



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 3 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**1. GODANA AMIN BARISA.....1<sup>ST</sup> ACCUSED**

**2. MAJENGO BARISA BAJILA.....2<sup>ND</sup> ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for the state**

**Ms. Aoko for the accused persons**

**JUDGMENT**

The two accused persons were jointly charged before this Court with murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence are that on 30.12.2016 at Mabuani area – Gede location – Kilifi County, jointly murdered **John Kazungu** each of the accused pleaded not guilty to the said charge. The facts of the case and circumstances under which the deceased was killed are contained in the evidence adduced by the prosecution witnesses herein summarized as follows:

**(PW1) – Kazungu Charo** who testified as the father of the deceased told the Court that in the afternoon of 2.1.2017 the deceased complained of a headache which he bought medicine to mitigate the pain. Be that as it is, **(PW1)** agreed with the wife **(PW2) Tumaini Charo Mure** that they undertake a physical examination of the deceased private parts. That is how he noticed a discharge of the deceased penis. It was decided that the only way was to have him see the doctor but his condition deteriorated. This is the time **(PW2)** inquired from the deceased who revealed that he had been beaten by **Barisa**.

It followed that **(PW1)** and **(PW2)** reported the matter to the police for investigations. That notwithstanding, the deceased was taken back to Tawfiq Hospital and on 5.1.2017 where he passed on while undergoing treatment.

**(PW3) – Furahah Randu Yeri**, evidence was that on 31.12.2016 he saw the first accused chasing the deceased on or about 10 a.m. on inquiry as to the reason the 1<sup>st</sup> accused was going after the deceased he replied that it was because the deceased was stealing their puppies. **(PW3)** proceeded to state that the 1<sup>st</sup> accused was kicking the deceased from the back. He however, later saw them part ways but was later informed that the deceased had passed on.

**(PW4) – Charles Charo Jeffa** of Gede location and a village elder testified to the effect that **(PW1)** and **(PW2)** involved him on the issue of the deceased alleged to have been beaten by the 1<sup>st</sup> accused. In the meantime, the deceased was taken to the hospital for further treatment. Before **(PW4)** could call a reconciliation meeting, the deceased passed away on 5.1.2017 at about 7.00 p.m.

**(PW5) – Safari Mure** also told the Court that on 8.1.2017 he happened to be one of the witnesses who identified the deceased body for purposes of post-mortem examination at Malindi Hospital Mortuary.

**(PW6) – Dolly Wangechi Mureithi** a nurse at Majomboni dispensary told the Court that on 3.1.2017 **(PW2)** visited the facility in company of a young boy seeking treatment. A quick observation made by **(PW6)** was that the boy who later became the deceased was walking with a bend. Further, **(PW2)** physical examination revealed a discharge of mixed blood from the penis of the deceased. In the course of treatment **(PW6)** stated that the deceased revealed that he had been beaten by known people to him whose names he did not disclose. **(PW6)** produced the treatment notes as exhibit 1. **(PW7) – Dr. Job Gayo** of Malindi Hospital evidence was at the post-mortem form report following the

death of the deceased. He confirmed that the post-mortem examination was conducted at Star-Hospital Mortuary on 9.1.2017. **(PW7)** confirmed that the post-mortem examination showed that the deceased had suffered injuries to anterior chest wall, Iliac region of the abdomen hematoma to anterior chest wall, hematoma on the anterior wall of the abdomen, the spleen was lacerated, hematoma to the pelvic region. In **(PW7)** opinion, the deceased cause of death was cardiopulmonary arrest secondary to abdominal trauma. He produced the post-mortem report as **exhibit 2. (PW8)** – **IP Levy Ikileng** of Watamu Police Station testified that on 6.1.2017 he received a complaint from **(PW1)** that his son, the deceased has died out of assault injuries inflicted by known assailants. He therefore commenced investigations on the matter by recording witness statements from those who had some information about the allegation. He also visited the scene where he drew a sketch plan of the area. He produced it as an exhibit. From the investigations, **(PW8)** apprehended the accused persons and did prefer a charge of murder contrary to Section 203 of the Penal Code.

