



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

MATHEW OTWANE WANYONYI.....ACCUSED

Criminal Law – Murder contrary to Section 203 of the Penal code whether there is sufficient evidence that the accused killed the deceased unlawfully with malice aforethought

JUDGEMENT

The accused Mathew Otwane Wanyonyi was charged with the offence of murder contrary to Section 203 as punishable conduct Section 204 of the penal code. The particulars constituted in the charge were that on the 18th February 2018 at Kware area in Ongata Rongai Township within Kajiado County the accused murdered Kevin Ondieki Matoke hereinafter referred to as the deceased. He pleaded not guilty to the charge. At his trial he was represented by learned counsel Mrs Makori while the prosecution was conducted by Mr. Meroka, the principal prosecution counsel.

In order to discharge the burden of proof under Section 107(1) of the Evidence Act the prosecution tendered evidence from ten witnesses.

Summary of the evidence by the prosecution

From testimony of **Pw1 – Joseph Matoke**, a cousin to the deceased stated that on the 18th day of February, 2018 he was at Kware area when he witnessed someone pushing the deceased. This led to a kind of response from the deceased trying to inquire what the problem was up to with his conduct. That is when Pw1 saw a confrontation arose with the person assaulting the deceased with fists and punches.

As the fight ensued the same accused turned against Pw1 and in fear for his life he took flight from the scene but keeping an eye on the incident. Pw1 further told the court that from his position he could see the accused having inflicted bodily harm against the deceased as he felled him on the ground. He according to Pw1 the accused continued to beat the deceased even as he lay in the ground.

Pw 2 Felistus Kafafa testified that while at her business premises she saw the accused negotiate a corner and in a short while members of the public were running towards that direction. In almost the same time Pw1 also joined in to go and find out what the incident was all about. That is when she saw the accused hitting the deceased several times as members of the public cheered on shouting *kill him, kill him*. In defiance with other members of the public Pw2 gave evidence that she intervened by asking the accused to stop beating the deceased. Though it did not happen immediately nevertheless accused in obedience to the plea from Pw2 left the scene. Pw2 in turn telephoned the police and reported the assault incident as she saw some other people make arrangements to escort the deceased to the hospital.

Pw3 – Thomas Matoke and Pw4 Josephine Matoke testified as a brother and a mother to the deceased respectively. In their testimony Pw3 and Pw4 had been informed of the assault incident. This made them to travel to Kenyatta National Hospital where the deceased had been admitted to undergo treatment. According to Pw3 and Pw4 unfortunately on 23rd February, 2018 he succumbed to death and on 1st March, 2018 they were asked to participate during the post-mortem where they identified the deceased body to the pathologist.

From **Pw5 Nyaboke Obiri** testimony was to the effect that on 18th February, 2018 at 1.00 p.m while going about her business she saw people chasing each other. She became curious closed her shop and followed them soon thereafter to the scene. On arrival at the proximity of the scene she saw the accused beating the deceased with fists, and footsteps as he lay down on the ground. In Pw5 testimony it took the intervention of Pw2 for the accused to discontinue acts of assault against the deceased.

Pw6 – Gilbert Magati Okumu although summoned by the prosecution did not witness the events of the fateful day when the deceased was assaulted. His contribution was to inform the relatives and next of kin of the deceased on what had be fallen him including reporting the

incident to the police.

Pw7 – **Cpl. Mwiti Charles** a police officer attached to Ongata Rongai Police Station acting on the complaint lodged at station took further action of arresting the accused person who was the alleged suspect of the assault.

Pw9 – Cpl. Johana Tanui a gazetted scenes of crime officer testified that he had been instructed to take photographs of the murder incident which occurred at Kware area. The set of photographs take both at the scene and at Kenyatta National Hospital Mortuary were produced and developed under his supervisions were admitted in evidence as exhibit 1. The accompanying certificate as exhibit 2.

Pw10 – **Pc Erickson Nyamwega** who was tasked with the role of investigating the offence gave a detailed description on steps taken to put the evidence together against the accused person. According to Pw10 the witness statements and the post-mortem report revealed two things. First that the deceased was assaulted by the accused on 18th February, 2018. Secondly, the post-mortem report confirmed that the deceased had suffered several injuries with more prevalent at the spinal cord. That formed the basis by Pw10 to recommend for a charge of murder against the accused person.

