



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 39 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MWITI KABUGA.....1ST ACCUSED

CLINTON MUTUGI GITONGA.....2ND ACCUSED

PAUL GITONGA MBABU.....3RD ACCUSED

MATHEW MAWIRA KABURO.....4TH ACCUSED

MICHAEL MUTWIRI KABUGA.....5TH ACCUSED

J U D G M E N T

1. **JAMES MWITI KABUGA, CLINTON MUTUGI GITONGA, PAUL GITONGA MBABU, MATHEW MAWIRA KABURO & MICHAEL MUTWIRI KABUGA**, the 1st, 2nd, 3rd, 4th and the fifth accused respectively are all charged with the offence of murder contrary **Section 203** as read with **204** of the **Penal Code**. The particulars as per the information presented to this court by the Director of Public Prosecution are that on 2nd April 2015 at Mumbuni Market, Kandungu within Tharaka Nithi County jointly murdered Morris Murithi (hereinafter to be referred to as the deceased).

2. All the five accused persons denied committing the offence. The State lined up a total of 6 (six) witnesses. The prosecution's case majority hinged on direct evidence or the witnesses who stated that they witnessed the incident that led to the demise of the deceased in this case. In summary, the deceased and Newton Karani (PW1) who were both working at a bar belonging to 1st accused were suspected to have stolen some money belonging to the 1st accused and as a result he was subjected to a mob beatings or mob justice which saw being literally beaten to death.

3. Newton Karani (PW1) who was also suspected have been associated with the deceased in the alleged theft told this court that he was in his house on 2nd April 2015 at around 6 am when he was woken up by 1st and 4th accused persons together with one Kibara and Edwin Njeru. He testified that the 1st accused ordered him to stand still as they ransacked his house and after failing to find whatever they were searching for, the witness was lead to the market a short distance away where the 1st accused's bar was situate where they locked him in, telling him that they were going to fetch the deceased. The witness said that the two (2nd & 4th accused) shortly thereafter returned with the deceased to the said bar where they tied him up before the 1st, 2nd, 3rd and 5th accused set upon him beating him and the deceased him for having stolen Kshs.27,000/- from 1st accused.

4. The witness (PW1) added that the 1st accused was demanding his money from the deceased as they beat him with sticks, electric cable and a knife. He saw the 1st accused with the cable wire, the 2nd accused a knife while 4th accused had a stick. The 5th accused was seen using fists and kicks.

5. The witness further told this court that he was later removed from the bar together with the deceased and taken out where they were tied together and beaten. He also stated that the assailants poured petrol and alcohol on them as they were forced to carry a crate of beer as they walked towards the road where according to him they were beaten up until the deceased succumbed and died. He added that just before the deceased succumbed, a local Sub- chief named Njiri came and rescued them by untying the sisal rope which had been used to tie them up. The witness identified the black cable wire (MF1 I), a knife MF1 2, sisal, rope MF1 3 and a wooden sticks MF 1 4 (a), (b), (c) and (d) as the weapon used to tie and beat him and the deceased. He stated that the Assistant Chief then called the police who came and collected the body of the deceased. He told this court that though he was also beaten and sustained injuries he never sought for treatment due to financial constraints.

6. Fabian Mwiti (PW2) on his part told this court that he was asleep in his home at around 2 am on 2nd April 2015 when he heard people talking loudly outside and when he came out he found people crowded at a bar known as Kiambi Bar which he said belonged to the 1st accused. He estimated the number of the people he saw as 10 and that he could identify one Roy Kariuki (his brother) the 1st accused, Ken Kaburu. He testified that he approached the bar and on inquiry, the 1st accused told him that his bar has been broken into and that he would go and get the person who was selling beer in the bar the previous day. The witness stated that he went back to his home to sleep and that around 7 am, the 1st accused, 4th accused and Njeru came with Newton Karani (PW1) and locked him inside the bar before going for the deceased whom they brought and tied. He stated that the two 'suspects' (deceased) and PW1 were tied with a rope before they were beaten. He said that the first accused assaulted both of them before Mutugi (2nd accused) Mawira (4th accused), Mutwiri (5th Accused) and Gitonga (3rd accused) joined in using sticks to beat up both the deceased and PW1. According to the witness, the two were first beaten inside the bar before being taken to the road where they received more beatings. He recalled that the 1st accused used a wire cable to beat up the deceased and PW1 while the others used sticks of acacia tree to beat them. He clarified that he was a mechanic and that he lived in a plot next to the bar that belonged to the 1st accused. He testified the area Chief later came to the scene at around 10 am and stopped the accused persons from further assaulting the deceased and PW1. He added that the deceased shortly thereafter passed on.

