



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL CASE (MURDER) NUMBER 12 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

HILLARY MARITIM.....ACCUSED

JUDGMENT

1. The accused Hillary Maritim was on the 12th March 2015 charged with the offence of Murder **Contrary to Section 203** as read with Section **204 of the Penal Code** of one Joseph Rotich on the 20th February 2015 at Teret area Njoro sub-county within Nakuru County.

The prosecution called seven witnesses to prove the essential ingredients of the offence of murder.

2. **Section 203 Penal Code** defined murder as the unlawful homicide committed with “*malice aforethought*,” the killing of a human being by another by any unlawful act or omission.

Section 206 Penal Code defines “malice afterthought” as

(a) an intention to cause the death 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 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 s caused or not by a wish that it may not happen.

(c) An intent to commit a felony

3. **Analysis of the Evidence**

PW1 was a 13 years old minor, FC and a pupil at [particulars withheld] primary school class five.

The court took her through a *voire dire* examination and upon being satisfied of her understanding and importance of telling the truth, she gave sworn evidence in Kiswahili.

Her evidence was that the deceased was her father and the accused her brother. She testified of another person by name Stanley who was with her brother Hillary Maritim at about 4.00p.m. on the material date.

4. She testified that her father the deceased was drunk and as he entered into their house where her mother (PW2) was in, the accused was coming out and hit the deceased on the head with his head whereupon he started bleeding, then, the person named Stanley who was with the accused beat the deceased continuously with a stick.

5. She was categorized in cross examination that it is Stanley who killed her father and not the accused who only hit him with his head.

6. **PW2** was Juliana Rotich the wife of the deceased was in the house.

Her testimony was that it was Stanley who beat the deceased with a walking stick as she cautioned the accused not to touch his father, as he had no shirt on.

That the said Stanley pushed the deceased into the house and upon checking him, she saw a wound on the head. She testified that the accused and Stanley left the house and the deceased slept in the sitting room but at about 5.00a.m., she found him dead.

7. On cross examination, PW2 testified that the deceased had earlier on cut a sheep, property of his son (the accused) but the whole week they had not quarrelled.

She reiterated that it was Stanley who beat the deceased continuously with the walking stick, while beating was the cause of his death.

8. **PW8 Sammy Yatich Talam**, a neighbour testified that about 6.00p.m. on the 20th February 2015 he visited the deceased home where he found the accused and Stanley. His testimony was that the accused hit the deceased with his head, but that Stanley beat the deceased repeatedly after tearing off his shirt and also hit his hand when he intervened, and dragged him into the house, stepped on him and kicked him on the stomach. It was his testimony that all this time the accused remained outside the house while the wife (PW2) did not intervene. He identified the walking stick the said Stanley used to beat the deceased-(MFI 1).

9. **PW5** is a brother to the accused. His testimony as that at about 7.00p.m. he found his father naked and being beaten by one Stanley Kiplatleyon, a relative with a stick. He told him to stop beating him and he left and went away. In the morning, he found his father had died. He denied having found the accused beating his father. On cross examination he blamed the said Stanley Kiptayelyon for the death of his father.

10. Dr. David Wainaina testified as PW6. He conducted a postmortem examination on the body of the deceased, at the Nakuru Provincial hospital mortuary in the presence of two persons, Kiet Hanson Maritim and Philip Kilel.

He formed an opinion that the cause of death was severe head injury following multiple blows by a blunt object. The report was produced as PExt 2.

11. The investigating officer CPL Rashid Libondo visited the scene of crime. He found the accused and the deceased body inside his house with bruises on the forehead, left eye, swollen head and fractured leg. He also recovered a hardwood stick that he suspected to have been the murder weapon.

He testified that during his investigations, he found that one Stanley Kiplatleyon was a relative of the deceased and the one who using the hardwood stick, beat the deceased, and escaped to unknown place, and was never arrested. He further established that the accused had hit the deceased with his head. He produced photographs taken at the scene as PExt 3 and 4.

12. When called upon to defend himself, the accused testified that on the material day and time, he was with his cousin, Stanley Kiptaleliyon and his father and all had taken *chang'aa* and the deceased when he started quarrelling with the said Stanley and that Stanley started beating his father. He denied beating his father or killing him.

It was his testimony that after the deceased, who was a drunkard and Stanley were separated, he went to sleep in his house, only to know in the morning, that his father had died.

He testified that he is the one who called the village elder, the chief and the police. He testified that he was arrested when he went to record a statement at the Likia police station and charged with the offence. He denied having killed his father, the deceased.

