



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 62 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

LAWRENCE MWIRIGI HENRY.....ACCUSED PERSON

JUDGMENT

1. The accused person herein has been charged with the offence of murder contrary to section 2013 as read with section 2014 of the Penal Code.
2. The particulars of the offence are that on the 26th day of August 2014 at Ntharene Market Imenti South Sub-County within Meru County jointly with others not before court murdered **Bernard Mutegi Thambu**.
3. The prosecution called seven (7) witnesses in support of its case.
4. **Pw1 Joyce Gakii** testified that she is a bar owner and wife to the deceased. That on the material date there was a confrontation at her bar between her and the accused herein. That the deceased stepped in her defence. Later on at the close of business she assisted the patrons to the bar to wash the glasses while the deceased removed pieces of broken glasses, thrown by the accused from the door. That later on one, Kimwele came and told her that she should follow Mutegi since he would be killed.
5. That she went to where the accused owned a pool table and found the deceased lying on the ground, bleeding and the accused standing near him carrying a piece of wood. That the accused also hit her with the piece of wood.
6. That the deceased was bleeding from the head and lying on a pool of blood. That he informed Kanario to go to report to the police station while he organised for transport for Mutegi. That they later reported the matter at Nkubu Police station and took the deceased to Consolata Hospital. They were later called by the doctor and informed that the deceased passed on.
7. They again reported the matter at Nkubu police station and at Ndaremi Police Post. The police accompanied Pw1 to the scene where Pw1 identified the accused. She informed the court that she could easily identify the accused despite the fact that it was dark since she had known him since 2009.
8. **Pw2 Rhoda Kathambi** and a niece to PW1 informed the court that on the material date she was on his way home when she heard noises. She proceeded to where the noises originated from. She met with Catherine who informed her that the accused was beating the deceased. That she accompanied Catherine to the Ntharene police post but while reporting the accused came holding a stick. That the accused person also sought to make a report. That the officer at the station informed them that they should summon Mutegi to come and make the report. They told the officers that Mutegi was in critical condition but they declined to book their report. That she later escorted Pw1 and his father to Consolata hospital where the deceased later died while undergoing treatment. In cross examination PW2 said she didn't see the accused beating the deceased. She also said that the accused was bleeding from the mouth when he found them at the Police post.
9. **Pw3 Fredrick Kinyua Thambu** testified that he is one of the person who identified the deceased upon his demise. That the deceased has injuries in the head and shoulders.
10. **PW4 Rose Mukiri** testified that she is a wife of the deceased. That on the material date she was called and informed of the demise of the deceased. She later on identified the body of the deceased. That the deceased was injured on the head and all his teeth were extracted.
11. **Pw5 P.c. Daniel Nzioka** was the investigating officer. He testified that Pw1 initially reported that the deceased had been assaulted but later on reported that the deceased had died from the fatal injuries. That he visited the scene at a pool table where there was a lot of blood.

That when they visited Ntharene Police post, they found the accused had also reported that the deceased had assaulted him but he was arrested and placed in the police cells. He recovered sticks that officers from the Police post took from the scene of the offence. He produced the sticks as **Pexh1a** and **1b**. That in the course of the investigation he established that the accused had been engaged in a confrontation with Pw1 and the deceased at Pw1's pub. That the deceased was later escorted by two to three people including the accused person who beat him.

12. The Investigating Officer PW5 established that the accused and PW1 differed and exchanged insults and that is when the deceased intervened and forced the accused out of the club and closed the door and that the accused threw two empty beer bottles at the club's door and broke them and that while the deceased was picking the broken bottles the accused and three others took him away.

13. In cross-examination he stated that he visited PW1's bar but the broken bottles were already collected and he didn't find them at the scene. However, the sticks were collected by officers from Ntharene police station. He however told the court that the sticks were from the scene and were booked as exhibits at Ntharene Police post. PW5 found that the accused had reported to the police post vide OB No. 2/26/8/14 that he had been assaulted by the deceased. PW1 also reported by OB No. 6/26/8/14 made at 05:50 hrs to the police that she was assaulted by the accused and she was later issued with a P3 form.

