



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 51 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANTHONY MUSAU NZIOKI.....ACCUSED**

**JUDGMENT**

Anthony Musau Nzioki, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are as follows:

**ANTHONY MUSAU NZIOKI: On the night of 6<sup>th</sup> and 7<sup>th</sup> February 2017 at Spring Valley Kayole in Njiru Sub-county within Nairobi County jointly with others not before the court murdered John Muli Mutua.**

The accused pleaded not guilty to this charge. The case was subjected to full trial in which eleven (11) witnesses testified for the prosecution. The accused testified as the only witness for the defence.

The evidence on record, as given by the prosecution witnesses, is that the accused Anthony Musau Nzioki, the deceased John Muli Mutua and one 'Odoshe', also referred to as Paul or Omondi, were friends. On the evening of 6<sup>th</sup> February 2017 at about 11.00pm the three went to home of Peter Mwangi Kaniri (PW1) also known as 'Kamnjoro'. Peter owned 8 shacks made of iron sheets at Spring Valley in Kayole. He had rented out these shacks to some tenants, among them a man witnesses referred to as 'Mgongo'. It is not clear from the evidence whether 'Mgongo' testified since no witness identified himself as such. Peter shared his house with Martin Mwangi Kariuki (PW8). The evidence of Peter Mwangi and Martin Mwangi is that at about 11.00pm on 6<sup>th</sup> February 2017 both were sleeping when the accused, the deceased and the said Odoshe arrived. They were known to Peter and Martin. The three called Peter and Mgongo and asked them to join them for some beer. Peter refused with the excuse that he did not like going out for drinks at night. Mgongo agreed to join them. He however returned shortly after walking away with them. He told Peter and Martin that he had changed his mind and decided to return home and sleep.

At around 3.00am the following morning, 7<sup>th</sup> February 2017, Peter Mwangi and Martin Mwangi were woken up by the deceased who was calling Peter asking for help. He told them that he needed water to wash his head because he had been injured. Peter Mwangi and Martin Mwangi went outside and noted that the deceased was bleeding on the head. They asked the deceased what had happened and he told them that 'those people have assaulted me' without naming the people. Peter Mwangi put water in a basin and started assisting the deceased to wash off blood from his head. Shortly thereafter the two witnesses heard people coming into the compound in a rush. The people pushed the door open and entered. They were the accused and Odoshe and were looking for the deceased. The deceased ran off and hid inside a bathroom in the compound. The accused and Odoshe said they were looking for the deceased because he had stolen their money and a phone. They looked for him inside the house belonging to Peter Mwangi but he was not inside. They asked for spades from the man referred to as Mgongo. It is not clear whether they were given one or two spades because evidence on that issue is not clear.

Further evidence shows that the accused and Odoshe found the deceased in the bathroom and they flushed him out. They set on assaulting him with the spade or spades. Pleas from Peter Mwangi and other tenants to stop assaulting the deceased were not heeded. Realizing that the deceased may be killed, Peter Mwangi chased the accused and Odoshe and deceased from his compound. The assault on the deceased continued outside the compound. Evidence shows that the accused and the deceased left the injured deceased but returned shortly after some time. It seemed that the deceased got a chance to escape in their absence. He stood and walked away slowly. After a few days, news that the deceased had died reached Peter Mwangi and Martin Mwangi.

Further evidence shows that in the early hours of the morning of 7<sup>th</sup> February 2017, Juliana Mwikali Mutua (PW2) who is mother to the deceased, Timothy Mwakali Mutua (PW4) brother to the deceased and Peter Mutua Mwakali (PW5) father of the deceased received the deceased at home in Kayole Junction. They noted that the deceased had a swollen head and a deep cut on the face. He was not able to talk well. He did not say who had assaulted him. He was taken to Provide Hospital but was not admitted. He was taken to Kayole Hospital where it was not possible to give him the treatment he required including a scan. The family took him to Nairobi West Hospital the following day

on 8<sup>th</sup> February 2017 but the charges were beyond their reach. They transferred him to Kenyatta National Hospital. He died at Kenyatta National Hospital on 9<sup>th</sup> February 2017.

The matter was reported at Kayole Police Station. Police started looking for the accused and Odoshe. The accused was traced to Mulolongo in a bar on 4<sup>th</sup> November 2017 and arrested. He was taken to Kinyui Police Post and Tala Police Station. He was later transferred to Kayole Police Station from where he was charged with this offence. Odoshe was not arrested and is still at large.