At close of the prosecution case the accused was placed on his defence. According to his evidence the accused explained that on 18th February, 2018 as he was walking home two men emerged and held him at the shoulder. Before he could respond in any way he was hit with a stone on the head and the lower limbs resulting in bodily harm. Under these circumstances the accused told the court that he reacted in self-defence and screaming for help at the same time. As the fight continued the accused stated that one of the assailants forcibly took away his mobile phone but on pursuing him, failed to catch up with him to recover it. The following day he went about his duties at the workshop until the 23rd February, 2018 when police officers apprehended him in connection with the death of the deceased. He denied any such involvement in the killing of the deceased.

Submissions on behalf of the accused.

Mr. Makori learned counsel for the accused submitted that in light of the evidence by the prosecution the offence of murder contrary to Section 203 is deemed not to have been proved beyond reasonable doubt. The learned counsel attached some significance to the defence of self and provocation that were material offered by the accused in his defence in answer to the version by the state. Learned counsel contended that in the circumstances of this case the accused person was entitled to retaliate against the attacks from the deceased and another person not before court. In regard to the principles in self-defence learned counsel cited the case of **Republic v Ismail Hassan Ibrahim 2018 eKLR**. In a nutshell learned counsel was of the view that the charge of murder was not proven beyond reasonable doubt.

In the final analysis, the principal prosecution counsel did not manage to file submissions to ventilate the summary of their case. However, the absence of it in respect of the decision I am about to make will not be prejudicial in any event. All these issues on whether a case beyond reasonable doubt has been discharged can be addressed through the entirety of the evidence on record.

The law

What requires to be proved by the prosecution in a murder charge is the killing of another human being under the circumstances specified in section 203 of the penal code. The provision states: **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”**

For the prosecution to sustain a conviction for the offence under this section the following elements must be proved beyond reasonable doubt.

- (a) That the person named in the charge is dead**
- (b) That the killing was alluded to by unlawful acts or omission.**
- (c) That the killing was accompanied with malice aforethought.**
- (d) That the accused person was the one who killed the deceased.**

The Standard of Proof

It is settled law as propounded in the cases of **woolmington v DPP [1935]** and **Miller v Minister of pensions**. In the two authorities its settled law that the prosecution must prove the case beyond reasonable doubt in order to satisfy the duty of the court correctly that it's the accused person before court and no none else committed the offence. For verdict of guilty and conviction to be entered on such a defendant the expression of beyond reasonable doubt supports the consistence dictates under Article 56 2(a) hence provides **“that the accused person has a right to be presented in court unless the contrary is proved”**

Therefore, the burden of proof rests on the prosecution throughout the trial of an accused person and there is no time does it ever shift to the accused. Even by allowing the accused person to state his defence it certainly not an excuse to invite him or her to supplement the prosecution case a type of evidence which is sufficient enough to prove a case beyond reasonable doubt may be either direct or circumstantial evidence. A central feature of law on the doctrine of beyond reasonable doubt as demonstrate by the dictum in Woolmington and Meller (Supra) decisions is the disclaimer that it does not mean proof beyond the shadow of doubt or to the Hilt

In a nutshell the distinction between the prosecution case and that of the accuses person would be weighed against this standard of proof of

beyond reasonable doubt

In this case the prosecution case was that the accused person Mathew Wanyonyi killed the deceased Kevin Matoke, with deliberate acts of assault with fist and punches. While on the other hand the accused maintains that if death ensued it was in defence of self, out of the provocation and attack by the deceased with his co-defendant not before court. In approaching the determination of the present case the following elements are to be considered:

(a) The death of the deceased

The evidence adduced to the court by Pw3 and Pw4 both next of kin to the deceased positively identified the body at Kenyatta National Hospital mortuary to be that of their brother and son respectively. The post-mortem report as evidenced carried weight which has been tested at the trial that the examination on the body availed credibly and reliably was that of the deceased and there is no mistaken identity.