7. Germann Mwenda (PW3) the Assistant Chief of Kamwango Sub-location came and testified that he received a call at around 9 am on 2nd April 2015 that there was an incident at Mumbuuni Kabuga market. He told this court that since the Area Sub-chief of the area was on leave, he got onto a boda boda and headed to the scene where he found a crowd of people at the road near the bar at Mumbuuni market. He stated that he found the crowd and milling around and when he forced his way to the centre he found the deceased lying down with his hands tied to the front bleeding from the nose and mouth. He was informed by the 1st accused that the deceased had stolen Ksh.30,000/- from him. He directed the crowd to move aside as he untied the deceased. He further testified that he found the 1st accused appearing like he was leading the beating as the 2nd accused was cheering him on. He clarified that he found the deceased and Karani (PW1) already beaten on allegations of theft of money belonging to the 1st accused. He added that he notified his senior including the D.O & the police and that after around 10 am he realized that the deceased had passed on.

8. Dr. James Kitili (PW5) told this court that he performed post mortem on the deceased body on 10th April 2015 and noted a cut on the forehead of about 3 cm and bruises on the scalp. He also noted multiple bruises on the chest, neck, both shoulders and back. He further noted a fracture on the frontal skull and a blood clot overlying the front part of the brain and bruises on the scrotum which was swollen. He concluded that the cause of death was severe head injury due to blunt head injury. He issued a Death Certificate No.437592 and tendered postmortem report a P. Exhibit 5.

9. Nobert Mwenda Mugo (PW4) an elder brother to the deceased testified that he identified the body at Chuka Hospital Mortuary.

10. Corporal Alfred Akumu (PW6) told this court on 2nd April 2015, he accompanied OCS Ntumu Police to a scene of crime when they received information from Assistant Chief (PW3) about murder. He testified that they found a huge crowd at the scene gathering around a body of a deceased person and one Newton Karani (PW1) who according to him appeared badly beaten and had difficulty talking. He told this court that he arranged for the body to be taken to Chuka Hospital Mortuary as he gathered PW1 and 2 other persons and took them to police base at Marima to record statements. Before leaving the scene he went to the bar where the deceased had first been locked up and beaten and with the help of PW1 recovered 4 sticks which he tendered as P. Exhibit 4 (a), (b), (c), (d) and (e), a black wire cable P. Exhibit 1 a machete like knife (pointed at the tip) P. Exhibit 2 and a sisal rope (P. Exhibit 3). He tendered them as exhibits in this case and told this court that the exhibits were scattered all over the bar. He testified that the 2 were beaten with a view to making them confess that they had stolen the money. He further told this court that his investigations revealed that all the accused persons save from accused 3 hailed from the same area. The 3rd accused in his testimony, to this court that he was a teacher in the locality (Mumbuuni) but was from a different area in Marima.

11. When placed on their defence all the accused persons chose to give sworn statement in their defence.

12. James Mwiti (1st accused) (DW1) in his sworn statement told this court that the deceased worked for him as a watchman at his bar and that on 2nd February 2015, he called him and informed him that there was burglary at his bar known as Kiambi Bar. He testified that upon receiving the news he got keys to the bar and went to the bar which was around 30 metres away from where he lived and that on reaching the place he found that the window grills had been broken and Kshs.30,000/- stolen in addition to crates of beer.