In his defence, the accused who testified under oath told the court that he arrived at Kayole Junction at 12.00am on 6<sup>th</sup> February 2017 from Mahi Mahi where he and the driver of the lorry he was working in had gone to harvest sand. He said that after parking the lorry he went to a bar known as *Mama na Baba* for drinks. It was getting late. He overheard other revelers talking about going home and mentioning a shop he knew. He realized that he could walk home in their company because of security reasons. He said that he shared beers with them and after they owner of the bar told them to go out so that he could close the bar, they walked out together. He said that while walking in a dark corridor he felt one of the men put his hand inside accused's shirt pocket. The accused held onto the hand of the suspect and pulled the man to the light. He sought to know from the man what he was doing but the man hit him knocking him down. He said that he screamed and the other people chased after the man who had taken his Kshs 800. He also joined in the chase until the man ran into the plot of one Kamnjoro. The accused said that the man hid inside the plot and those pursuing him also entered the plot. The accused said he knew Kamnjoro and another man called Mgongo who was his workmate. He said that the suspect had hidden in a bathroom; that the accused woke Mgongo up and informed him; that people decided to flush the suspect from the bathroom; that the suspect pleaded with those people not to demolish the bathroom; that he came out and found people waiting; that he hid behind Kamnjoro; that the suspect was searched but nothing was recovered from him; that Mgongo came out carrying a space and hit the suspect; that the landlord told the people to leave and they all left and went outside; that everyone assaulted the suspect until he became unconscious; that people wanted to burn him and forced the accused to join them to go and buy petrol but on returning to the scene they found that the suspect had left.

The accused told the court that after the suspect died, he was threatened by some people he said were members of Gaza Group that they would kill him because he had caused one of theirs to be killed. He said he reported the threats to the police at Obama Police Police and that the police advised him to go away for some time. He said he decided to go home to Katheka Village. He denied that he went to call Kamnjoro and Mgongo to join him for a drink. He said he went to Kamnjoro to ask for help and that he did not have a weapon or a spade. He exhibited a letter dated 12<sup>th</sup> March 2018 from the Chief of Matheini Sub-Location in Matungulu Sub-County to prove that he had been working with National Youth Service. The letter shows that the accused had been working with Kazi Kwa Vijana at Matheini Location since 7<sup>th</sup> July 2017 to 23<sup>rd</sup> October 2017.

At the conclusion of the defence case both the defence counsel and the prosecution counsel did not wish to make final submissions. This leaves the matter to the court to read, evaluate the evidence and make a determination.

The law places the burden of proving a criminal case on the prosecution. Under section 203 of the Penal Code that creates the offence of murder, the definition of murder is given as follows:

***Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.***

The prosecution has an obligation under the law to prove the following ingredients:

- (i) Death of a person has occurred.
- (ii) That that death was caused by the person charged in court.
- (iii) That the death resulted from an unlawful act or omission.
- (iv) That the person causing the death had malice aforethought.

Malice aforethought is defined under Section 206 of the Penal Code. It is established by evidence proving any one or more of the following circumstances:

- (a) *An intention to cause the death of or to do grievous harm to any person, whether that person is the person killed or not;*
- (b) *Knowledge that the act or omission causing death will probably cause the death or grievous harm 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 or any person who has committed or attempted to commit a felony.*

Where malice aforethought is lacking, then a killing becomes manslaughter and not murder (see **Nzuki v. Republic [1993] eKLR**).

Turning to the first ingredient whether death of a person has occurred coupled with whether that death was caused by an unlawful act or omission, it is my finding that it is a fact, going by the evidence on record that the death of John Muli Mutua indeed occurred. When John Muli arrived home in the early hours of 7<sup>th</sup> February 2017 he had a swollen head and a deep cut on his forehead. These injuries are in accord

with the injuries inflicted on him as testified by Peter Mwangi and Martin Mwangi and even the defence of the accused. The testimony of the two prosecution witnesses show that the deceased was assaulted and the brunt of that assault was on the head. His family did all that was within their power to have him treated but he died in Kenyatta National Hospital on 9<sup>th</sup> February 2017 just two days after the assault. Dr. Bernard Owino Midia (PW7) documented the following injuries:

- (i) Abrasions and lacerations on the forehead that had been stitched.
- (ii) Defence injuries on the left forearm.
- (iii) Blood clots on the right side, right hemisphere of the head.
- (iv) Features of rising pressure within the head.
- (v) Multiple areas of bleeds in the skin of the head.

