



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 24 OF 2014

REPUBLICPROSECUTOR

VERSUS

STANLEY KARIUKI WALUGORO alias KARISH.....ACCUSED

JUDGEMENT

1. The Accused **STANLEY KARIUKI WALUGORO** alias **KARISH** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 28th day of March, 2014 at Mukuru Kwa Njenga village in Embakasi Division within Nairobi County murdered **JOSEPH MUTISO MUTUKU**.

2. On 2/4/2014 his journey through the corridors of criminal justice started when he appeared before Muchemi J. then at the Criminal Division of High Court at Milimani but could not take place as he had no legal representation. On 7/4/2014 a plea of not guilty was entered in his favour and after several mis-steps at hearing on 5th December 2015 Kimaru J. released the same on bail pending hearing upon condition set out in the said Ruling.

3. After several adjournments caused by none availability of the prosecution witnesses on which is captured by the records of proceedings on 20/2/2017, the trial commenced before me by the testimony of two witnesses who were brought to court under warrants of arrest issued by Koriri J. on 2/11/2016. This explained the slow course of justice within the corridors of justice which has nothing at all to do with the court.

PROSECUTION CASE

4. **PW1 JOHN MUTHINI MUTUKU** a brother of the deceased was called and given information that the deceased was being beaten and when he went to check he found that he had been assaulted. At the scene there was the accused and two other people one being a "Somali boy". On enquiring what had happened the accused told him that the deceased had stolen his three (3) empty crates of beer and gave him a name of the lady they had allegedly been sold to who denied having bought any. When he went back to the scene he found that the deceased had left for his house. The deceased informed him that the accused had assaulted him with a piece of timber stick which was produced in evidence.

5. It was his further evidence that when he went back to check on the deceased he found him dead. **PW2 JACINTA MBITHE MUTUKU** attended to the postmortem examination and identified the body to **PW5 DR. DOROTHY NJERU** who confirmed that the deceased had laceration of the scalp, contusion of soft tissue on the lateral aspect of both upper limbs, extensive subgaleal hematoma and skull fractures lines. She formed an opinion that the cause of death was head injury due to blunt force trauma.

6. **PW3 MUSAU MUTISO** stated that while passing through the scene which was in an incomplete building he heard a cry and decided to check on what was happening thereat and upon entering into the building he found three (3) men, two (2) whom he knew as "Tiso" the deceased, and "Karish" the accused with the deceased lying down bleeding and hands tired with a wire and the accused holding a wooden timber and the other man standing besides him. Since he had money on him he did not want to risk losing the same so he left them only to meet the brother of the deceased (**PW1**) whom he informed to go and check what had happened to his brother.

7. It was his further evidence that the deceased when he saw him had a cut on his right and fractured right arm. He heard the accused say that the deceased had stolen his empty crates. He knew both the deceased and the accused. Under cross-examination he stated that he identified the accused positively at an identification parade.

8. **PW4 PC STEPHEN MUTHAMO** was instructed by the OCS to investigate the matter taking over from the said OCS Chief Inspector Nyongesa. He recorded statements and collected exhibits. **PW6 INSP. PETER OWINO** a scene of crime officer visited the scene where he found the deceased lying on an old mattress on the floor with blood stains. His face had blood clots with fresh deep cut wounds on the hand

and bruises on the back and arms. He took photographs thereof before being taken to a house where there were blood stains on the sofa set, stone blocks, two plastic containers which had blood stains. They arrested two male adults therefrom by the OCS.

9. PW7 CHIEF INSPECTOR VICTOR NYONGESA the then OCS visited the scene of crime and proceeded to the house of the deceased which was an iron built plot one bed roomed where the body of the deceased was on a mattress with a deep cut on the head and injuries all over the body. He was then led to the second scene where they found three male, blood stains on the door and steps to the ground floor. There was also a piece of timber with blood stains which he assumed was the murder weapon. He was able to link up the two scenes through the blood stains and blood trails along the way from the iron sheet room to the houses under construction. He concluded that the accused was assaulted at scene two and drugged to scene one. He arrested the accused who had beaten the deceased on allegation that he had stolen his things. He investigated the alleged theft of beer bottles but did not recover them.

DEFENCE CASE

10. When put on his defence the accused gave sworn statement of defence and stated that on 28/3/2014 at 7.30 a.m. he heard noise outside his house and when he went to check on the happenings found a crowd of people with a person bleeding. He inquired what had happened but was not told. He went back to his house and at 4.30 p.m. was arrested by the police to assist with investigations. He stated that **PW3** did not identify him by name and denied killing the deceased though admitted friendship with **PW2** his brother. In cross-examination he confirms seeing the deceased and his brother in the area.

SUBMISSIONS

11. At the close of the case the defence filed written submissions while the State opted to rely on their written submissions at no case to answer stage. On behalf of the accused it was submitted that the vital witnesses were not called to testify and that the dying declaration of the deceased was never corroborated. It was submitted further that there was contradiction in the evidence of prosecution witnesses and that the samples of blood stains linking the two scenes were never taken for analysis to confirm the same thereby creating doubt on the credibility of prosecution witnesses.

