



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 7 OF 2012

DIRECTOR OF PUBLIC PROSECUTIONREPUBLIC

VERSUS

HILLARY MUGO MWENDIA1st ACCUSED

EVANS MBAI NJERU.....2nd ACCUSED

JAMES MBOGO NYAGA.....3rd ACCUSED

JUDGEMENT

1. The accused persons Hillary Mugo Mwendia, Evans Mbai Njeru and James Mbogo Nyaga were charged with murder contrary to **Section 203** as read with **204 of the Penal Code**.

2. The particulars of the offence are that on the 2nd day of December 2011 at Githure Village RUGETO sub-location of Ngariama location Kirinyaga County, they murdered James Kinyua.

3. They denied the charges. The prosecution summoned a total of six witnesses in support of its case while the defence called only the accused persons.

4. The brief facts of these case are that the accused were arraigned before High Court at Embu on 20/1/2012.

5. Later it was transferred to this court on 15/10/12. The hearing did not however take off until 29/6/2015 when the first witness was heard. The facts of the case are that on 2/12/11 the accused and the deceased were in a bar known as Israel Bar at Rungeto Village. The accused and the deceased were drinking in that bar together. Later the 1st and 3rd accused left the bar with the deceased. The 2nd accused also followed them. Edwin Munene Wangari (PW-1-) was also in the bar drinking and left ten minutes after the deceased and the 1st accused and 3rd accused left the bar. He was accompanied by Mbai the 2nd accused in this case. On the way the PW1 heard noises and on checking what was happening, he found the 1st & 3rd accused bearing the deceased who was on the ground by kicking him and stepping on him. The 2nd accused joined them and the three beat the deceased. PW-1- tried to intervene but the 3rd accused hit him. The three accused were hitting the deceased on head and on the entire body. The 3rd accused had a stick which he used to hit the deceased on the head several times. PW-1- took off upon bearing hit with a fist by the 3rd accused. He decided to go and inform the father of the deceased. The accused were claiming that the deceased had stolen shoes belonging to the 3rd accused. Neighbours were informed by the 2nd accused and they proceeded to the scene where the deceased lay with serious injury on the head. The deceased was escorted to Embu hospital where he was admitted.

6. While at the hospital he informed one of the witnesses that he was beaten by Mbai and Mbogo and that he had also mentioned Mwendia. The deceased passed away after three days while undergoing treatment.

7. A postmortem was conducted on the body of the deceased by Doctor Njiru G. N. at Embu Provincial Hospital. The doctor formed the opinion that the cause of death was cardio Pulmonary arrest due to intracranial pressure from injuries consistent with reported multiple injuries. The accused who were seen by PW-1- beating the deceased were arrested and charged with this offence.

The accused gave their defence on oath and denied the charge.

Prosecution Case

PW1 Edwin Munene Wangari, a butcher, who knew all the accused persons from their childhood and the deceased, testified that on 2.12.11 after closing his butchery he went to Israel bar all the accused persons and the deceased were at the bar. The 1st and 3rd accused persons left

the bar with the deceased, shortly after he left with the 2nd accused heading home when they heard a noise at around 10:00 p.m. When they went close they found the deceased being beaten by the 1st and 3rd accused, the 2nd accused joined in. He tried to intervene but the 3rd accused hit him. He testified that the 3rd accused hit the deceased with a stick several times on the head, they claimed he had stolen shoes for the 3rd accused person. He left the scene and went to the home of the father deceased and informed him his son had been beaten, but he didn't wake up and said that his son will come home. He went home, the next day he was informed by the father of the deceased that he had been taken to Embu Hospital. He passed on three days later. He recalled meeting the 2nd accused the following day who greeted him and went about his business. He confirmed that he saw the accused persons as there was sufficient moonlight and he was with them, he reiterated that the 3rd accused hit him.

8. PW2 Bancy Wangui Gichobi, from Rugento sub-location Ngariama, a housewife, she testified that she knew all the accused persons and the deceased and that on 2/12/2011, she was called from her home at around 10:30 by Mbai who told her that someone had been beaten at the road. He told her he knew who it was and wanted her help, because she was alone she asked him to look for Duncan Nyaga a village elder. She and Monica Wanguru a neighbor woke up other neighbors and accompanied them to the road where the deceased Kinyua lay unresponsive, and was wearing only a trouser. She testified that he was bleeding from the mouth and ears, and his head was swollen. They found Duncan at the scene, the father of the 3rd accused and Mbai, the 2nd accused. The deceased's father was with them so he rushed him to the hospital, three days later she heard he had passed on. She did not witness who had beaten him or any weapon at the scene.

