



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC.....PROSECUTION

AND

DKM

MARGARET NJERI MATHENGE.....ACCUSED

JUDGMENT

1. **DKM** and his mother **Margaret Njeri Mathenge** are charged with murder c/s 203 as read with s.204 of the Penal Code.

2. It is alleged that on 20th August 2015 at Gachika Village within Nyeri County jointly murdered Joseph Kinyua Wachira who is a first cousin to DKM, and nephew to Margaret Njeri Mathenge. DKM's father and the deceased's mother are brother and sister.

3. The case for the prosecution is that on the night of 19th August 2015, Joseph Kinyua went to the home of the accused persons at about 11:00pm. He was demanding Kshs.1000/- which he alleged the 1st accused had robbed him of. The 1st accused came out of the house to ask him what it was all about but instead he started a fight. 1st accused was by then a 15-year-old boy. Joseph grabbed him. A struggle ensued. They both fell down on some stones that were in the compound. The 2nd accused upon hearing the commotion came out of the house and assisted the 1st accused to beat the deceased.

4. According to PW2 **Jane Nyambura**, a sister in-law to the 2nd accused, she was in her house on the material night when she heard the deceased enter the 2nd accused's compound. She heard the deceased call out the 1st accused demanding his Kshs.1000/-. She heard them quarrelling about the Kshs.1000/-. She also heard Accused 2 telling the deceased that she had told him to go home, and heard the deceased tell her that he would not leave without his Ksh.1000/-.

5. She testified that she came out of her house, which was about 50m from that of the Accused, and under some light bulb, she watched as Accused 1 pushed the deceased to the ground, then Accused 2 came out of her house, picked a piece of wood which she held with both her hands and beat the deceased telling him to go home, until he stopped talking. . That when deceased stopped talking she thought he had left and gone to his home.

6. She went back to her house but around midnight she heard the dogs barking towards the shamba. It is then that she heard the voice of Accused 2 chasing the dogs. Then she saw three people whom she identified as the 2 accused persons, and the husband to the 2nd accused person carrying something. She watched them as they went wherever they went and watched them as they, returned to their house.

In the morning of 20th August 2015 PW1 **Beatrice Wangui** the mother to the deceased passed by her house and told her that Accused 2 had beaten her son badly and almost killed him. She requested her to watch over him. She went to deceased's house and saw that he was not talking.

7. PW1 the mother to the deceased testified that on 19th August 2015 her son Joseph Kinyua came home about 9:00pm. The rest of the family were already asleep. He was shouting that his cousin the 1st accused had stolen his Kshs.1000/-. Apparently no one bothered with him, or responded he left.

8. Later, she received a phone call from the 2nd accused her brother's wife who is also an aunt to the deceased telling her to go and collect her son who was fighting with the 1st accused. 2nd accused then switched off her phone. Five minutes later, she heard the 2nd Accused and her husband (PW1's brother) outside her house telling her they had brought her sign. She testified that she peeped through a hole in the wall

and saw that they were carrying him in a sack. Neither herself nor her husband came out of the house to check on the deceased.

9. The following morning when she woke up she found the deceased lying outside his door- he had spent the whole night outside. She called PW2 Mary Njeri, her daughter in law, her husband, another in law by name Nyambura. They broke the door to the deceased's house and put the deceased in his bed. She noticed that he had injuries on the head, which was swollen, and was bleeding from the mouth. She testified that went to look for 2nd accused to ask her why she had not taken the deceased to hospital. She said the 2nd accused told her that was her problem. She proceeded to her place of work – then went to report at the police station. The police told her to take him to the police station.

10. PW7 Isaac Irungu Rukwaro's testified that his motor vehicle is the one that was used to take the deceased to the hospital. That he was called by Njeri Muriithi PW3 who told him that Joseph Kinyua was very sick and was bleeding from the nose. She told him Joseph Kinyua's mother was at Kiganjo Police Station. He rushed there, picked PW1, went to the home, picked Joseph and PW3. They proceeded to the police station, then to Consolata Mathari hospital. He said as they were rushing him to Mathari hospital he died on the way. Upon arrival at the hospital the Doctor certified the same and directed them back to the police station.