In their defence the 1<sup>st</sup> accused elected to give a sworn testimony and denied any involvement with an unlawful act which killed the deceased. On the part of the second accused he elected to remain silent.

**(DW3)** – **Barisa Bachira** testified to the effect that on 30.12.2016 they were playing soccer with others in the field who included the two accused persons. In his testimony **(DW3)** did not recall seeing the deceased in the field because the rules do not allow minors to participate in the games.

At the close of the prosecution case, Learned counsel **Ms. Aoko** filed her respective submissions urging the Court to acquit the accused persons for lack of evidence.

### **Analysis and determination**

The one-million-dollar question is whether the prosecution did discharge the burden of proof beyond reasonable doubt to prove the accused persons committed the offence of murder contrary to Section 203 and 204 of the Penal Code. Turning to the ingredients of the offence it is the duty which rests with the prosecution to prove the following ingredients:

- (a) The death and cause of death of the deceased.*
- (b) That the deceased death was unlawfully caused.*
- (c) That in causing death the accused persons had malice aforethought.*
- (d) That in all there is direct or circumstantial evidence to place the accused persons at the scene of the crime.*

From the evidence adduced before Court in support of the charge with regard to the death of the deceased thereof, I find that **(PW1), (PW2), (PW5) and (PW7)** proves beyond reasonable doubt that the deceased John Kazungu is dead. The post-mortem report by **(PW7) Dr. Gayo** medical evidence corroborates **(PW1) and (PW2)** testimony.

On whether the deceased death was unlawfully caused. The prosecution relied on the evidence of **(PW3) Furahah Randu**, who saw the first accused chasing and kicking the deceased at the back. **(PW3)** later received information from **(PW1) and (PW2)** that the deceased had been taken ill and subsequently succumbed to death while undergoing treatment. Besides the evidence given by **(PW3)**, it was the case for the prosecution that the post-mortem report by **Dr. Gayo (PW3)** confirmed the multiple injuries suffered by the deceased. The pathologist stated and opined that the injuries were consistent with the cause of death being cardio-pulmonary arrest secondary to abdominal trauma. There is therefore cogent evidence from **(PW1), (PW2), (PW3), (PW6) and (PW7)** point towards a strong basis that the deceased died as a result of severe injuries as depicted in the post-mortem report.

With regard to the ingredient of malice aforethought as set out in Section 206 of the Penal Code, the prosecution is under a duty to lead evidence to prove the following manifestation:

- (a) An intention to cause the death of another.*
- (b) An intention to cause grievous harm to another.*
- (c) Knowledge that the act or omission will cause death.*
- (d) Intent to commit a felony.*
- (e) Intention to facilitate the escape from custody of a person who has committed a felony.*

On this ingredient the predecessor of the **Court of Appeal in Tubere s/o Ochen v Rex {1945} 12 EACA 63** the Court opined that:

*“malice aforethought is deemed to be proven from proof of any of the following circumstances:*

- (a) The nature of the weapon used*
- (b) The manner in which it is used against the deceased.*

*(c) The part or parts of the body targeted by the assailants.*

*(d) The nature and gravity of the injuries sustained, either they can be described as a single stab or multiple brutal injuries.*

*(e) The conduct of the perpetrators prior, during and after the commission of the offence.*

On this ingredient, it is quite clear that the prosecution placed reliance upon the evidence of **(PW3) Furahah Randu** the eye witness who saw the first accused kicking the deceased. Given the fact that thereafter, **(PW3)** heard that the deceased had been admitted at the hospital for purposes of treatment and subsequent death, it became apparent what transpired on 30.12.2016 between the deceased and the first accused had a direct causal connection with his death. No other incident was noticed which presented itself where the deceased could have suffered injuries complained of and thereafter leaving him for death.

As observed by **(PW7) Dr. Gayo** in his evidence, the deceased body was riddled with multiple blunt injuries which formed a combination to occasion a cardiopulmonary arrest, secondary to abdominal injuries. The fact that the deceased had sustained injuries to the chest, pelvic iliac and sternal parts of the body is convincing evidence of an intention to inflict grievous harm against the deceased.

