



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL CASE NO. 6 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH WAMWEA GITERE.....ACCUSED**

**JUDGEMENT**

The accused **JOSEPH WAMWEA** was indicated with the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code (Cap. 63) of the Laws). The brief facts in the charge sheet are that at unknown times between the night of 12<sup>th</sup> April, 2017 and early morning of 13<sup>th</sup> April, 2017 at Kiserian Township within Kajiado North sub-County, the accused murdered Augustine James Kinyanjui. He pleaded not guilty. Mr. Anam Advocate represented him at the trial while Principal Prosecution Counsel Mr. Meroka led the prosecution on behalf of the State.

**Evidence by the State**

In order to discharge the burden of proof against the accused person under Section 107(1) of Evidence Act, the prosecution summoned eight witnesses. I take the chronology of events leading up to the death of the deceased starting with the testimony by PW2 Lucy Gatwiri. According to Lucy Gatwiri – on the night of 12<sup>th</sup> April, 2017 while going about her duties as a water at Blue Bar a fight broke out between the accused and the deceased. When the situation got out of control, she threw both of them outside the premises so that other customers can have their drinks without any disturbance. Further in Lucy Gatwiri’s testimony the following day she had to receive a telephone call from Langa, PW3 one of her customers that Augustine Kinyanjui has been found dead on the roadside. In a little while that morning she also saw the accused visit the bar.

In cross-examination by Mr. Anam for the accused, PW1 confirmed as having witnessed the accused holding the collar of the deceased. That is when she decided to chase him out of the bar.

**PW2 MARY WANJIKU** who testified as the mother-in-law to the deceased in her evidence stated in court that on 12<sup>th</sup> April, 2017 they parted ways with the deceased. She further elaborated that the following day through a telephone call from one Susan Nyokabi the deceased had been found lying on the road with some physical injuries. On arrival at the scene PW2 confirmed that her father-in-law had already passed on.

**PW3 MAVEN LANGAS** who testified as the owner of the pool table located at Blue bar where the incident took place explained that on 12<sup>th</sup> April, 2017 on or about 8.30 p.m. he saw the accused and the deceased fighting. In the testimony of PW3 as he moved to separate them he heard the accused utter threats to the deceased to the effect that he takes care because he has trusted him for a long time and **leo nitakuua**. “**Leo ujue mahali utapitia lazima nitakuua.**” That was the end of that scene of 12<sup>th</sup> April, 2017 as they both left the bar at different times. There was no any other information about the two according to PW3 until the 13<sup>th</sup> April, 2017 when the deceased body was discovered at the road side with multiple injuries. The deceased’s mother-in-law PW1 was informed of the incident by PW3. These circumstances caused them to report the matter to Kiserian Police Station.

In cross-examination by Mr. Anam PW3 stated in court that his observations of the deceased’s body at the time revealed injuries to the neck, eyes and jaws.

**PW4 P.C. JOSEPHAT MUGO** testified as the Scene of Crime Officer who undertook the task of taking photographs of the deceased at the scene and at the mortuary. The set of photographs together with certificate were both admitted in evidence as exhibit (a)(b) respectively.

**PW5 JOHN KIMANI**’s evidence was that the accused worked for him at his premises as a casual labourer. However, he was not privy to the incident of murder which the accused was being looked for at his place of work. According to PW5, the accused was sought for, arrested and charged with the offence of killing the deceased.

**PW6 P.C. DICKSON MISATI** indicated to the court that he conducted the initial investigations involving the death of the deceased. In his role PW6 stated that he made arrangements to visit the scene and have PW4 take photographs of the scene and to capture any relevant material to the case. His evidence was corroborated with that of **PW8 P.C. ELPHAS OBIERO** who took over the investigation on the incident. After recording witness statements, taking the accused for a mental fitness examination and receiving the post mortem report a charge of murder was preferred by the state against accused.

As the defence had consented with the production of the post mortem report, the mental examination report, government analyst report and safaricom data report they were all admitted in evidence as exhibits without calling the makers. The prosecution documentary evidence was therefore taken in as exhibit (2-5).

The other witnesses also called by the State was **HOSEA KULOBA (PW7)**. The gist of his testimony was about the movements of the accused on the night of 12<sup>th</sup> April, 2017. He did not witness the altercation being referred to by PW2 and PW3 in these proceedings. That is all what the prosecution case stands for in establishing the guilt of the accused person.