13. **Analysis and Determination**

It is upon the evidence as tendered that I must scrutinise to find out if the offence of murder as defined under **Section 206 of the Penal Code** was committed, and if so the perpetrator – See paragraph 2 of this judgment.

14. All the prosecution witnesses testified to having seen one Stanley Kiptaleliyon, a cousin to the accused hitting and beating the deceased with a walking stick, described by the investigating officer as hardwood stick that could not break.

Though the deceased and the accused had quarrelled over some sheep that had been cut by the accused a week before this incident, they also confirmed that during that week, the two had not quarrelled.

15. There is no dispute that the said Stanley was in the company of the accused and had hit the deceased with his head, though by mistake when they met at the door of the house as the deceased was going in and the accused coming out – PW1's evidence. – I have examined the conduct of the accused during and after the event. In my view, it does not portray a person who had the intention (*mens rea*) to cause death of the deceased by hitting him on his head with his head, that I find to have been unintentional and by mistake.

16. It is however instructive to note that when the said Stanley, who was never arrested continued beating the deceased, the accused did nothing to stop the said Stanley from beating his father, and later went to sleep.

In the case **Okethi Okale & Others –vs- Republic (1965) EA 455** the court held that

“In every criminal trial a conviction can only be based on the weight of the actual evidence -- the burden of proof in criminal proceedings is throughout on the prosecution – it is the duty of the trial judge to look at the evidence as a whole.”

17. The prosecution evidence was direct evidence, of at least four witnesses PW1, PW2, PW3 and PW5 who were present and saw the events that lead to the deceased death. All saw the said **Stanley** beating the deceased with the walking stick, and some tried to intervene to stop the beating.

18. The doctor's conclusion as to the cause of death was consistent with the evidence that the deceased was severely beaten with a blunt object, the walking stick in the head.

19. In the present case, the prosecution must prove the elements of murder against the accused

(1) That he committed the offence of murder of his father.

(2) That in so doing, the accused had the necessary intention to do so.

(3) That the accused participated in killing of the deceased.

20. As stated in the case **Bonaya Tututi Ipu –vs- Republic (215) e KLR** the court held that reliance on aforethought is the *mensrea* for the offence of murder and its presence or absence is the determinant factor for the offence under **Section 203 of the Penal Code**.

Further, the **Court of Appeal** in **Republic –vs- Tubere S/O Ochen (1945) 12 EACA 63** said

“Malice aforethought can be inferred from the facts of the case considering the nature of the weapon, and the manner in which it was used to inflict the injuries, the part or parts of the body targeted, the evidence of the accused before, during and after the offence.”

21. What then is the culpability of the accused in all this scenario?

Section 21 Penal Code states

“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 probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

22. The accused's role in the commission of the offence is that the said Stanley was in his company, and that he was seen hit the deceased with his head, although by mistake and unintentional, before Stanley descended on him with the walking stick causing the fatal injuries.

The mere fact of these two having been together, in my mind, is not evidence of a common intention to commit the unlawful act. No evidence of any common intention was tendered.

23. The court must satisfy itself that the accused had the intention to cause the death or grievous harm by hitting the deceased with his head. The nature of the weapon, his head, would in all reasonable intent and propose not have been expected to cause death or grievous harm to the deceased.

24. **PW1** was heard stating that the accused and the deceased happened to meet at the door as one was coming out and the other going out when, by mistake they hit each other by their heads. This in my considered view was not intentional, the meeting having been unplanned, but by chance.

25. Further the accused's conduct during, and after the event do not prove malice aforethought – See **Republic –vs- Wilfred Karanja (2015) e KLR and Republic –vs- Tubere s/o Ochen (Supra)**.

I find that the accused had no common intention with the named Stanley.

26. To that end, **Section 20 and 21 of the Penal Code**, in my view are not applicable in this case. I am not persuaded that the accused had a common purpose with Stanley to commit the offence. See **Court of Appeal** decision in **Njoroge –vs- Republic (1983) KLR 197**.

27. In light of the plain and cogent direct evidence and in circumstances thereto, I have no doubt in my mind that the accused did not have the necessary *mensrea* to cause either grievous bodily harm or to kill the deceased or at all.

28. There is cogent and uncontroverted evidence that points to one Stanley as the person who inflicted the fatal blows to the deceased.

It is unfortunate that this person, a cousin to the accused was never traced or found after the event to face a charge of murder of the deceased.

29. The prosecution therefore fell short in proving, beyond reasonable doubt, that the accused killed the deceased.

Consequently I pronounce a verdict of Not guilty, and direct that, unless lawfully held the accused is set free forthwith.

Delivered, dated and signed at Nakuru this 26th Day of September 2019.

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J.N. MULWA

JUDGE