The particular form and style of this murder as alluded to by the eye-witnesses, Pw1, Pw2 and Pw5 contains in my view essential elements that points out that the deceased was assaulted on 18th February, 2018 at Kware Area. Following the attack he was admitted at Kenyatta National Hospital where he succumbed to the injuries on 23rd February, 2018. Based on this analysis it is undisputable fact that Kevin Matoke is dead.

(b) The unlawful acts of omission to cause death.

Unlawful in law means something or acts done without justification or excuse. In the Kenyan Criminal Law for a killing to amount to homicide or murder under Section 203 of the penal code the accused acts or omissions must be the operating and substantial cause of death. Life in being is a right protected under Article 26 of the constitution 2010. In that case the legal position in law is that even the unborn being is protected. As such no one has right to terminate a life of another human being without any justification or excuse.

The provisions of law which contains the questions and answers on causation of death are traceable to Section 213 of the penal code. The correct approach in situations where the victim of the murder has suffered physical injuries out of unlawful acts of assault is to consider whether injuries suffered have a direct correlation with the cause of death. In the instant case Pw1, Pw2 and Pw5 witnessed the accused killing the deceased with fists and punches. It was out of these acts that the deceased was admitted at Kenyatta National Hospital on 18th February, 2018 until the 23rd February, 2018 when he passed on.

The post mortem report Dr. Midia revealed multiple injuries to the chin, clavicle and cervical spinal cord. The abrasions ranged in size from 3.5 – 6 cm. Significantly the pathologist noted that there were no defence injuries. The cause of death was stated to be spinal injury due to blunt force trauma. There is no evidence that prior to the 18th January, 2018 the deceased had sustained any such serious injuries to the spinal cord. Contrary to the accused contention there is credible and cogent evidence from the prosecution as stated by Pw1, Pw2 and Pw5 that stated at least the unlawful acts had occurred at Kware Area. The deceased and accused had a confrontation. The accused provoked the attack with no basis to infer provocation on the part of the deceased.

In the instant case there was prolonged and brutal beatings from the accused that finally resulted in the deceased death. Its plausible that the evidence adduced by Pw1 and Pw2 to the effect that the accused went against all requests made to stop from beating the deceased but could hear neither of the voices from the public. Instead what emerged was a full blown attack against the deceased inflicting serious harm.

The last point to consider under this element is whether the mitigating circumstances of provocation and self-defence ought to be appreciated in favour of the accused. As a result, sudden attack accused alleged that before attack he was confronted by 2 men. The last point to consider is whether the mitigating circumstances of provocation and self-defence ought to be appreciated in favour of the accused.

The host of case in law under Section 207 and 208 of the penal code provocation is considered a defence when a person kills another under circumstances which would constitute murder but having been committed in the heat of passion and because of the preceding events one loses control, it becomes a mitigating factor to be convicted of a lesser offence of manslaughter. Under section 17 of the penal code an accused person is not criminally liable for an offence if it is proved that his action was justified that he or she carried it out in self-defence.

The question of self-defence under our criminal law is but an enquiry based on the principles of English common law. In so far as the doctrine has evolved the definitive principles are clearly expounded in the case of **Palmer v Republic 1977 1 ALL ER 1077**. The test in Palmer case is that a man under attack is allowed to defend himself against imminent attack in circumstances in which force being used against him or her is likely to cause death or grievous harm. However, the rider to the test is whether the person or accused believed upon reasonable doubt grounds that it is as necessary to act in self-defence to retaliate and use force in the manner he did.

The explicit decisions by Kenyan courts on this issues can be traced in various decisions. As a preface statement in the case of **Anthony Njue Njeru v Republic Cr. Appeal No. 77 of 2006** may serve to give reality to the applicability of the law on self-defence. The court held as follows:

“A killing of a person can duly be justified and excisable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.” See also **Republic v Joseph Chege Njora 2007 EKLK**

In addition, in the case of **Mungai v Republic 1984 KLR 85** the court further stated that:

“No doubt this element of self-defence may, in most cases will in practice, merge into the element of provocation and it matters little whether the circumstances relied on one regarded as acts done in excess of the right of self-defence of person or property or as acts done under the series of provocation. The essence of the crime of murder is malice aforethought and if the circumstances shows that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice rebutted and the offence will be manslaughter”

From these decisions the High Court and Court of Appeal of Kenya it is agreed that for an accused person to be entitled the right to self-defence, or defence of others or property, the defensive act must be reasonably necessary and proportionate to the risk being prevented. It is a principle of law that in self-defence the accused person must have explained the obligation to retreat from the attack before applying the use of force. This is consonant to the constitutional provisions under Article 26 which protects the right to life. The later in all circumstances requires society and its people to protect and preserve the life of a human being at all costs unless excusable by law.