The accused was placed on his defence. He denied the events of 12<sup>th</sup> April, 2017 as alluded to by the prosecution. Further in his testimony the accused admitted that they enjoyed cordial relationship with the deceased prior to this fateful day. The accused acknowledged that on 12<sup>th</sup> April, 2017 there was a conflict which arose between him and the deceased while enjoying their beer at Blue bar. The accused made reference to the incident by beating up the deceased who had started provoking him by using vulgar names like dog. He however denied that he ever lost control to involve himself in fighting the deceased having been intoxicated, he decided to leave the bar altogether.

### **Submissions on behalf of the Accused**

Mr. Patrick Anam counsel for the accused presented his written submissions dated 19<sup>th</sup> November, 2018 and filed on 20<sup>th</sup> November, 2018. Learned counsel submitted that the prosecution has not discharged its mandate to prove beyond reasonable doubt that the accused committed the offence. The accused raises the following points in support of his defence; that the post mortem report shows the cause of death was strangulation. According to counsel, the prosecution failed to produce evidence linking the accused with the death that the prosecution did concede at the hearing that they did not have the results of the DNA analysis and the call logs placing the accused at the scene of crime. In paragraph 20 of the submissions the issue of circumstantial evidence was raised, the accused argued that the fight with the deceased should not be used to find him guilty of murder. The learned counsel relied on the case of *Joan Chebichii v Republic [2003] eKLR* where the court observed that:

**“Before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, 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. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence”**

Learned counsel submitted that the prosecution presented weak evidence and the case for murder has not been proved beyond reasonable doubt against the accused hence he should be acquitted.

### **Submissions on behalf of the State**

Mr. Meroka, Principal Prosecution Counsel for the state presented his written submissions dated 7<sup>th</sup> November, 2018 and filed on 14<sup>th</sup> November, 2018. The prosecution submitted that they proved the four primary ingredients of offence, namely the death of the deceased, the death of the deceased was unlawful, there was malice aforethought and the accused was positively identified as the one who caused or participated in the killing of the deceased.

According to prosecution counsel, the death of the deceased was proved by the testimonies of PW1 and Police Constable Dickson Misati. Further counsel contended that the unlawful death of the deceased was proved by PW6 who booked the post mortem on 18<sup>th</sup> April, 2017 and the cause of death was neck impressions as a result of manual strangulations.

On the issue of malice aforethought the prosecution submitted that this was proved by PW3 who testified that the accused threatened the deceased that he would kill him on the night of 12<sup>th</sup> April, 2017. The prosecution relied on the case of **Abigail alias Onyango v Republic Criminal Appeal No. 321 of 1990**, on the test to apply in determining the sufficiency of circumstantial evidence to sustain a conviction.

### **Analysis and Determination**

This court has had the advantage of hearing both parties in these criminal proceedings. The approach is to weigh the externals of the offence as defined in Section 203 and the indicative defence by the accused person to decide whether the prosecution has discharged the burden of proof on the charge.

On examination of the charge, evidence and rival submissions made by both counsels to this case. The first issue which forms the substratum of this case is whether the prosecution has established beyond reasonable doubt the charge of murder contrary to Section 203 of the Penal Code.

The prosecution called a total of 8 witnesses to prove the ingredients of the offence of murder beyond reasonable doubt, stated to be:

**(1) the death of the deceased**

**(2) that the death of the deceased was unlawful**

**(3) that in causing the death there was malice aforethought on the part of the accused and**

**(4) that the accused was positively identified as the one who caused or participated in the killing of the deceased**

I will consider each of the elements and whether the prosecution has satisfied the court that the accused was the one found culpable for the offence.

