled to the benefit of doubt. (**See Sarkar on Evidence, 12th Edition, Page 34**).

The rule always remains that in order to justify an inference of guilt, the incriminating facts must be incompatible with the innocence of the

accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. If I have to summarise the criteria, this evidence is sufficient to sustain a safe conviction if:

- (a) The circumstances from which the conclusion is drawn should be fully established;
- (b) All the facts should be consistent with the hypothesis;
- (c) The circumstances should be of a conclusive nature and tendency
- (d) The circumstances should exclude every hypothesis but one proposed to be proved. **(Sarkar, at page 34)**

Some of the earliest decisions in this part of the world in which the application of circumstantial evidence has been explained and which, to a greater degree have gained relatively enough notoriety include **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135 and Simon Musoke versus Republic (1958) EA 715**. These decisions largely regurgitate the principles enunciated by Sarkar and earlier English decisions on this question.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence (6th Edition, page 311)**, held as follows:

In order to justify 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 his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.

The Privy Council decision in **Teper versus Republic (1952) AC 480** was cited with approval in **Simon Musoke versus Republic**; it was stated in the former case at page 489 that: -

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

As I understand the prosecution case against the accused, the inculpatory facts are that, first, the accused spent the entire fateful day with the deceased; a fact that the accused himself admitted. He stated in his defence that he spent the day drinking with the deceased.

Secondly, the evidence by the deceased's mother (PW1) that when she met the accused on her way to the scene, the accused told her that he had assaulted the deceased; thirdly, the evidence by Mwangi (PW4) that the accused sought for refuge from his house when he realised that he had killed the deceased. Fourthly, the arrest of the accused at Mwangi's home.

Looking at the evidence in its entirety, it is possible to draw an inference of guilt from these facts. I am persuaded that these facts lead to an irresistible conclusion that the accused was behind the deceased's murder; there is nothing he said in his defence that can be said to raise a reasonable doubt on the conclusion that can be made out from these facts.

Taking the accused at his own word, he parted ways with the deceased at about 10: 00 P.M., which is almost the same time that the Weru heard a commotion outside their shop. It is also at same time that Mr. Weru (PW7) established that the deceased had been fatally wounded.

The deceased's mother left for the scene almost immediately because Mrs. Weru informed her of the state of her son soon after he had been assaulted. Her evidence that she met the accused on the way would be logical and made sense in these circumstances; I find no reason to doubt her testimony that the accused admitted having assaulted the deceased when he met her.

Again, there would be no basis to doubt her because her evidence in this regard was not challenged by the defence, at least to an extent of raising a reasonable doubt that what she said could not be possibly true.

The accused himself did not appear to have adopted any particular line of defence on this aspect of the prosecution evidence. He initially said that he did not meet anybody on his way home; later in his testimony he said that he could not remember whether he met anybody because he was allegedly drunk. If that was true, there would be no basis of doubting the deceased's mother's evidence that she not only met him but that he also told her that he had assaulted the deceased.

The evidence that he admitted having assaulted the deceased was corroborated by the evidence of Mwangi (PW4) who testified the accused went to his home for protection; it was his evidence that he was a member of the community policing popularly referred to as 'Nyumba Kumi' and it is for this reason that the accused found his home the most ideal place of refuge.

Like the deceased's mother, Mwangi testified that the accused told him that he had killed the deceased and it is for this reason that he feared the repercussions that were likely to ensue from members of the public. He thought would rather be presented to the police than be left at the mercy of members of the public.

The police officers who arrested him also corroborated the evidence that they not only found him at Mwangi's home but also that he similarly told them that he had assaulted and fatally injured the deceased.

It is worth noting that the accused did not deny going to the Mwangi's home from where he was subsequently arrested; as a matter of fact, it was his own evidence that he went to Mwangi's home 'to seek for help'; however, he did not state the kind of help he was seeking from him. It can only be because, as Mwangi himself stated in his evidence, the accused feared for his life after he killed the deceased. To quote him, he stated as follows:

“My son, Wachira called me, he came where I was and told me that the accused had sent him to me. The accused was at my home and he wanted to see me. I went back home. I found the accused. He told me that he wanted me to assist him. He told me that he had hit the deceased with a stone and since he had died, he wanted me to take him to the police station. He feared being beaten by the police”.

The accused himself thought Mwangi would be able to assist him and because of this trust in him, Mwangi would not have testified anything different other than what the accused himself told him. In other words, there is no reason to doubt Mwangi's evidence that the accused told him that he had murdered the deceased.

When I consider all these evidence I am satisfied that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I am also convinced that there are no other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused that I am inclined to draw from these facts.

His initial statements that he had assaulted the deceased may also be properly accepted in evidence as part of the *res gestae* under section 6 of the Evidence Act, cap. 80 Laws of Kenya. That section states as follows:

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

The accused's utterance to the deceased's mother soon after he had assaulted the deceased were not only nearly contemporaneous with the fact of the murder of the deceased but they also explained the fact of the murder itself.

For the reasons I have given, I find and hold that the accused was the author of the unlawful act that caused the deceased's death.

The final question for consideration is that of malice aforethought. Malice aforethought is the mental element of murder and it is either express or implied; it is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**) but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

It has been held to be constructive if it is proved that the accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm (see **Raphael Mbuvi Kimasi versus Republic (2014) eKLR; Isaak Kimanathi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007 (unreported))**).

It has a statutory underpinning in section 206 of the Penal Code which basically prescribes the circumstances under which malice aforethought may be deemed to have been established; it 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.

The pathologist's evidence is pivotal in this regard. It is pivotal in the sense that it shows the nature and the extent of the injuries to which the deceased succumbed and which, in turn go to show, whether or not the perpetrator had the necessary malice aforethought.

The deceased sustained bruises on the left frontal and temporal region of his face. He sustained a "repressed circular comminuted fracture approximately 6 centimetres long on the occipital/parietal region." It was the pathologist's evidence that besides bleeding from the mouth and nostrils, the deceased was also bleeding from this particular region. As a result, it was his opinion that the deceased died as a result of a severe head injury secondary to blunt trauma secondary to assault.

The injury was no doubt severe and looking the facts as presented before court, the deceased may have been hit by a rock that was found close to his body and which was exhibited in evidence in support of the prosecution case.

It is not clear why the accused hit the deceased particularly when he testified that he was friends with the deceased and they had grown up

together. The pathologist's evidence points to the fact that the deceased may have died of a single blow on his head. It is possible that the accused may have hurt the deceased without any intention to cause his death or cause him grievous bodily harm. I say so because there is no clear evidence that that was his intention although it cannot be ruled out altogether. Whatever the case, these possibilities create some doubt in mind that the accused had the necessary malice aforethought. The only reasonable conclusion that I can make in these circumstances is that the accused ought to benefit from this doubt. It is for this reason that I find that the accused is not guilty of murder. However the facts as established show that he is guilty of a lesser offence of manslaughter under section 202 of the Penal Code. That section reads as follows:

202. Manslaughter

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

I have already held that the accused was the author of the unlawful act that resulted in the deceased's death. In the absence of proof of malice aforethought, I find him guilty of the offence of manslaughter. He is convicted accordingly.

Dated, signed and delivered this 15th day of June 2020

Ngaah Jairus

JUDGE