



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO 82 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

DICKSON MWENDA MBAABU.....ACCUSED

JUDGMENT

1. **Dickson Mwenda Mbaabu** (*the accused person herein*) was charged with the offence of murder contrary to **Section 203 as read with 204 of the Penal Code**. The particulars of the offence are that on 8th October 2014 at Thangarine Village Kibachi Location, Igembe sub-location within Meru county murdered **Isaac Kimathi**.

Prosecution's Evidence

2. The prosecution summoned five witnesses in support of its case. **PW1 GLADYS MUTHEE** the mother to the deceased testified that on 8/10/2014 at night, the father of the accused woke her up with information that her son had been beaten by the accused. The father of the accused had carried the deceased on his shoulders. The witness testifies that she called the deceased (her son) and he did not respond. She states that she then carried the deceased into the house to wait for the father (her husband) to come and see what way to help him. She testified that the father of the accused informed her that the deceased and the accused had gotten into a fight and the deceased had been injured.

3. **PW2 M'THERU M'IKOTHA MUNGANIA** a resident of Amwathi village testified that on 8/10/2014 at 1am at night, he was at home when he heard Mbaabu (Mwenda's father) calling Gladys (mother of the deceased). He testified that he heard the father of the accused say that he had brought Kimathi (the deceased) after they fought with Mwenda (the accused). PW2 further testified that he went outside his house and into Gladys compound where he saw her taking the deceased inside the house and laid him on the bed. PW2 testified that he went back to his house and slept and in the morning he went to visit the deceased. On reaching the house he touched his body and it was cold. He went out and called Gladys and informed her that Kimathi was dead and proceeded to report the matter at Kimweline Police station.

4. **PW3 JOSHUA KAINGA the eye witness** testified that on 7/10/2014 at around 8:00pm he arrived at Kamau town. He heard screams coming from the Mbaabu homestead. He went into the accused person's home where he found people standing there. Upon inquiring he was told that the accused was beating the deceased. He testifies that he saw the accused and his father beat the deceased.

5. **PW4 CPL HENRY NAIBEI** the Investigating officer testified that a report was made about a deceased child who was at Thangarini. On arrival where the body was he confirmed that the deceased was lying dead on the bed. He took the body to the Meru Hospital Mortuary. He testified that he began to carry out investigations into the case where he established that the deceased was at the home of the accused person and that at night the two had a disagreement over miraa and had subsequently fought. He testified that the investigation further established that the father of the accused participated in the beating of the deceased and that on realizing that they had badly injured him the father of the accused carried the deceased to his home where he woke up his mother and informed her about the incident.

6. **PW5 DR MOHAMMED NOOR** the medical doctor stationed at Meru level 5 Hospital testified that he knew Doctor Guantai who is the doctor who carried out the post-mortem on the body of the deceased. He stated that he worked with him from 2014 to 2018 when the examining Doctor went to pursue his masters at the university of Nairobi and that securing his attendance in court to testify would be difficult. He further stated that he knew the handwriting and the signature of the said doctor and confirmed that it was the one on the post-mortem report. PW5 produced the post-mortem report dated 21/10/2014 in respect of the body of Isaac Kimathi (the deceased) marked as PEXH1 bearing the stamp of the hospital. He testified that the deceased's cause of death was respiratory failure secondary to severe traumatic brain injury caused by blunt force trauma to the head.

The defence

7. The accused person when put to his defense and in his sworn evidence, stated that he knew the deceased as his cousin and that he did not kill him. He stated that he was aware that the deceased had died but was not aware how he died. He stated that PW3 lied that he saw the incident and that he was not arrested but instead went to the police station to report that people were burning their house. The accused further contends that the testimony given by PW3 that his father went into hiding after the incident is false and that his family has always been home. He further stated that he had no quarrel with the deceased at any one time.

Analysis

8. Section 203 of the Penal Code defines the offence of murder as follows:

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

Elements of murder

9. Arising from the above definition, the Prosecution must prove beyond reasonable doubt the following elements of the offence of murder:

- i. The fact of death
- ii. The cause of such death
- iii. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and
- iv. The said unlawful act or omission was done with malice aforethought.

Fact and Cause of Death

10. Of fact and cause of death, evidence adduced show that the deceased died. His body was identified by **Shadrack Karuti** and **Peter Mingaine** on 21st October 2014 to the medical examiner for a post-mortem. The post-mortem report indicates that the deceased died from cardiorespiratory failure caused by severe traumatic brain injury due to blunt force trauma to the head. Accordingly, the prosecution has proved the fact and cause of death.