**(a) Death of the Deceased**

Death is proved if the prosecution satisfies beyond reasonable doubt through direct medical evidence or circumstantial evidence that the deceased is dead. In the case of **Ahmed v Sate 2001 18 NWLR 746** the court held **“In relation to cause of death, medical evidence is direct evidence of the cause of death, a fact in issue when given by the Doctor who carried out the autopsy or by a doctor who treated the deceased”**. The prosecution case on this element is simple. It is well summarized by the testimony of PW1 Mary Wanjiku the mother-in-law, PW2 Lucy Gatwiri who knew the deceased who worked as a cashier at Blue Bar knew the deceased as a regular customer who frequented the bar. PW3 Maven Langas owner of the pool table at Blue Bar and PW4 P.C. Joseph Mugo scenes of crime officer who took photographs confirmed the death of the deceased. PW6 P.C. Misati and PW8 P.C. Obiero both who were involved in the investigations of the murder gave credible evidence in reference to the deceased’s killing on the night of 12<sup>th</sup> April, 2017. Finally, the post mortem report by Doctor Ndewa identifies positively that the body of Augustine James Kinyanjui sustained multiple bruises to the neck. The cause of death was stated to be neck compression due to manual strangulation and, brain contusion. That therefore proves sufficiently the deceased is dead.

**(b) The unlawful act of death**

According to the prosecution evidence the deceased was drinking beer at Blue Bar on 12<sup>th</sup> April, 2017 in the company of the accused. PW2 confirmed that she worked at that bar as she normally serves them being her regular customers. As narrated by PW1 in the course of their drinking, a fight erupted between them which resulted them being thrown out of the bar. They however came back and continued to be served with alcoholic drinks. The accused and the deceased were again at each other fighting. According to PW3 the accused vowed to the deceased that no matter what was going on he will kill him. Though PW2 and PW3 did not come out clearly the nature of harm inflicted on the very night they are categorical of the fight between the two of them. In that evidence when I evaluate the sequence of events it appears that the conflict between the accused persisted on and off until PW3 ejected them out of the bar at different times on 12<sup>th</sup> April, 2017.

Dr. Ndegwa opines in his post mortem report that the deceased had suffered injury to the right eye, left eye brow, left cheek, left temporal scalp petechial scleral and conjunctival hemorrhage and bruises to bilateral neck. The photographs taken of the body of the deceased by PW4 P.C. Mugo admittedly gave credence to the findings by the pathologist. The cause of death of the deceased in so far as the post mortem report was concerned concludes that it was due to neck compression, due to manual strangulation and brain contusion. When the accused and the deceased fought in the bar they were exchanging punches with one another, with no use of any weapon.

Under Article 26 of the Constitution there exist a legal duty to protect life of another human being. The prosecution is bound to establish the casual relationship between the death and proximate cause.

The general principle of criminal law is that an offence may be committed by either acts of omission or commission. The integral part of an accused person’s liability is that the offending act must be unlawful and depended on him or her to execute the intention. In the case of **Republic v Larken 1943 ALL ER 217** the court held as follows:

***“Where an act which a person is engaged in performing is unlawful, then, if at the time it is a dangerous act, that is, an act which is likely to injure another person, and if done voluntarily it is a murder but if in advertently he causes the death of the other person he is guilty of manslaughter”***.

The formulation of the stated objective of unlawful is found in the case of **Guzambizi v Republic 1948 EACA** where the court held inter alia **“that all homicides are unlawful unless justified under the provisions of the law i.e. in defence of self, property or third party under imminent danger to his life or property or in advancement of the criminal justice.”**

To support an indictment for murder or manslaughter the prosecution is enjoined to prove causation within the provisions of Section 213 of the Penal Code. It is to be noted that under Section 213 where death flows from a felony of some kind and the unlawful act is sufficient to render the death of the victim. It is presumed the accused is guilty of murder or manslaughter depending whether there was presence or absence of malice aforethought. There is therefore a correlation between the injuries and the cause of death.

In the instant case there is evidence which makes Section 213 of the Penal Code applicable that the deceased died as a result of the injuries suffered by another human being. From the testimony of PW2 and PW3 it is correct to hold that the accused formed the intention to prosecute an unlawful act of assault against the deceased on the night of 12<sup>th</sup> April, 2017 at Blue Bar. Evidence was led by the prosecution to prove that the acts of sustained serious bodily harm were the cause of the deceased death. I am of the strong view that the deceased death is traceable to the injury inflicted by the accused during the fight with the deceased and any subsequent follow-up grounded on the threats to kill as stated by PW3. Certainly, the prosecution has established sufficiently that the death of the deceased was unlawful.