14. PW5 concluded that the accused together with two to three people assaulted the deceased to show his prowess against the deceased who was a KDF soldier.

15. **PW6 Catherine Kanario** testified that she was a bar attendant at Pw1's pub. She confirmed the confrontation between the accused and PW1. She stated that the deceased told the accused to leave PW1 alone and that the deceased held the accused by hand and took him out of the bar that after awhile the accused came back to the bar took 2 empty tusker bottles and threw in the club. That the 2 bottles got broken but no one was injured. That when the club's door was being closed Mutege the deceased held Mwirigi and they went out. PW6 thought that they were going to discuss but the deceased didn't come back. That when they got out after 30 minutes they saw the accused standing along the road while armed with a rungu and he told PW1 "**Hata wewe nitakupiga ulale hapo kama bwana yako amelala.**" **PW6** said that the accused was standing where the deceased had fallen and was bleeding. That the face of the deceased was covered with blood. People were running away from the scene. She also corroborated the testimony of **PW1, PW2, PW3, PW4 & PW5** as to the reports they made at Nkubu Police station and that the accused had also reported that he had been assaulted.

16. In cross-examination she testified that they took about 30 mins before leaving the bar. That the distance between the bar and where the deceased was is about 150-200 metres.

17. **PW7 Sila Kisingu Sila** a medical officer attached to the Department of Defence as a consultant pathologist. That the deceased had a multiple stitched injuries in their body. He concluded that the cause of death was severe brain injury with extensive skull fractures with fragmentation. Extensive subdural haemotoma following blunt force trauma to the head.

18. In cross-examination he stated that the injuries were offensive as opposed to defensive marks. Defensive marks are usually very clear.

19. **Dw1 Lawrence Mwirigi** testified that he was at the bar of Pw1 on the material day where he took four beers bought for by his friends. That Pw1 had asked her why he did not frequent his bar to which he replied that it was because Pw1 had previously beat his father and that did not auger well with him. It was also his testimony that Pw1 also alleged by him being the elected market chairman he had wished his bar to be closed to which he responded that that was not the case. He also told the court that he had informed Pw1 that he was at the bar to look for Mutiso but Mutiso had already left.

20. That Pw1 told the deceased to take him out of the club. That she also held him by the collar. He resisted and as a result some beer bottles fell and shattered. That the deceased came and started pushing him outside while beating him. That he ran outside while raising alarm.

21. That the deceased pushed him and hit him with a stick the result of which his tooth broke. That he beat him on the back and on the mouth. Members of the public restrained the deceased from beating him.

22. It was his testimony that he later on rushed to Ntharene police station and reported the assault. He was also treated at Nkubu Hospital. He confirmed that he met Pw2 and Pw6 at the police station. He denied that he assaulted the deceased or being present when the deceased was being beaten. He stated that the deceased was restrained by the members of the public when he was beating him.

23. He also told the court that Pw5 Pc Nzioka had requested for money for the determination of this case.

24. **Dw2 Dominic Mutembei** testified that he was present at the bar when the confrontation between the accused and Pw1 ensued. That the accused ran out of the bar and he was followed by the deceased who brandished a rungu. That Pw1 also got a panga from the counter and followed the deceased who was pursuing the accused person. He said that because of the commotion he paid his bill and left to go but on arriving at the bus stage he found the deceased lying down then there was a crowd surrounding him. Among the crowd was Pw1 at the scene. That there were about 30 people at the stage but he could not see and/or identify the accused person from the people at the stage.

25. He however confirmed that there was a street light at the bus station. That the bar to the stage is 100metres apart. His evidence about the distance from the scene to PW1's club corroborates the evidence of PW6.

