



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GEDION WAMBUA KOKO ALIAS KAKA.....1ST ACCUSED

RAPHAEL MBITHI KIMELI ALIAS MUSEMBI.....2ND ACCUSED

BENSON NDONYE MUTUA ALIAS BEN.....3RD ACCUSED

J U D G M E N T

A. Introduction

1. The accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 30th August 2016, at Ndune market in Makima location of Mbeere South sub-county within Embu County murdered Nzuki Kamau to which offence they pleaded not-guilty.
2. The prosecution called eleven (11) witnesses in support of their case which is summarized herein.

B. Prosecution Case

3. PW1 testified that on 30/08/2016, the 1st accused found her in the grazing fields tying her goats. It was PW1's testimony that the 1st accused was looking for his son (PW2) and it was clear that the 1st accused was in a rage. PW1 knew the 1st and 2nd accused as father and son for they were her neighbours. PW2 testified that the following day he learnt of the deceased's death as a result of the theft of the same radio the 1st accused had stated had been stolen by his son the 2nd accused.
4. PW3, a businessman at Ndune market testified that on the material date he witnessed someone being beaten by a group of people about 100-150 metres from his bar. He further testified that he did not go near the scene and as such did not identify who was the recipient of the beating and who was handing out the beating. PW4, a patron of PW3's bar testified that on the material date PW3 informed him and other patrons at the bar that someone was being beaten. PW4 and a friend, Peter Mutua, went to the scene and found a man being beaten by a mob which included a man called Komu and the 3rd accused.
5. PW5 another bar owner in Ndune market testified that on the material day at around 7.00 pm she witnessed the deceased being beaten by the 1st 2nd and 3rd accused persons for allegedly stealing a radio from the 1st accused one Gideon Wambua. PW5 testified that the 1st accused was armed with a stick of about 1 metre long.
6. PW6, a father to the 2nd and 3rd accused testified that he interacted with the deceased at around 8.00am in the morning when the deceased came to borrow a pen from him. PW6 further testified that later on in the day, he intervened when the 1st accused wanted to beat the deceased and took the deceased with him to his house where the deceased stayed for a while before leaving to go buy miraa. PW6 did not see the deceased again.
7. PW8 corroborated PW4's testimony. He further testified that the deceased had been beaten and was lying on his stomach, bleeding from the nose and mouth. He further testified that the 3rd accused was armed with a whip and the 1st accused with a stick.
8. PW9 testified that he examined the accused persons with instructions from the DCI Mbeere South and found them mentally fit to stand trial. PW10 carried out the post-mortem on the deceased and concluded that the deceased died as a result of a raised intracranial pressure due to subdural haematoma sustained due to blunt force trauma to the head consistent with fatal assault.

9. PW11, the investigation officer testified that on the 31/08/2016, he accompanied the OCS Kiritiri to Ndune market where they found the deceased's body in open ground. He later formed part of the investigation team which he led and on the 17/09/2016 arrested four (4) suspects of whom 3 were charged in this case.

C. Accuseds' Case

10. The 1st accused testified that on the 30/08/2016 he was at home when he saw one Nzuki coming from his neighbour's home carrying a woofer in a carton and upon inquiry of what he was carrying; he further testified that he later went to the home of the 2nd accused's mother and reported what he had seen where he was informed that the woofer had been stolen from the 3rd accused brother's home.

11. He also testified that he accompanied the 2nd accused and the 3rd accused to go get the deceased and bring him to the market. He further testified that the 2nd accused hit the deceased with a whip on the chest and when the deceased took off he was followed by the 3rd accused who caught up with him and together beat him up for stealing. He testified that he left the scene. He denied dragging the deceased to the crime scene.

12. The 2nd accused opted to remain silent which is an option provided for by the law. The 3rd accused testified that he had been informed that the deceased had stolen a woofer from his brother's home. He further testified that around 6.30pm he proceeded to the market where the deceased and Musembi were. He interrogated them on the theft and neither of them admitted to the theft. He testified that the deceased started fighting him and this led to him to abandoning the matter. The 3rd accused denies assaulting the deceased or witnessing the death.

D. Analysis of the Law

13. Having considered the prosecution's evidence as against the defence proffered by the accused person, in my view, the main issue for consideration is whether the prosecution have discharged the burden of proving the guilt of the accused person beyond reasonable doubt to sustain the charge of murder.

14. To prove a charge of murder, the prosecution has a duty to establish the following elements:

- i) the death and cause of death of the deceased;*
- ii) That the accused caused the death through an unlawful act or omission; and*
- iii) The accused possessed the intention to cause harm or kill or malice aforethought.*

15. According to the Information filed by the Prosecution, the Accused person Brian Kariuki faces a charge of Murder contrary to **Section 203 of the Penal Code** which section provides:

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

16. Section 204 of the Penal Code is the Penal section upon conviction for the offence of murder.

17. The malice aforethought is a very important ingredient for the offence of murder. The prosecution has to establish malice aforethought. **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows:

“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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”***

18. Therefore, on whether the prosecution proved death and cause of death of the deceased herein, the postmortem on the body of the deceased was carried out by PW10 and concluded that the deceased died as a result of a raised intracranial pressure due to subdural haematoma sustained due to blunt force trauma to the head consistent with fatal assault.