On my own analysis given the evidence of **(PW1) – (PW8)**, I am of the considered view that under the guidelines stated by the Court in **R v Tubere** case the prosecution has failed to satisfy the criteria for the Court to infer manifestation of malice aforethought beyond reasonable doubt. It is clear from the provisions of Section 206 of the Penal Code that mensrea elements of the offence comprising intention to cause death or to do grievous harm, knowledge that the accused knew or had reason to believe that his act or omission will cause death, be proven beyond reasonable doubt. This is borne out by the fact founded on **(PW3)** testimony that the 1<sup>st</sup> accused while beating the deceased was unarmed and the conduct is inconsistent with someone who had planned the execution of the offence with malice aforethought to cause the death of the deceased. What is deducible from the evidence was a dangerous act which endangered the life of the deceased. On the facts of the case it seems fundamentally this to be a case of manslaughter.

In line with **Lord Deplock in DPP v Newbury & Another {1976} 2 ALL ER 365:**

*“the accused person is guilty of manslaughter for its proven that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death.”*

For the above reasons, I am unable to reliably find the unlawful act was accompanied with malice aforethought.

The last evidence on this matter is one touching on identification of the accused persons under this ingredient the prosecution placed reliance on the testimony of **(PW2)**, the mother of the deceased who heard the dying declaration of the deceased soon after the injuries but before his death.

Further evidence in support of identification came from **(PW3)** who stated in Court that she saw the 1<sup>st</sup> accused chasing and assaulting the deceased. There is no dispute that the evidence of **(PW2)** meets the threshold of the provisions in Section 33 (a) of the Evidence act on dying declaration statement of the deceased. The two witnesses were firm on their testaments on positive identification of the accused persons.

The above findings when considered in light of the principles in **Simiyu v R {2005} 1KLR 192 Waithaka Chege v R {1979} EA 271 and R v Turnbull {1970} 3 ALL ER 549**, more specifically **(PW1)** evidence places the 1<sup>st</sup> accused at the scene. In this regard, the evidence obtained by **(PW3)** shows that the attack took place during the day. The accused and the deceased are said to have stopped fighting but going forward **(PW3)** never pursued the events.

However, the testimony of **(PW3)** viewed with that of **(PW2)** fortifies the fact on identification and advancement of a narrative that he was joined later by the second accused. The reason and the motive for the assault is as inquired of **(PW3)** that 1<sup>st</sup> accused alleged the deceased to have stolen their puppies. Though the motive for murder or manslaughter is not a mandatory ingredient, it goes to demonstrate the existence of the chain of events culminating in the commission of the offence. That being the case recognition evidence of the accused persons cannot be said to have been in error or mistaken.

The upshot of all the above assessment is that I find the accused persons guilty of the lesser offence of manslaughter contrary to Section 202 of the Penal Code as punishable under Section 205 of the Penal Code and accordingly convict them of that offence.

### **Sentence**

The maximum penalty for manslaughter is imprisonment for life. In the statement **Ms. Aoko** on behalf of the convicts submitted in mitigation that the accused persons may be treated as first offenders, further the Court should consider the manner in which the offence was committed. It was also the quest by counsel for a lenient sentence that the personal circumstances of the convicts be taken into account with a possibility of a non-custodial sentence as well as the possibility of reform and rehabilitation.

In the instant case, the facts are self-explanatory as gleaned from the Judgment of the Court. This offence undoubtedly, though reduced to manslaughter is a very serious offence involving a violation of Article 26 of the Constitution on the right to life. The deceased life was terminated unlawfully at a very young age without any excuse or justification.

However, as mentioned by **Ms. Aoko**, the convicts are young offenders and that guideline of age and other parameters forms the basis of determining sentence as expounded by the **Supreme Court in Francis K. Muruatetu v R {2017} eKLR**. This is to say every factor on

mitigation and aggravating factors counts towards the context of imposing an appropriate sentence. That being the case all in all, the circumstances of the case does not fit the rarest of the category permissible to impose a maximum imprisonment for life.

Accordingly, I would sentence each of the convicts to a term imprisonment of (4) years with a commencement date of 23.1.2017 on account of Section 333 (2) of the Criminal Procedure Code.

14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF DECEMBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Alenga for the state
2. Ms. Aoko advocate for the accused persons