9. PW3 Beatrice Wamboi from Kithure village, a farmer, and the aunt of the deceased, testified that she knew all accused persons. She testified that on the fateful day PW2 called her at around 10 pm and informed her that Mbai, the 2nd accused, had informed her that someone was beaten at the road side. She then called her brother John Kathendu and his wife Pauline Wanjiku, parents of the deceased. They went together to the scene, where they found Mbai (2nd accused) and Duncan. The deceased was rushed to the hospital. She testified that on 4/12/2011 the deceased informed them while at the hospital that it was the 2nd and 3rd accused who had beaten him, in the presence of his mother and Monica Wanjiku. After three days they were told he was dead.

10. PW4 Dr. Joseph Thuo a psychiatrist at Embu level 5 Hospital, testified that on 16.12.2011 the three accused persons were brought to the hospital by police officers through the OCS Kirinyaga, for mental assessment, he submitted that all three were fit to stand trial, and produced the medical reports and P3 forms for each accused person PEXH 1 (a) and (b) for the 1st accused; 2(a) and (b) for the 2nd accused; 3(a) and (b) for the third accused person.

11. PW5 Dr. Godfrey Njuki Njiru produced a post mortem report for the deceased filled at Embu level 5 Hospital on 13.12.11. He testified that the deceased was an African male aged 20-25 years, he had multiple bruises at the trunk, on the upper arm where there was swelling. He also had a fracture on the base of the skull, bleeding in between the brain tissue, all other systems were normal. He concluded that the deceased succumbed as a result of the injuries to the head. He produced PEXH 3 the postmortem report dated 13.12.11.

12. PW6 Rama Mwachio IP No.54190 testified in 2011 he was stationed at Kianyaga police station and was the investigation officer in the matter. On 6.12.11 John Gakendu came and reported the death of his son James Kinyua aged 24 years. He interviewed him and he stated that on 2.12.11 at 10:30 p.m. he was informed by PW1 that his son was lying in the middle of the road that he had been beaten and sustained serious injuries on the head and both limbs. He went to the road and found his son who had serious injuries in his head and both limbs. His son told him he had been beaten with a stick by the three accused persons. He took his son to Embu general Hospital he was in hospital for three days then succumbed on 5.12.11. He testified that he recorded statements of witnesses and did not recover the murder weapon but at the scene of the crime there was a tree on the side with broken branches. He testified that he saw the body of the deceased and that there were visible injuries on the head, hands and legs. He also summoned the three accused persons and recorded statements from them under inquiry. He recommended the charge of murder against the three accused persons.

The Defence Case

At the close of the Prosecution case, the Court ruled that the accused persons had a case to answer and put them on their Defence.

13. DW1 was the first accused person Hillary Mugo, who testified that on the fateful day he was at Israel bar but was not with the deceased, he passed by the bar, and was there for about 20 minutes. He claims he did not see the 2nd and 3rd accused at the bar and testified that the deceased was very drunk but he never left with him. He denied he was present when the deceased was beaten with sticks.

14. DW2 Evans Mbai Njeru, the 2nd accused person claimed that on the 2.12.11 he was coming from his place of work at around 11:00pm heading home when he heard a person scream he found the deceased after he had been beaten he went and called neighbours then he went home. He was later summoned to record a statement at the police station he was locked up for two weeks for beating the deceased he alleges he was not involved.

15. DW3 the third accused James Mbogo Nyaga, testified that he was heading home on the fateful day when he met the deceased with Kiragu (PW1) who were going home, he passed them. He was later arrested on Thursday and charged with killing the deceased. He denied the allegation.

All parties filed submission except the 1st accused person.