11. He noted that the deceased was bleeding from the nose, had a mark on the head but it was not bleeding. He heard from the discussion in the car by the deceased's relatives and the police that he had been hit but he did not know by who. He did not see any physical injuries.

12. PW6 attended the postmortem, PW4 and 5 assisted to place the deceased in his house on the morning of 20th August 2015.

13. On 26th August 2015 a postmortem was conducted on the deceased's body by **Dr.Obiero Okoth** PW9 at Consolata Hospital Mathari. PW6 attended the postmortem on behalf of the family. The report indicates that the body was found at Gachika on 20th August 2015 at 1:34pm and time of death was set at 16:00hrs. The circumstances of the death were described as:-

“The deceased was assaulted by 2 people known to him. He was taken to Mathari hospital for treatment but died on arrival”

On examination he noted the body of a young adult, male and described nutrition as wasted. Cause of death was head injuries secondary to blunt trauma. The deceased had a comminuted depressed (pond) skull fracture

14. PW10, the Investigating Officer **No.80851 IP Hilda Namu** testified that on 20th August 2015 she was working at Kiganjo Police Station. About 4:00pm the OCS rang her and told her that there was a murder at Gachika. She and her colleagues went to the home of the suspects and interviewed them. They told her that deceased had fought with 1st accused over Kshs.1000/-. That after he fight the 2nd accused and her husband had taken the deceased to his home, called out his mother to open for him but she had refused to open the door. They left him there.

15. She testified further that the following morning his parents took him inside his house leaving their daughter in law to take care of him but his condition worsened. The mother reported to the police and while they were taking him to hospital he died.

16. On visiting the scene she found that it was a large homestead where all these people lived the deceased and his family, the accused persons and their family, and the other witnesses as well She said the deceased was drunk that night, that he was beaten by the accused persons with a wooden stick which she did not recover but the accused persons told her that during the fight the 1st accused pushed the deceased and he fell down on a stone. Upon recording statements of witnesses, she recorded in her statement she was ordered to arrest the 2 accused persons. They were presented before Dr. Thuo J.N at Embu Level 5 hospital, who conducted mental assessment on 2nd September 2015 and found each fit to plead. The 2 reports were produced by Dr.R. Mwenda on behalf of Dr. Thuo.

17. The 2 accused persons took plea on 21st September 2015 and pleaded not guilty to the charge.

18. At the close of the case for the prosecution the accused were each found to have a case to answer to warrant each being put on the defence. Each made an unsworn statement. They called one witness.

19. The 1st accused, who was a child at the material time told the court that on 19th August 2015 he was in the company of a friend when they passed by deceased's homestead. They found him abusing his mother PW1. On inquiry he said he would not continue and he entered his house. They left. Later that night the deceased went to his (Accused 1's) home shouting. He was drunk. When Accused 1 went to ask him he grabbed him. In the struggle, they both fell down and where they were there were some building stones. A struggle ensued. At some time they were up. Deceased grabbed Accused 1 and threw him down. He screamed for his mother because now the deceased was on top of him. She came and separated them and told him Accused 1 to go back inside his house, which he did.

20. Accused 2 confirmed that the deceased came to her home that night about 11:00pm. He was shouting. Demanding Ksh 1000. She tried to wake up her husband DW1 but he was drunk. She got up, put on the lights and went out. She rang deceased's mother PW1. Since the homes are not too far apart, she asked her whether she could hear the noise her son was making in her compound. She said deceased's mother told her that she had no business with him because had just come from home where had been insulting her. She told him to come for her son but she said he was an adult and could walk home by himself. When she went out she found deceased beating Accused 1- she separated them. She tried to speak to him but he also insulted her.