13. He then inquired from the watchman (deceased) if he had informed anyone else and he reportedly told him he had not. He testified that he asked the deceased to accompany him to his brother known as Cosmas Kibari whom he woke up and notified him of the burglary. He woke up and accompanied him to the bar where they found many people and gathered at around the bar. He then sent the deceased to go and fetch him a mobile phone at his house which he did. He then reportedly called a police officer at Ntumu Police Station but he could not go through.

14. The 1st accused told this court that when he inquired from the deceased to explain about the burglary and whether he had seen anyone, he reportedly told him that he saw Newton Karani (PW1) standing near the broken window. He testified that Newton Karani (PW1) was his employee and so he proceeded to where he was staying where they woke him up and asked him to accompany them to the Bar where he reportedly informed him about the burglary incident. According to him, the deceased then changed the narrative he had earlier given that he had seen Newton Karani (PW1) standing near the window and stated that he had gone to sleep.

15. DW1 fourth told this court that he then decided to go and sleep in the bar and while he was sleeping he was woken up by one Vivian Mwiti and told that the deceased was behaving rather strangely. He woke up and went outside and saw the deceased standing near a toilet with beer on hand drinking and that he was drinking one after another. He added that when they went closer they found him standing behind the toilet having dug a hole where he had hidden a crate of beer and was removing one bottle after another drinking. According to him, people he did not name surrounded him as he called a police officer at Ntumu to inform him that one "suspect" had been arrested and tied with ropes. He was reportedly told by the unnamed police officer to take the "suspect" to police station. He then asked the deceased

where he had put the money and he reportedly told him he had hidden it at his brother's bathroom. He went to the bathroom but did not find the money. He stated that when he missed the money he came back and asked the deceased to say where the stolen money, was and that he told him that he had handed the money to his brother known as Micheni. The 1st accused went using a boda boda to Micheni's house. He added that it was around 6 am by then and that he picked Micheni and brought him to where the deceased was and that when he told him that the deceased had said he had given him the money, Micheni turned against him (deceased) and slapped him. He then told the two that he would take both of them to the police station with the crate of beer. He told this court that he ordered the deceased to carry the crate of beer and that when they reached the road the deceased declined to continue carrying the crate of beer forcing the people who had gathered to beat him up. The 1st accused testified that he went back to the bar to lock it up. He added that he untied Newton (PW1) and it was then that the Sub-chief arrived at the scene and proceeded to untie the deceased. He then proceeded to Ntumu Police Station but he was called and informed that the deceased had died. He denied beating the deceased or ordering for his beating. He conceded that although he wanted to get his money back, he was helpless in the face of around 50 people who were beating the deceased.

16. Clinton Mutugi Gitonga (DW2) 2nd accused on his part also gave sworn statement. He told this court that he was in the house when he heard that two people had been arrested for theft and that he proceeded to the market where he found around sixty people had surrounded two suspects and beating them. He went closer and noticed that the two had their hands tied and besides them was a crate of beer. He further added that he was in the process of stopping the mob from beating the two "**suspects**" when the Assistant Chief arrived and took charge. He stated that he was surprised when he was arrested 15 days later on allegations that he had taken part on the mob justice that led to the demise of the deceased.

17. Paul Gitonga Mbabu (DW3) and the 3rd accused in his sworn statement of defence testified that he was a teacher at Maatha Primary School. He told this court that he knew the 5th accused because he was a parent in the school he was teaching and that apart from him, he does not know the other co accused persons. He also stated that he did not know the deceased person. He also stated that he used to stay in Mumbuni Market but would go home over the weekend. He also testified that though he knew about Kiambi Bar he did not know its proprietor.

18. The 3rd accused told this court that on the material day as he was heading to school in the morning as was norm, he met a crowd of around 50 people milling around two people. He added he did not recognize the two people who were lying down and that shortly thereafter the Area Sub-chief arrived and that when he learned that the two people were suspected to have stolen. He denied having anything to do with the beating of the deceased person and wondered why two witnesses testified against him.