ANALYSIS AND FINDINGS

The charge of murder is proved by three elements of the offence as stated by the Court of Appeal case of Anthony Ndegwa Ngari –v- Republic [2014] eKLR, they include: -

(a) *the death of the deceased occurred;*

(b) *that the accused committed the unlawful act which caused the death of the deceased; and*

(c) *that the accused had malice aforethought.*

The burden is on the prosecution to prove criminal liability which is established by the two ingredients namely actus reus and mensrea. In Woolimington –v- D.P.P. (1935) A.C 462 at 481 where the court discussed the law of legal burden of proof, it was stated:-

“Though the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception

No matter what the charge or where the trial, the principle that the prosecution must prove the suit of the prisoner is part of the common Law of England and no attempt to whittle it down can be entertained.”

16. The court must determine whether the prosecution has established its case against the accused beyond any reasonable doubts. This calls for a close examination of the evidence the prosecution seeks to rely on in attempts to discharge this burden. Section 203 of the Penal Code defines murder. It States:-

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

(a) The death of the deceased

There is no dispute that the deceased died.

The death of the deceased has been proved by the testimony of PW5 and 6 who viewed the deceased’s body and saw it had head and limb injuries the postmortem form **PEXH. 3** produced by PW6 confirmed that the deceased *died of cardiopulmonary arrest due to intracranial pressure from injuries consistent with reported multiple injuries. There is also the testimony of PW2 & 3 who saw the deceased at the scene of crime before he was taken to hospital and had injuries on the head which was badly swollen and blood oozing from the mouth and ears.*

(b) Proof that accused persons committed the unlawful act which caused the death of the deceased (actus reus)

All the accused persons deny the allegation that they caused the unlawful death of James Kinyua. The prosecution has a burden to prove that accused caused the death of deceased in this case through unlawful acts. The only eye witness at the time the crime was being committed was PW1, who testified that he tried to restrain them but was attacked by the 3rd accused. The murder weapon was also not recovered from the crime scene. The cross examination did not challenge the identification of the accused persons by the witness. They made allegations of PW1 fixing them and coached statements. However they did not give any reasons or motive as to why PW1 would falsely implicate them with this serious allegation. I caution myself that PW-1- was the only witness who implicated the accused. The evidence must therefore be treated with caution. The court is supposed to make a finding as to the integrity, honesty and truthfulness of a witness. This determines whether the witness is reliable. It is a well established principle that there is need for caution before accepting identification evidence. I think the emphasis is on identification of a stranger. Courts have held recognition is better than identification. There is a distinction between identification and recognition. However recognition may also be treated with caution where circumstances do not favour a positive recognition. The evidence will be acted upon if the court is satisfied the identification is positive and free from possibility of error.

17. In this case, there is no dispute that the three accused were well known to PW-1-. The evidence of PW-1- was confirmed by the accused that the deceased was in the bar at the same time when the deceased was there. PW-1- left the bar soon after deceased, 1st & 3rd accused left the bar. PW-1- was with 2nd accused. I find that the testimony by PW-1- is reliable. The 2nd accused went to call PW-2-. This confirms that he was at the scene as testified by PW-1-. It is submitted that some witnesses were called. There is no bar under the law in rely on the evidence of a single witness to convict. The law does not place a requirement on the number of witnesses who are required to prove a fact. Section 143 of the Evidence act provides –

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

Jevan Mwanjau & another v Republic [2015] Eklr The Court of Appeal in Malindi held the view that

‘Under section 143 of the Evidence Act, in the absence of any provision of law to the contrary, no particular number of witnesses is required to prove a fact. It follows that there is no legal impediment in convicting on the sole testimony of a single witness. The time-honoured principle is that evidence has to be weighed and not counted, that is, whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise as opposed to whether there is a multiplicity or plurality of witnesses. It is therefore open to a competent court to fully rely on the evidence of a solitary witness and record a conviction. Conversely, it is equally true that the court may acquit a suspect in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The court must, however, where the evidence of a solitary witness relates to identification of a suspect in a criminal case, exercise extreme caution.’

PW-1- adduced direct evidence.