Turning my mind to the facts of the present case it reveals the following: These two people being the accused and the deceased were on separate missions not inter linked with each other. There had been no quarrel between them on this occasion or on any other occasions going by the evidence on record before the fatal occurrence. On this material day Pw1, Pw2 and Pw5 confirm that the accused out of nowhere started to assault the deceased. The deceased was not armed when the accused violently began to unlawfully inflict physical harm.

The prosecution witnesses Pw1, Pw2 and Pw5 direct evidence demonstrate that without any fear that the deceased might suffer grievous harm accused was motivated to continue attacks against accused without any justification. It is instructive to note that from Pw2 and Pw5 testimony that all efforts to disengage the accused from beating the deceased fell on deaf ears. In particular, the cheers from the members of the public uttering words like, *Kill him kill him*, tended to encourage the accused to use even more violent force.

The main case as set up the prosecution testimonies of Pw1, Pw2 and Pw5 confirms that the aggressor was the accused. There was no real fight between the two save for the assault from the accused against the deceased which culminated in a fall on the ground. Because there was no resistance from the deceased, a deliberate attack upon his body was intended to physically harm him to the hilt that he was to die from the injuries. The accused increased the violent nature of his assault including using of his footsteps.

According to the prosecution evidence the accused person worked as a bouncer in one of the night clubs at Ongata Rongai. Where the incident occurred was not in any of the clubs accused worked as a bouncer. The exact time of the assault was 1.00 p.m. in the afternoon and in broad daylight. It will be recalled by this court that the accused is a well-muscled build human being and if his body mass and energy is applied against the deceased forcibly the risk of grievous harm is not a remote occurrence.

The accused person in his defence stated that he reacted in self-defence after being attacked by the accused with another not before court. If indeed his version is to be believed the following elements are to be deduced from the totality of the evidence from the prosecution.

That the accused carried out the attack in self-defence and he believed the action to be necessary to defend himself from the deceased. (ii) the use of force was reasonable response in the circumstances of the situation as he perceived it. (iii) That the use of force in retaliation was not excessive.

Again the evidence by the prosecution witness Pw1, Pw2 and Pw5 properly analysed is in a consistent with the defence raised by the accused person. The result therefore is that the accused conduct and his acts of omission and commission falls short of the test on the concept of self-defence.

The final element is that of malice aforethought

Murder as defined in Section 203 of the penal code is the voluntary killing of any other human being without any excuse or justification. For the prosecution to prove the offence of murder of any person malice aforethought either stated to be direct or implied by the evidence presented to the court must be proved beyond reasonable doubt.

The issue of malice aforethought is the central element which distinguishes murder from other homicides. Malice aforethought has been defined in Section 206 of the penal code and is construed to be manifested in particular set of facts. If any of the any of the following circumstances exist malice aforethought shall be deemed to be established by evidence proving that the accused had malice aforethought:

- (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 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.**

In specific cases which interprets Section 206 the courts have not been left helpless to struggle with the application and manifestation of malice aforethought. The facts to be proven as such range within the principles laid down in some of the following cases: In the case of ***Tubere v Republic 1945 12 EACA -63***. The court held that

“Intentional killing can of necessity be inferred where the prosecution lends evidence to establish the weapon used, the manner in which it is used, part of the body targeted and injured, the conduct of the accused before, during and after the incident”

This mensrea view of the crime in our criminal justice system is not to be equated necessarily with premeditation or ill will, or hatred or malice. What the law requires under Section 206 of the penal code is prove of the fact that in causing death the accused committed it intentionally and with malice. That is why in the case of *Ernest Asami Bwire Abang alias Onyango v Republic CA CRA No. 32 OF 1990* the court held that

“If the facts establish that the victim of murder was subjected to brutal killing calculated to cause grievous harm or death it is admittedly fine to conclude that the accused committed the murder with malice aforethought. Furthermore, a person would be deemed to have committed murder even without the necessary malice aforethought in circumstances where he causes grievous harm.”