19. Mathew Mawira Kaburo (DW4) 4th accused in his sworn statement of defence testified that on the material day in the morning he had gone to pick his phone from the market as he had left it charging overnight. He further stated that as he reached the market, he found a crowd of people numbering around 50 surrounding two people who had been tied together using a rope. He further stated that he did not know why and who had tied them. He told this court that he never bothered to find out why they had been tied and that he proceed on his journey and business. He denied taking part in beating the deceased saying that he had no motive to do so and he had no differences with him. He denied having been armed with a knife at the material day and place claiming that he had nothing to do with it.

20. Michael Mutwiri Kabuga (DW5) and fifth accused also in a sworn statement of defence denied committing the offence. He stated that he is a businessman at Mumbuni market and was on his way to his place of business on 2nd April 2015 at around 8 am when he met a crowd of people standing on the road. He stated that he was in a hurry and did not stop to check what was going on. He told this court that he only learnt later that a theft had occurred in Kiambi bar. He denied taking part in beating the deceased and said that he was not present when the two persons including the deceased were beaten. He told this court that he was arrested 3 weeks later and taken to Ntumu police station before being charged with murder in this case. He denied having anything with the murder.

21. The prosecution unlike the defence chose to put in final written submissions urging this court to find that they have proved their case beyond reasonable doubt. It has listed the requisite elements in murder citing the decision in **R- vs- Mohammed Dadi Kikare & 7 others [2014] eKLR.**

22. The State submits that the fact of death is not contested. It contends that the cause of death was established to be cardio pulmonary arrest due to severe head injury inflicted by a blunt object. It further submits that the PW1 and deceased were beaten with various implements tendered in court as exhibits. The State submits that there is enough proof that the deceased met his death as a result of unlawful acts of violence perpetrated by the accused persons herein. It has pointed out that Newton Karani (PW1) is an eye witness to the murder and that his evidence was corroborated by PW2 & PW3.

23. The prosecution has relied on the decision in **Republic -vs- Tabulanyeka S/o Krya & 3 others (1943) 10 EACA 51** where it was held that the cumulative effect of the assault carried out the different accused persons such as it would result in death would render each of them responsible for all the acts in furtherance of their purposes. It contends that the witnesses they presented at the trial established and proved *mens rea* (malice aforethought) as against all the accused persons.

24. The State contends that all the accused persons had no tangible evidence in their respective defences. In its view, the fact that defence did not call any witness to exonerate themselves, shows that their defences were a sham and did not displace evidence tendered against them.

25. **Analysis and Determination**

(i) **The Law**

The provisions of **Section 203** of the **Penal Code** defines the offence of murder as;

"Any person who of malice aforethought cause death of another person by an unlawful act or omission is guilty of murder"

Section 204 provides for the sanction of anyone found guilty of murder but before I address my mind on the sanction it is imperative to address the crucial ingredients of murder as defined by law as cited above. These ingredients as have been noted by the prosecution are;

- a) Death of the deceased
- b) Actus Reus (act causing death)
- c) Mens rea (Malice aforethought)

26. **Facts/Evidence**

The evidence tendered by Dr. James Kitili (PW5) and in particular the post mortem report (P. Exhibit 5) and Death Certificate No.437592 shows beyond doubt that Morris Murithi is deceased. There is no contest about given the evidence referred above and other prosecution witnesses.

26 (b) **Actus Reus**

This court has considered and evaluated the evidence in regard to the cause of death or what really caused the death of the deceased in this case. The evidence of the doctor who performed post mortem again provides crucial evidence on what caused the death of the deceased's. According to Dr. James Kitili (PW5), the deceased suffered multiple injuries to wit cut on the forehead, bruises on the scalp, chest, neck, both shoulders, fracture on the frontal skull bone, and bruises on the scrotum which was swollen as a result. The cause of death was found to be severe head injury due to blunt head trauma.