26. Having considered the evidence on record for the prosecution and the defence, this court is to determine whether the ingredients of the offence of murder have been proved by the prosecution beyond reasonable doubt.

27. The four ingredients that need to be proved by the prosecution beyond reasonable doubt were settled in the case of Republic versus Mohammed Dadi Kokane & 7 others [2014] eKLR as follows :-

a) The fact of the death of the deceased

b) The cause of such death

c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

d) Proof that the said unlawful act or omission was committed with malice aforethought.

28. Malice aforethought shall be deemed to be 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 actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of 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 of any person who has committed or attempted to commit a felony.

29. The first issue to be considered is the fact of death of the deceased and the cause of death. The fact of death has been attested to by all witnesses for the prosecution as well as the accused and his witness and it is therefore not indispute that Benard Mutegei is no longer alive. PW7, Dr Sila Kisingu Sila produced the Post Mortem Report indicating that the deceased's cause of death was severe brain damage with extensive skull fractures with fragmentation and extensive sub-dural haematoma following multiple blunt force trauma to the head.

30. The 3rd issue is whether the cause of death was a result of an unlawful act and/or omission on the part of the accused person. PW1 and PW6 said that one Kimwele came and told them to follow the deceased as he might be injured by the accused person. From the evidence on record the deceased intervened when the accused and PW1 had a confrontation and were exchanging insults. Each accused the other of having attacked and holding them by the collar. Evidence of PW1, PW6, the accused and the DW2 confirms that the deceased removed the accused person out of the club and when he was found lying down the scene was over 100metres away. PW6 estimated the distance at between 150 and 200 metres. Kimwele who alerted PW1 and PW6 that the deceased might be injured did not come to court to say whether he saw the accused beating the deceased or whether as the accused person claims the deceased was beaten by a mob who were trying to restrain him from assaulting the accused. It is not reconcilable that having forcefully removed the accused out of the club because of a commotion the deceased could have accepted to accompany the accused in a friendly way out of the club. It is therefore probable that the deceased pursued the accused person to the scene where he sustained injuries that led to his death. The accused persons explanation that the deceased pursued him and injured him was confirmed by PW2, PW6, PW5 that he was bleeding from the mouth and that he had one tooth broken by the time he went to report at the police post. The possibilities that the deceased was the aggressor are higher considering that there is no explanation how he found himself about 200m away from PW1's club. The multiple injuries sustained by the deceased could not have been inflicted the accused person alone and although he must have fought with the deceased who had pursued him, his explanation that members of the public intervened to restrain the deceased from beating him further is plausible. DW2 said that the deceased took a club from the counter and pursued the accused while armed with the club and that PW1 also took a panga and followed them. PW5 the Investigating Officer said that 4 pieces of broken sticks were recovered at the scene and he produced 2 pieces. Whereas PW1 and PW6 claimed that they found the accused holding a stick and standing at the scene where the deceased was lying and that the accused also went to the police post carrying the stick. It is not clear whether it is the stick the accused was carrying that was used to inflict the injuries on the deceased or the on the accused person.

31. Considering that the person who saw what happened between the accused and the deceased namely one Kimwele was not called as a witness this court cannot clearly say that the accused committed the offence of murder as it appears that he was actually the victim of the aggression by the deceased but unfortunately the deceased succumbed to the injuries he suffered in the cause of the confrontation that he started.

32. This court therefore finds that there is no clear evidence upon which to base a finding that the accused had malice aforethought and that he had intended to kill the deceased. He is acquitted under section 322 of Criminal Procedure Code.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2019

IN THE PRESENCE OF:

CA: Mr Kinoti

REPUBLIC:- Ms Mbithe for state

ACCUSED:- Present in person

Ms Mwangi holding brief for Mark Mureithi Advocate for accused.

HON A. ONG'INJO

JUDGE

Mrs Mbithe

We can have a copy of the judgement.

Order

Copy of judgment to be supplied to state.

HON A. ONG'INJO

JUDGE