In section 4 of the penal code grievous harm is defined as any dangerous or permanent harm or injury which is life threatening. This legal proposition was considered in the case of *Rex v Yakobo Ojiambo S/O Nambio 1944 11 EACA 97*, in this case the accused assaulted the deceased repeatedly, moved his bod and threw it in a swamp while he died on immersion in water. The cause of death was confirmed to be asphyxia. The court found him guilty of murder. This principle reaffirms that malice aforethought may be found in the intent to kill, where no justification or mitigating circumstances can be shown to have existed. Thus the operation of Section 206 encompasses also the element of knowledge that the act which causes death will probably cause death or grievous harm to some other person.

From the evidence of the prosecution witnesses more specifically Pw1, Pw2 and Pw5 who happened to be at the scene there are no circumstances attending to the murder that the law recognizes as sufficient to mitigate unlawful acts by the accused to persuade this court to rule out malice aforethought.

In the present case the prosecution has proved that by the vicious fight and assault offer the deceased the accused intended to inflict serious harm which infact resulted in the death of the deceased. There is no evidence of provocation as known in law as defined under Section 207 read together with Section 208 of the penal code.

In this case thought there was no focused intention to kill but the behaviour of the accused person was such that his persistent and continuity on inflicting bodily harm was so extreme and unreasonable. It is apparent that even the bystanders and other members of the public will not dissuade him from this life threatening acts of violence.

The cumulative effect of all these is the finding by this court that the prosecution has discharged its burden of proof beyond reasonable doubt that the killing of the deceased was carried out by the accused person with malice aforethought. It follows therefore that the accused person is found guilty of the offence of murder contrary to Section 203 of the penal code and is hereby convicted accordingly.

SENTENCE

This court has considered the mitigation presented by the accused thought his defence counsel Ms Makori. The father of the deceased made a moving victim impact statement on how the death has caused enormous psychological trauma to the family. Thy are yet to come to terms with the loss of their son whose life was prematurely terminated by the accused person.

The pre-sentence report is quite detailed having regard to the terms of reference and the general law on such reports and after care non-custodial sentences. There is no dispute that the accused has been treated as a first offender. However, in the instant the following aggravating factors stand out. The nature of the offence which violates the right to life under Article 26 of the constitution. The degree of perversion and deviance demonstrated by the accused person during the assault against the deceased. The accused was in a position to retreat and avoid the use of excessive force which contributed to the to the death of the deceased at the end of it all. The actual impact of the commission of the offence upon the family as established from the victim impact statement is a pointer to what crime can do to the victims who in most cases find no answers within the criminal justice system. Prior to this acts by the accused there was no evidence of provocation or attack which could have attracted the violence meted out upon the deceased.

I would accept that the position in Kenya has since changed on the mandatory death sentence contrary to Section 203 of the penal code. The matter was comprehensively considered by the supreme court in the **Fancis Muruatetu & another v Republic [2017] eKLR** case. However, the fact remains that a crime involving the death of another human being through acts of omission and commission remains a serious and heinous crimes of our time. The current position in law is that death penalty is no longer mandatory. Sentencing of offenders charged under Section 203 of the penal code can now enjoy some level of Judicial discretion depending on the facts of each particular case to impose an alternative sentence besides the death penalty.

From the perspective of imposing sentence in this case the accused is aged 29 years the relevant factors are malice aforethought and the degree of deviance attract a great deal of gravity of the sentence in relation to this offence. The aggravating factors outweighs any mitigation offered by the accused. The accused to me deserves no mercy. The approach I take is to pass a custodial sentence in place of the death penalty. Guided by the above factors I sentence the accused to 35 years imprisonment.

14 days right of appeal explained.

Dated, signed and delivered in open court at Kajiado this 24th day of January, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Waiganjo for Mr. Makori for the accused

Mr. Meroka for the DPP