**(c) Element of Malice Aforethought**

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances; as defined in Section 206 of the Penal Code –

- (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 death or grievous harm to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish it may not be caused;**
- (c) An intention to commit a felony and**
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who committed or attempted to commit a felony.**

The element of malice aforethought was discussed in the following authorities:

**Republic v Tubere S/O Ochen 1945 EACA 63** the court held that: *“an inference of malice aforethought can be established by considering the nature of the weapon used, part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack”*. **Ogelo v Republic 2004 2KLR 14**; the court held that: *“malice aforethought can also be inferred from the manner of killing.”* Further in the case of **Nzuki v 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 the following intentions, the test of which is always subjective to the actual accused: **(a) Intention to cause death (b) Intention to cause grievous bodily harm.**

The court also stated in this case that it’s not every circumstance surrounding the death of deceased from the injuries inflicted upon him should an automatic inference of malice afterthought be said to be manifested as defined in Section 206 of the Penal Code.

It thus means, where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse, it doesn’t matter whether the accused desires the result or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to occur from his conduct is not by itself enough to convert a homicide into a crime of murder.

Applying the above principles I agree with the prosecution that there is evidence of existence of malice aforethought on the part of the accused person in committing the felony of murder contrary to Section 203 of the Penal Code. This can be deduced from the prosecution witnesses PW2’s who testified that she saw the accused holding the deceased by the collar, when she intervened and chased him out of the bar. Her testimony was corroborated by PW3 who testified that the accused was assaulted the deceased and he separated the two on that very night. It is reasonable to conclude that the accused assaulted the deceased and the injury inflicted on him caused the death soon thereafter. According to PW3 evidence prior to the accused being separated from the deceased he had threatened him he will surely be killed that night unless he finds an alternative route to use while travelling home. This final act of killing the deceased was in darkness and clandestine circumstances with only the accused and the deceased in location. The contextual analysis of this case appears to establish strong links within the chain that the accused never retreated or immediately disconnected himself from fighting the deceased. There were no eye witnesses to the events which finally took place on the roadside where the body of the deceased was discovered. The prosecution relied on circumstantial evidence and the threshold stated in the case of **Abang alias Onyango v Republic Criminal Appeal No. 32 of 1990** where the court held as follows:

- 1. The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.**
- 2. Those circumstances should be of a definite tendency pointing towards guilt of the accused.**
- 3. The circumstances taken cumulatively should form a chain to complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else.**
- 4. The circumstances and facts must be absolutely incompatible upon reasonable hypothesis with the innocence of the accused and incapable explanation other than that of guilt of the accused.**

In **Sawe v Republic [2003] KLR 364** the Court of Appeal emphasized and reaffirmed the principle thus:

***“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.”***

Therefore, circumstantial evidence can be a basis of a conviction only if there are no other existing circumstances weakening the chain of circumstances relied on by the prosecution. 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 in the prosecution. This burden always remains with the prosecution and never shifts to the accused. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

The rule of evidence under section 111(1) and 119 of the Evidence Act provides for a statutory rebuttable presumption if it exists in favour of the accused person. The two sections stipulate as follows:

**“111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

**“119 the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

In the instant case the reappraisal of the evidence sufficiently establishes a complete chain which positively places the accused at the scene of the murder.

I find that after the moment the accused picked a fight with the deceased he had the intention to kill him or cause grievous harm. The question became even more relevant when viewed together with the testimony of PW3. As at the time of the fight the accused issued threats to kill the deceased that particular night. He went further to warn the deceased to find an alternative route or else he be ready to die. In his defence the accused made an attempt to introduce the element of provocation from the deceased when they fought in the bar. However, I take cognizance of the fact that under section 207 as read with Section 208 of the Penal Code provocative has a special legal meaning. Therefore, for the accused to be availed the defence he must establish that he was provoked within the definition recognized in the statute. The evidence must show that by an act of provocation he suddenly and temporarily lost his self-control. It is clear from the testimony of PW2 and PW3 who stated that the accused and the deceased began to hassle the other. What PW2 and PW3 brought out was the fact that as the fight advanced they disengaged and threw them out of the bar. The initial separation did not seem to have ended the conflict. It is not in dispute that the accused left the bar ahead of the deceased. This was followed by the deceased later in the same night. What can be manifested from the circumstances of this case the two must have resumed fighting again where they were sure nobody was keeping an eye of the incident. Whether one applies the doctrine of provocation or self defence the overall occurrence, nature of the offence and the events leading to the death do not entitle the accused any such defences.