The opinion of the doctor is that the deceased died as a result of head injury due to blunt force trauma. The doctor said that the cause of death was consistent with an assault. An assault is without a doubt an unlawful act. This leads me to find and hold that the prosecution has proved beyond reasonable doubt that death of a person, John Muli Mutua, occurred and that it was caused by means an unlawful act, an assault.

I have read and evaluated the evidence in a bid to determine the twin issues as to who caused the death of the deceased and whether he possessed malice aforethought. I have considered the evidence of Peter Mwangi and Martin Mwangi. I have also considered the evidence of John Mwema Kimangu (PW9). These three witnessed knew the accused and the deceased before the date of the assault. These witnesses testified to seeing the accused, the deceased and one Odoshe who they referred to as Paul or Omondi. The three witnesses were present in the compound of Peter Mwangi when the assault occurred and they witnessed the assault. The three witnesses have confirmed that a spade or spades was used to assault the deceased. On his part the deceased does not deny having been at the compound of Peter Mwangi. Although he did not name the victim of the person who was assaulted after he robbed him of Kshs 800, the accused admitted to have been present when the allegedly suspect was assaulted by the members of the public. He is recorded as telling the court that the suspect was hit by Mgongo using a spade and that after the landlord told people to leave his compound, they all went outside the compound. He told the court that "everyone assaulted him" and that "he was beaten until he lost consciousness". He also confirmed prosecution evidence that after the assault the attackers left but returned to the scene but found the deceased had left. The accused explained in his defence that the attackers forced him to join them to go to buy petrol with the intention of returning to burn the suspect. He testified that after buying the petrol they returned to the scene to find that the suspect had left. This suspect who is alleged to have robbed the accused of his money must be the deceased. All the evidence points to him being the person assaulted and injured at the compound of Peter Mwangi.

My careful reading and evaluation of the evidence on record from both the prosecution and the defence leads me to the conclusion that the accused took part in assaulting the deceased. I am doubtful of his defence he did not know the alleged suspect and that he was forced by the members of the public to join them to go and buy petrol. According to the evidence of Peter Mwangi and Martin Mwangi there were no other people who came from outside the plot. It was only the accused and one Odoshe who came to the compound, at first in company of the deceased and later the two came pursuing the deceased. The rest of the people present were tenants in that plot. I have no doubt in my mind that the accused participated in assaulting the deceased in the company of another not before this court.

I have considered the element of malice aforethought on the part of the accused. It is not clear from the evidence who, between the accused and Odoshe, struck the blow or blows on the deceased. However both of them were present and acted in the common intention of assaulting the deceased. I find the element of malice aforethought not proved beyond reasonable doubt. Evidence shows that the accused, the deceased and Odoshe were friends and that on that night the three went out to drink and even invited Peter Mwangi and Mgongo but these declined. The reasons for the assault of the deceased are not clear although there is mention that there were allegations that he had stolen a phone and money. None of these items were found on the deceased when he was searched. Whatever the case, it is obvious that relations between the three friends soured that night and the two turned on the deceased and assaulted him. Malice aforethought on the part of the accused has not been proved beyond reasonable doubt.

I find that I am not able to believe the defence of the accused. I doubt that he left Nairobi for fear of an attack by the alleged Gaza group. His defence does not challenge prosecution case and does not create doubts in my mind. I therefore find the evidence by the prosecution credible and sufficient to prove that the accused was involved in the assault of the deceased.

For the reasons given above, it is my finding that the prosecution, in failing to prove beyond reasonable doubt the element of malice aforethought has failed to prove the crime of murder to the required standard. As a consequence therefore this court finds the accused not guilty of murder and hereby acquits him of the same. This court however finds the accused guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code which offence this court finds has been proved beyond reasonable doubt. I hereby find the accused guilty of manslaughter and convict him. Orders shall issue accordingly.

**Delivered, dated and signed this 28<sup>th</sup> day of March 2019.**

**S. N. Mutuku**

**Judge**