21. Her husband DW1 woke up and found her arguing with him and told him that they could discuss the issue of his money the following day. She and her husband escorted him to his home., Upon arrival, she called out to deceased's mother PW1 .PW1instead began to argue with them from inside the house saying that she would not open the door because the deceased had just been insulting her. They stayed for a while then left him there and went back to their home.

22. DW1, **Stephen Mathenge Karagita** brother to PW1 and uncle to deceased, father to accused 1, husband to Accused 2 testified that on the material night he was called out by his wife that deceased was outside shouting and demanding for money. When he went out, he found deceased who was drunk, and who kept falling down. He told him to go home and they would discuss the issue of his money the following day. He decided to escort him home. When they got there the deceased's mother refused to come out of her house saying that had insulted her. They left him and went back home. The following day PW1 passed by his house going to work, some minutes to 8:00am. She said the deceased was at home. He too went to work. About 4:00pm some police officers fetched him he went to the police station, his son and wife were there they were held while he was released and recorded a statement.

23. The issue for determination is whether the prosecution had proved beyond a reasonable doubt that: -

i) *The 2 accused persons caused the death of Joseph Kinyua Wachira*

ii) *That they had malice aforethought.*

iii) *That they had a common intention to cause the death of Joseph Kinyua Wachira.*

24. The facts as to what happened on the material night are not in dispute save that it is denied that the 2 accused beat up the deceased.

25. The state through Mr. Magoma and the accused persons through their respective counsel Mr. S. K. Njuguna for 1st accused, and Mr. Gathiga Mwangi for 2nd accused each made their submissions. The state urged me to find that they had proved their case beyond a reasonable doubt. The accused persons urged me to find that the case for the prosecution was insufficient to support a conviction for the offence of murder, and that the accused persons ought to be acquitted.

26. The 1st accused relied on **Philip Muiruri Vs Republic (2016) eKLR** on the requirement for the prosecution to prove both the *actus reus* and *mens rea* beyond a reasonable doubt and on **Joseph Kimani Njau Vs Republic (2014) eKLR** -on the determination of *malice aforethought*.

27. The 2nd accused relied on **Musili Tulo vs Republic Appeal No.30/2013**, and **Abanga alias Onyango vs Republic Cr.Appeal No.32/90**, and **Sawe vs Republic (2003) KLR 364** to show that even the circumstantial evidence relied on by the state was insufficient to meet the standard of beyond a reasonable doubt.

28. What does proof beyond a reasonable doubt entail?

29. In **Philip Muiruri Ndaruga** the Judge, citing from the Canadian Supreme Court Case No. **Republic vs Lifchus** pointed out that criminal proceedings begin on the footing that the accused person is always innocent, just as is guaranteed under Art 50 (2) (a) of our Constitution, until proven guilty by the provision of evidence by the prosecution to establish the charge.

“.....the term beyond a reasonable doubt has been used for a very long time and is part of our history and traditions of justice. It is so engraved in our criminal law that some think it needs no explanation.....regarding its meaning”

The court went on to explain the meaning of a reasonable doubt. That it is

“..... not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or lack of evidence” (emphasis mine)

30. What evidence do we have here?

31. From the prosecution; that the deceased went to the home of the accused persons, he was drunk, shouting and demanding for some money from accused 1, that a fight broke out between him and the accused 1, that accused 1 pushed him to the ground, that Accused 2 hit him with a piece of wood, that he sustained an injury to the head. That that injury was determined to be the cause of his death. From the defence that; that deceased went to that home, that he was drunk, that he grabbed accused 1 and they fell down, that there were stones where they fell and accused must have hit his head there, that Accused 2 just separated the two, and she and her husband escorted him home, and called out his mother to open for him.