19. On whether the accused persons caused the death of the deceased herein, PW5 testified that she witnessed the deceased being beaten by the 1st 2nd and 3rd accused persons for allegedly stealing a radio from one Gideon Wambua. PW5 testified that the 1st accused was armed with a stick of about 1 metre long. PW8 testified that at the time he went to the scene, the deceased had been beaten and was lying on his stomach, bleeding from the nose and mouth. He further testified that the 3rd accused was armed with a whip and the 1st accused with a stick.

20. In their defence, the 1st accused implicated both the 2nd and 3rd accused as having been the ones who beat up the deceased. Despite the testimony of PW8 and PW5 placing him at the crime scene as he was armed with a long stick. The 1st accused in a sworn testimony testified that he was not at the scene. The 3rd accused also denied beating up the deceased. In an unsworn testimony he stated that he was not at the scene of the crime as he had left when the deceased wanted to fight him.
21. The testimony of PW5 and PW8 was corroborative and place the accused persons at the crime scene. The accused persons do not rebut the testimonies of these two prosecution witnesses but merely denied the offence. Further the weapons said to have been in the hands of the accused were sticks and whips which are consistent with wounds suffered by the deceased as evidenced in the post-mortem report. The deceased had several blunt injuries caused by blunt objects. The cause of death in the final opinion formed by PW10 was consistent with the type of injuries caused by blunt force trauma.
22. The 1st accused admitted in defence that he accompanied the 2nd and 3rd accused to go and get the deceased and they escorted him to the market. Both 1st and 2nd accused in their defences put themselves at the scene of crime and said they left later for different reasons. I did not believe the two accused persons because they were clearly identified at the scene as they assaulted the deceased using whips and sticks.
23. The 2nd accused who was implicated by his father the 1st accused did not defend himself. He was likewise identified by PW5 and PW8 as he assaulted the deceased. I believed the 1st accused in his honesty that he was with the 2nd and 3rd accused as they picked the deceased from wherever he was and escorted him to Ndune market where he was beaten up by the three.
24. The three accused persons tried to hide behind a mob that they alleged assaulted the deceased at the market. But from the evidence of the witness, the accused persons were the accusers, the prosecutor and the judge of the deceased. This started in the morning at the homes of the 1st and 3rd accused's family homes and was extended to the market when the deceased was dragged there.
25. The prosecution have established through the evidence and in particular that of PW5 and PW8 that the three accused persons are the ones who kicked off the beating of the deceased with each armed and in active participation. This attracted a crowd at the market who came to watch the beating scenario. If any of the members of public participated in the final stages, it was a minimal role if at all, but the authors of the death of the deceased were the three accused persons. Bearing in mind the surrounding circumstances, the accused persons cannot hide behind a mob.
26. I found the evidence of PW5 and PW8 credible and reliable that it is the three accused persons who assaulted the deceased and inflicted upon him injuries that caused his death.
27. The prosecution have established that the three accused persons who acted in concert with common intention to punish the deceased are responsible for the unlawful act known as *actus reus*.
28. On whether the accused had malice aforethought, the state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. The Eastern Court of Appeal in the case of **Republic v Tumbere S/O Ochen [1945] 12 EACA63** in determining whether malice aforethought had been established, considered the following elements:
- (1) *The nature of the weapon used.*
 - (2) *The manner in which it was used.*
 - (3) *The part of the body targeted.*
 - (4) *The nature of the injuries inflicted either a single stab/wound or multiple injuries.*
 - (5) *The conduct of the accused before, during and after the incident.*
29. This being a murder charge, the prosecution must prove *mens rea* and *actus reus*. The *mens rea* of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the case of **Joseph Kimani Njau v Republic (2014) eKLR** the Court of Appeal stated:
- “In both criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ...”***
30. The postmortem report reveals multiple injuries on the face, head, on both upper and lower limbs. The injuries on the head caused internal bleeding that damaged the brain. The nature, severity and multiplicity of the injuries leave no doubt that the accused persons were determined to end the life of the deceased or to cause him grievous bodily harm. This is covered under Section 206 (a) of the Penal Code.
31. I am satisfied that the prosecution have proved that the killing of the deceased was premeditated in respect of the three accused persons.
32. It is my finding that the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code has been proved against the three accused persons.

33. I find them guilty of the offence and convict them accordingly.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. Muriuki for 2nd and 3rd accused and holding brief of Guantai for the 1st accused