18. PW3 also testified that the deceased while at hospital implicated the 2nd and 3rd accused persons, in the presence of his mother and one Monica Wanguru. Her testimony as to the deceased's dying declaration was however challenged during cross examination by the 2nd accused person, there existed a variance in her written statement and oral testimony where she wrote Mbogo (3rd accused) and Mwendia (1st accused) and not as she had testified Mbogo (3rd accused) and Mbai (2nd accused) as the alleged attackers. Though admissible the weight of this testimony as against the 1st and 2nd accused is questionable. In CHOGE -V- REP 1985 KRL 1 the court observed as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

19. The 1st and 3rd accused are placed at the scene by PW1, while the 2nd accused is placed at the scene by PW1, PW2 and PW3. The 1st accused person places himself at the Israel bar where he saw the deceased very drunk and DW3 states he also saw the deceased on the fateful day with PW1. This confirms the testimony of PW-1- that they were at the bar.

20. Nevertheless, the burden of proof lies on the prosecution to identify the accused persons as the perpetrators of the alleged crime. The murder weapon was not recovered, nor was there any scene evidence produced indicating that there existed broken branches as possible weapons as submitted by PW6, however almost all witnesses testify that a tree did exist on the side of the road. PW-1- stated that 3rd accused was using a stick to hit the deceased on the head.

21. It seems the only direct evidence identifying the accused persons is that of PW1 who witnessed the accused persons beat the deceased, his testimony is credible, as he had great familiarity with the accused persons since their childhood, there was thus sufficient evidence on their identification. His testimony is reliable and credible.

22. On the issue of circumstantial evidence, in Mombasa Criminal Appeal No. 84 of 2012 Erick Odhiambo Okumu vs Republic (2015) eKLR it was held that

“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence.”

23. The Court of Appeal also held in MUSILI TULO V. REPUBLIC (2014) eKLR.

“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

24. The court of appeal set out the threshold for circumstantial evidence as follows:

i. *The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

ii. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*

iii. *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

It also considered a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480:

“It is also necessary before drawing the inference of 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 SAWE -V- REP [2003] KLR 364 the Court of Appeal held:

1. *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 hypotheses than that of his guilt.*

2. *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*

3. *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

25. The circumstantial evidence alone of the physical state of the deceased, the scene of the crime on the fateful night does indeed unerringly point to the guilt of the accused persons. It supports the direct evidence of PW1.

26. From the foregoing, I find that the Prosecution has proved beyond reasonable doubt as regards the identification of the accused persons

by PW1, that the 1st, 2nd and 3rd accused person did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence.

(c) Proof that accused persons had malice afterthought

The court must determine whether accused persons had the mens rea or malice aforethought while harming the deceased. Whether they had the intention to kill or cause grievous harm as set out in section 206 Penal Code. **NZUKI VS REPUBLIC [1993] KLR 171** the Court of Appeal held that:-

'Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.'

The prosecution relied on the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63**: That inferred malice aforethought based on the following factors:

- (a) The nature of the weapon used.
- (b) The part of the body targeted
- (c) The manner of killing or in which the weapon is used
- (d) The conduct of the accused before, during and after the attack.

27. According to PW1 the third accused person was witnessed hitting the deceased severally on the head with the stick and also jumping on the deceased. The second accused kicked the deceased severally on the ribs and head. The 1st accused person was found kicking and bearing the deceased. As per the postmortem report the deceased had multiple injuries on the head and limbs a fact which confirms the testimony of PW-1- on the manner in which the deceased was assaulted.

28. The accused persons may not have had the intention to cause the death of the deceased, but they clearly had the intention to cause grievous harm, because of a lost shoe that the deceased had allegedly stolen, as per PW1 testimony he could not restrain the 3rd accused person as he attacked him and told him to mind his business.

It is therefore evident that each of the accused persons had malice aforethought and had the intention to cause grievous harm to the deceased.

29. The prosecution's evidence has sufficiently established the guilt of the accused. The element of malice aforethought has been established in terms of **Section 206(b) of the Penal Code**. The defence by the accused though given on oath was a bit casual and a mere general denial. I found no reason not to believe PW-1-. He had no reason to implicate the accused falsely. I find that the defence was not plausible. I reject it.

FINDING

Consequently, and for the reasons afore stated the prosecution has proven its case against the 1st, 2nd and 3rd Accused person beyond reasonable doubt. The Accused persons are therefore guilty of the offence of murder and are be convicted.

Dated at Kerugoya this 15th day September 2020.

L. W. GITARI

JUDGE