32. S. 21 of the Penal Code defines common intention:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.(emphasis added)

33. The prosecution sought to establish that the two accused person had a common intention cause harm to the deceased and in doing so caused his death. They did so through the evidence of PW2. Upon hearing the explanations by the accused persons and DW1 the testimony of PW2 became doubtful. First the shouting the deceased was doing could be heard all the way to his mother's house as it was not that far. Accused 1 said she called PW1 to ask her whether she could hear the noise her son was making in her accused 1's compound. PW1 confirmed receiving that call. Hence it is not only PW2 who could hear the happenings in the accused's home, even the mother to the deceased could hear. The fight between the deceased and the Accused 1 was started by the deceased. He was the aggressor. He went to that home demanding his money. He grabbed the accused 1 and they fell or he was pushed. That was not intended to hurt him. Accused 1 was

getting away from him. This was not done in common purpose with the Accused 2. Deceased still managed to get the Accused 1 on the ground and got on top of him. It is at this point that accused 2 came in. her testimony is that she separated the two. PW2's testimony that she watched quietly, silently as the Accused brutally beat up the deceased as he lay on the ground is unbelievable. That she could watch this horrifying scene, she quietly go back into her house to sleep, that she never called anyone to help, she never uttered a word, she never told the deceased's mother or anyone at all that she had seen the 2 accused beat the deceased until she recorded her statement.? Further analysis of the evidence of PW2 in light of the defence creates more doubt as to its truthfulness. If indeed she could see the Accused 2 beating the deceased until he stopped talking, and he was on the ground she would not be saying

*“Since the deceased stopped talking I **thought** he had gone home”*

34. She was watching. So why would she think he had left yet she could see everything from where she was standing. Surely she ought to have seen him leaving, or just lying there? That sounds like the logical conclusion of a person *hearing* an altercation, and where one person keeps quiet she could assume the person had left. It cannot be a conclusion drawn by a person who is 'watching' another being beaten to silence. The only inference here is that she never saw any beating otherwise she would have been certain as to why the deceased had gone silent. She would have seen him going home – his walking would also have attracted the barking of the dogs because they did not belong to the home but to neighbours.

35. Further her testimony that she went back to her house after deceased went silent is a contradiction to her own testimony. That when she heard the dogs began to bark. She

“Saw three people carrying something. I do not know what they were carrying there was light from a bulb”

36. From where did she see these three people? From inside her house? From a window? From a hole in the wall? From outside her house? She was so close to be able to see everything but she could not tell whether the people she alleges she saw were carrying another person or not. Where were the three people she alleges she saw in relation to the light bulb? That once again, she did not utter any word to the three or call out to anyone in the homestead yet there were other members of the family.

37. No stick was looked for or recovered by the investigation officer, yet the accused persons were arrested from their home the same day the deceased died.

38. Is there other evidence that the accused persons beat up the deceased? The prosecution relied on PW1's testimony that her son was brought home carried in a sack. Her behavior from her own testimony is suspect. She confirmed that Accused 2 rang her and told her that the 1st accused and the deceased were fighting. She testified she did not open the door because

“I did not know what they had done to him.... they were carrying him in a sack. I saw through an opening in the wall”

She never mentioned the sack story to the police. This was her son. The fact that she did not know what the accused persons may have done to him was more reason for her to come out of the house and see for herself. No sack was looked by the investigating officer. None was recovered to support her claim. The accused 1 and her husband said they escorted the deceased home. There is no evidence of any grudge between the deceased and the accused persons. No reason why the accused 1 would beat up the deceased who was not violent towards her.

39. The pathologist found that the deceased died from head injuries resulting from blunt trauma. Under cross-examination he said

Question: “If a person who is drunk is walking in the evening and falls, hits on a stone, can he have such injuries?”