Finally, in my view if the accused wanted to raise it as a defence nothing could have stopped him in doing so. It is however clear from his defence that he has distanced himself from the act of causing the death of the deceased. Obviously, the accused person and deceased had started using force at each other while they were in the bar drinking. Thereafter began creating a disturbance which escalated into a full blown fight, but soon they left the bar at different times but in close proximity. The accused knew the deceased route he usually uses when walking home. There is no indication that the fight stopped by the intervention made by PW2 and PW3. I find no reason to doubt that it flared up again but this time outside the precincts of the bar. The fight and utterances of threats to kill by the accused in the bar should not be seen in isolation with the death of the deceased.

The accused has a rebuttable burden to explain how the deceased died or met his death and he never executed his threat to kill the deceased. The accused testified in his defence that he parted with deceased at 8.00 p.m. on 12<sup>th</sup> April, 2017 and went to another bar, drank the whole night and left at 4.00 a.m. in the morning.

The fact that the accused and the deceased were together at the bar on that night of 12<sup>th</sup> April, 2017 and he had fought with him with threats to kill is circumstantial which called for an answer from the accused. Their departure from the bar and the discovery of the deceased having been strangled is in consonant with the fight inside the bar where both of them were drinking. The accused failed to adduce evidence or in the form of witnesses to account for his whereabouts in a manner to exonerate him from the scene. The fact that he went to another bar and drank until 4.00 a.m. without coming into contact with the deceased is not credible enough to displace circumstantial evidence by the prosecution.

In my opinion the circumstantial evidence irresistibly and invisibly points to the guilt of the accused. I am satisfied that the circumstances of the case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the offence was committed by the accused.

The cause of murder under Section 203 of the Penal Code is complete whenever life is unlawful taken away with malice aforethought. By virtue of the principle of law on circumstantial evidence I know of no other intervening factor to apply to the fact of this case that render an alternative option that the death which ensued was not caused by the accused.

With respect to the totality of the evidence, if A and B fought in public place in a continuum manner and threatens the life of B, that he will not live to see another day and the circumstances of the evidence indicate commission of the offence, with proximity as to time and location it could easily be inferred that tragic result was as a consequence of the deliberate acts of assault and threats to kill carried into effect.

The accused has not disputed that he made an extra-judicial confession that he will kill the deceased in the presence of PW3. The piece of evidence of evidence is consistent with the fight which went on at Blue Bar and the threats to kill coupled with the recovery of the deceased body fit in the chain which positively places the accused person as the perpetrator of the crime. The alibi defence raised by the accused has been controverted by the circumstantial evidence of PW2 – Lucy Gatwiri and PW3 – Langas. I find no evidence that a third person came into the scene besides the accused person to kill the deceased.

For the above reasons I find the accused guilty of the offence of murder contrary to Section 203 and do convict him according to the

provisions of the law.

**SENTENCE**

Considering the nature of the offence, I have taken into account the mitigation as stated by counsel for the accused person. The pre-sentence report captures the following elements. That the accused is a family man married but with no children. The home report in regard to the possibility of reintegration and rehabilitation remains our NON-responsive given the personal circumstances of the accused person.

The aggravating factors in this offence which weigh against the accused being considered for any alternative sentence consist of (a) the gravity of the offence and the conduct of the accused. (b) This murder had an element of malice aforethought as the evidence shows a man set out to kill the deceased. (c) The accused person must have foreseen that key confronting the deceased with such a violent force death may result or permanent serious physical harm. (d) The accused did not seem to have retreated in executing the plan of inflicting harm whose results ended up being the tragic death of the deceased. (e) There is no evidence that any of the unlawful act against the deceased was done in the realm of self-defence. (f) The fact of the matter that this murder was committed in the course of an assault to me is an aggravating factor. (g) By virtue of his unlawful act of omission, the accused violated the right to life under Articles 26 of the constitution.

After reviewing various factors and the penal law concerning homicide sentencing under Section 204 of the penal code. I exercise discretion not to impose the death penalty but go for a long custodial sentence to punish this heinous crime. In arriving at this decision, I have considered the common objectives of sentencing being to punish crime, rehabilitation and retribution which reflect in this unfortunate death. Accordingly, I sentence the accused to 28 years imprisonment.

14 Days Right of Appeal explained.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of February, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Liko for Anam for the accused

Mr. Meroka for the DPP