12. It was stated that for a death declaration to support a conviction it was necessary to exercise caution in reception of such evidence as it is generally unsafe to base a conviction solely on the dying declaration of the deceased. It was submitted that the prosecution did not prove its case beyond reasonable doubt and the following cases which I have had the advantage of reading were submitted in support of the submissions:-

a) Republic v Peter Muthoni, Nairobi criminal case no. 27 of 2013.

b) Jamleck Mwaniki Njururi v Republic, Meru Criminal Appeal No. 3 of 2019.

DETERMINATION

13. For the State to sustain a conviction on a charge of murder, they are under legal duty to prove beyond any reasonable doubt the following ingredients of the offence:-

a) The fact and the cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That accused acted with malice aforethought.

14. The fact and cause of death of the deceased is not disputed. The same was proved beyond reasonable doubt through the evidence of **PW1** the brother of the deceased, **PW2** his sister, **PW3** a neighbour and the eye witness to the incidence, **PW4** and **PW7** the investigating officer and the first officer at the scene, **PW6** the scene of crime officer all who confirmed the death of the same. The cause of death was proved through the evidence of **PW5** who conducted post mortem examination on the body and confirmed that the cause of death was head injury due to blunt force trauma. I therefore find and hold that the prosecution proved beyond any reasonable doubt the fact and the cause of death.

15. On whether the said death was caused by unlawful act of omission or commission on the part of the accused person: **PW3 MUSAU MUTISO** knew both the accused and the deceased very well, when he responded to the cry of the deceased he found him with the accused and another person who he did not know with the deceased lying down and him standing up holding a wooden log (timber) in his hand. The deceased was bleeding and his hands tired with wire. This evidence was corroborated in material particular by that of **PW1** the brother of the deceased who went to the scene and found the deceased having been assaulted. He also found the accused at the scene who confirmed that the deceased had stolen his empty beer crates.

16. **PW1** placed the accused whom he knew as his friend together with two people one whom he identified as a "Somali boy". The accused informed both **PW1** and **PW2** that the deceased had stolen his empty crates and **PW2** was able to positively identify the accused in an alleged identification parade conducted by the police. **PW6** confirmed having arrested the accused at the scene and his investigation confirmed that the accused had beaten the deceased on allegation that he had stolen his empty beer crates. The accused in his defence put himself at the scene by testifying that he allegedly while in his house heard noise outside and when he responded to the scene found a crowd of people with a person who was bleeding. He admitted knowing the deceased and his brother **PW2** thereby corroborating the prosecution evidence. I therefore find and hold that there was no mistaken identity of the accused since he was known to the prosecution witnesses.

17. The deceased before his death told his brother that it was the accused who had assaulted him before leaving the scene to go to his house from where he was found dead. I am therefore satisfied that the said information meets the condition for admission of dying declaration which as was stated in the case of **REPUBLIC V PETER MBURU MUTHONI [2015] eKLR** tendered by the defence is admitted when made in extremity when the maker is at a point of death and the mind is induced by most powerful consideration to tell the truth. I have noted that the said declaration was corroborated in material particular by the evidence of PW3 who found the accused at the scene assaulting the deceased. He knew the accused well and therefore find that the accused was positively identified. The accused was found on the scene and was linked by **PW7** the investigating officer to the offence through the blood trail. Whereas the blood at both scenes were not analyzed I find that the evidence tendered by the prosecution leave no doubt in my mind that the death of the deceased was caused by the accused and nobody else.

18. The accused having admitted that he knew both the deceased and **PW2** his brother and having taken into account the evidence of **PW2** whom I found to be a very credible and truthful witness, heard the accused whom he knew as 'Karish' say that the deceased had stolen his empty crates thereby corroborating the evidence of **PW1** and **PW7**. I find the accused's defence unbelievable and dismiss the same. I therefore find and hold that the prosecution proved to the requisite standard that the unlawful death of the deceased was caused by the accused.

19. On whether the said death was caused with malice aforethought: **Section 206** defines the same as intention to cause death or do grievous harm or knowledge that the act or omission causing death will probably cause death of or grievous harm to some person. From the injuries inflicted upon the deceased as per the postmortem report and the fact that it was inflicted upon the deceased head and from the picture taken at the scene, it is clear that the accused who had lost his empty beer crates had the intention to cause death or do grievous harm to the deceased and succeeded to do so. The nature of the injuries sustained by the deceased to my mind shows that the accused had the requisite malice aforethought and I find and hold that the prosecution through evidence proved that the accused had malice aforethought beyond reasonable doubt.

20. In the final analysis I find and hold that the prosecution has proved beyond any shadow of doubt all the ingredients of the information of murder and therefore find the accused **STANLEY KARIUKI WALUGORO** *alias* "**KARISH**" guilty of the murder of **JOSEPH MUTISO MUTUKU** *alias* "**TISO**" on 28th the day of March 2014 contrary to **Section 203** of the **Penal Code** and convict the same accordingly and it is so ordered.

Dated, signed and delivered at Nairobi this 20th day of February, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for Mr. Okeyo for the State

Mr. Oduor for the accused

Accused present

Court assistant- Karwitha