Answer: “Yes, that is blunt trauma”

On re-examination he said

“Falling down could give you these injuries- it would depend on the height from which you fall. These injuries were too extreme to result from a fall from a normal height”

40. The pathologist left the court with the possibility that a person who was drunk could fall and sustain such injuries, and that it would depend on the height from which he fell. The possibility that a fall could cause the head injury the deceased sustained gives credence to the evidence given by the defence witnesses. That the deceased fell on some stones. If it was in the process of a struggle and being drunk, the manner in which he fell, the kind of stone he fell onto would make a difference. That possibility has not been removed by the prosecution. In this case the accused persons explained what happened- the deceased was the aggressor he went to the home and when Accused 1 came out he grabbed him and they fell onto the stones. DW1 said deceased was so drunk he kept falling, getting up and falling down. The investigating officer said she was told by one of the witnesses that deceased was

“Mlevi sana kupindukia”

Hence the possibility still remains out there that he could have fallen down and gotten hurt.

41. Were any investigations conducted? This case was clearly not investigated Apart from recording statements and arresting the accused persons no investigations were carried out. There was an alleged murder weapon. The accused persons were arrested from their home going about their normal chores – there was no evidence that anyone had tried to conceal anything. They narrated to the police what had

happened. The police never made any effort to recover the piece of timber that PW2 allegedly saw being used to beat the deceased. His mother said he was brought with a sack and placed outside her house –again that sack was never recovered if it existed.

42. The curious thing is that the deceased's mother let him sleep outside the whole night. She tried to tell the court she feared the worst but why did she not come out of her house to check on her son? Would the Accused 2 injure him, and then bring him right to her door, and call her out to come and see? It is highly doubtful. The mother gives no explanation as to why she never went out to check on her son- why she never called PW2, PW3, PW4, PW5 to come out at that time, yet they could all hear the noise.

43. It is more curious that when they found him the following morning they just put him in bed, put his tea on the floor. Did anyone speak to him? Nobody mentions talking to the deceased even to ask him what happened. No one says they spoke to him or he spoke to them

It is not clear whether he spoke to anyone the whole time. With the knowledge that he had been beaten by Accused 2 it is strange that PW2 told no one- nobody bothered to take him to hospital until too late. All the actions around this case by all the relatives are clear: that there was no evidence of any malice aforethought on the part of the accused persons to warrant any conclusions from the members of the family that any one intended to kill the deceased, or anyone had done anything intended to cause the death of the deceased.

44. The explanations by the accused persons demonstrate circumstances of a 'kawaida' happenstance in many homes across this country where the ugliness of alcohol/ substance abuse lives; where parents who become the victims of their children's habits and related consequences lose hope in their children, lose hope in themselves and wear a helmet over the love they have for their babies who lose complete control of themselves, like the deceased herein. His mother's reactions, and those of his aunts and uncles, appear to those of a parents dulled by the relentless actions of a child to destroy himself with alcohol. Leaving him out all night, not bothering with him even after putting him to bed, not even asking him what happened, leaving his tea on the floor, a literal folding of arms until things looked really bad. The only persons who did something that amounted to some care, were accused 1 and her husband, escorting him home.

45. Having considered the evidence, the law, the defence by the accused persons it is clear to me that the prosecution has not established beyond a reasonable doubt that the accused persons jointly

a. Had the common intention to cause death;

b. Had the common intention to cause grievous bodily harm; and

c. Knew that there was a serious risk that death or grievous bodily harm that would ensue from their acts, and

d. That they committed commits those acts deliberately and without lawful excuse with the intention to expose the deceased to risk as the result of those acts. See **Nzuki vs Republic (1993) KLR 171** cited in **Joseph Kimani Njau vs Republic (2014) eKLR**

46. Hence, I find in favour of the accused persons. Section 324(3) of the CPC provides:

If the court decides in favour of the accused, he shall be discharged from that information.

47. Each of the accused persons is discharged from the information accordingly.

Dated, delivered and signed in open court at Nyeri this 8th February 2019

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Court Prosecutor: Ms.Jebet

Gathiga Mwangi for Accused 1

Waweru Macharia holding brief for S.K.Njuguna for Accused 2.

Mumbua T Matheka

Judge

8/2/19