Unlawful acts or omissions that caused death

11. Section 213 of the Penal Code provides for the circumstance where a person may be deemed to cause death. The section states as follows: -

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases: -

- a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;**
- b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;**
- c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;**
- d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;**
- e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”**

Proof that the deceased met his death as a result of unlawful acts or omissions by the accused

12. It was **PW2's** testimony that on 8/10/2014 at night, the father of the accused woke her up with information that her son had been beaten by the accused. The father of the accused had carried the deceased on his shoulders. The witness testifies that she called the deceased (her son) and he did not respond. She states that she then carried the deceased into the house to wait for the father (her husband) to come and see what way to help him. She testified that the father of the accused informed her that the deceased and the accused had gotten into a fight and the deceased had been injured.

13. **PW3 JOSHUA KAINGA the eye witness** testified that on 7/10/2014 at around 8:00pm he arrived at Kamau town. He heard screams coming from the Mbaabu homestead. He went into the accused person's home where he found people standing there. Upon inquiring he was told that the accused was beating the deceased. He testifies that he saw the accused and his father beat the deceased.

14. **PW4 CPL HENRY NAIBEI** the Investigating officer testified that a report was made about a deceased child who was at Thangarini. On arrival where the body was he confirmed that the deceased was lying dead on the bed. He took the body to the Meru Hospital Mortuary. He testified that he began to carry out investigations into the case where he established that the deceased was at the home of the accused person and that at night the two had a disagreement over miraa and had subsequently fought. He testified that the investigation further established that the father of the accused participated in the beating of the deceased and that on realizing that they had badly injured him the father of the accused carried the deceased to his home where he woke his mother up informed her about the incident.

15. **PW5 DR MOHAMMED NOOR** produced the post-mortem report dated 21/10/2014 in respect of the body of Isaac Kimathi (the deceased) marked as (P EXH1) bearing the stamp of the hospital. He testified that the deceased's cause of death was respiratory failure secondary to sever traumatic brain injury caused by blunt force trauma to the head.

16. The only evidence linking the accused with the murder of the deceased emanated from PW3.

17. In criminal cases, the burden of proof lies with the prosecution to prove beyond reasonable doubt the guilt of the accused. And if reasonable doubt exists as to his guilt, the doubt is resolved in favour of the accused. This position has held since the late part of 1700. Viscount Sankey L.C[1] puts it more subtly;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's 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 guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

18. **Mativo, J[2]** expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

19. PW3 who was the only eye witness to the fight. Here I am content to cite a sure guide; RORIA vs. REPUBLIC [3], where the Court of Appeal for East Africa held that:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness,

That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

20. I should satisfy myself that it is safe to rely on the evidence of PW3. His evidence was that, when he went to the home of the accused after he heard screams coming from the home, he made enquiries as to what was happening and he was told that it is the accused and his father who were beating the deceased. He then stated that he saw the accused and his father beating the deceased. He did not give such succinct account of the beating, the weapon used, or the manner the beating was delivered or names of some of the people he found at the scene or where he stood in relation to the scene of the assault or such other important detail which creates a vivid impression or picture in the mind of the court on really what happened. I expected the witness to provide to the court specific details and anecdotes to give power and illustration of the incident and that the beating was occasioned upon the deceased by the accused and his father. His narration is terse and lacking in important details which could have helped the court visualize the manner the assault was carried out.

21. I am more perturbed that the investigating officer who was aware of the evidence by PW3 did not visit the home of the accused where its alleged the fight took place or trace persons who are said to have been at the home of the accused when the accused and his father beat up the deceased. It is also surprising that it was not demonstrated that frantic efforts were undertaken by the IO to have the father of the accused arrested and charged with this offence or to record a statement. Notably, the father carried the deceased who was unconscious to his home. The father is yet to be apprehended or questioned. These are crucial leads to any competent or investigator who cares about public interest in investigation of cases.

22. The post mortem report shows that the fatal wounds were inflicted by a blunt object, evidence, say that the accused person hit or used the blunt object exhibited to inflict the fatal injuries on the deceased would have been of great corroborative value. But, it is lacking.

23. Recapitulation of these realities is an expression of court's great trepidation on the manner investigations were done in this case; serious omissions becomes the sole reason the case will be lost, yet, it may have been otherwise a good case.

24. In the upshot, and I repeat, that, although the accused may have killed the deceased, with great trepidation, the evidence is not quite assuring; I find that a reasonable doubt exists as to whether the accused killed the deceased. Accordingly, it is doubtful whether the unlawful acts or omissions by the accused caused the death of the deceased.

Malice aforethought

25. In light of the foregoing finding, it is impossible to find that with malice aforethought the accused caused the death of the deceased.

26. In the upshot, I find the accused not guilty of the murder of ISAAC KIMATHI and is accordingly acquitted under section 366 of the CPC. It is so ordered.

Dated and signed at NAROK this 14th day of December, 2020

F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day of December 2020

T. W. CHERERE

JUDGE

[1] H.L.(E)* WOOLMINGTON V DPP [1935] A.C 462 pp 481

[2] in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR

[3] [1967] EA 573