27. The question as to who caused the multiple injuries to the deceased from which he later succumbed is answered by the evidence of PW1, PW2 and to some extent PW3. PW1 expressly stated that the people who went to his house at around 6 am were the 1st accused and 4th accused in the company of other two people not before court. They woke him up, searched his house before leading him to the market nearby where Kiambi bar belonging to the 1st accused was situate. He says he was locked up and beaten after the deceased was also brought into the bar as well and also locked up on suspicion that they had stolen some money belonging to the 1st accused. According to him, he was tied together with the deceased before the 1st accused with a cable wire (P. Exhibit 1), Mutugi (2nd accused), with a knife (P. Exhibit 2), Gitonga (3rd accused) using fists and kicks and Mawira using a stick (P. Exhibit 4 (a) - e) beat them up before removing them and dragging them to the road where they subjected them to more beating. PW2 (Fabian Mwiti) another eye witness in this evidence corroborated the evidence of PW1 on who assaulted him and the deceased. He was categorical that it is Mwiti (accused one) who started the assault using a cable wire against both PW1 and the deceased before Mawira (accused 4), Mutugi (accused 2), (Gitonga) accused 3 and Mutwiri accused 5 joined in and beat them **"everywhere in the body."**

27. Apart from the two eye witnesses who appeared to have been present during the whole ordeal, the Assistant Chief Germann Mwenda (PW3) came later and found the 1st accused (Mwiti) still going on with the beatings while being cheered on by the Clinton Mutugi (2nd accused). The evidence tendered clearly show that though the assault or beatings that the deceased and PW1 underwent were sort of mob beatings the 1st, 2nd, 3rd, 4th and 5th accused cannot escape culpability.

28. The 1st accused in his defence told this court that both the deceased and PW1 were his employee. He conceded that he indeed went for PW1 in his house and later brought him together with the deceased (who was the watchman at the said bar). What he did not concede is the fact of tying them together with a rope but all indications show that that is what happened. He says he told the deceased to carry the crate of beer he was allegedly found with and that the deceased carried the crate upto the road but refused to carry it any further and that people started beating him before the Assistance chief arrived. This narrative by the 1st accused in my view lends credence to the evidence or narrative given by PW1, PW2 and PW3. He only failed to state that in the ensuing beatings that both the PW1 and deceased were subjected to, he was the leading character because he was the one felt aggrieved by the theft of money in his bar.

29. The 2nd, 3rd, 4th and 5th accused persons all adopted the same defence. They all conceded that though they were present at the scene of crime they were passive and only saw people they could name assaulting the deceased and PW1. They all had no past differences with the eye witnesses presented by the prosecution. There was no basis established to show that the prosecution witnesses and in particular PW1, PW2 and to some extent PW3 were either motivated to lie or mistaken to implicate them.

30. This court finds that based on the evidence tendered the element of *actus reus* has been established and proved against each one of the 1st to 5th accused persons. It is of course difficult to establish as to who actually inflicted what injury but there is no doubt that the beatings that deceased received from all the accused persons caused the sort of injuries noted by the doctor who performed the post mortem examination. The provisions of **Section 20(1) of Penal Code** provides that criminal culpability does not visit only the person who committed the acts in question, equal criminal culpability lies with any person or persons who acted abetted or were complicit in the illegal act or omission. When the Assistant Chief (PW3) arrived at the scene of crime he found only accused one beating the deceased and he saw 2nd accused person cheering on excitedly. This clearly show that the two accused persons together with the other accused in this case clearly had a common purpose which was to unlawfully administer what they considered mob justice to both the deceased and PW1 whom they suspected had stolen from the 1st accused. Otherwise why would someone stand and cheer a person who is inflicting pain and serious injuries to a helpless person lying down with his hands tied with a rope unless he is complicit of the illegal acts. Apart from the 1st and 2nd accused, the Assistant Chief also saw the 3rd accused in the crowd at the scene of crime and he knew him well as he had found him previously taking illegal brews and though the Assistant Chief did not witness him do anything, the fact that he was found at the scene corroborates what PW1 and PW2 told this court in regard to his culpability. This court finds that the evidence tendered by the prosecution

clearly established the cause of death of the deceased and the fact that all the accused persons herein jointly took or played a part in assaulting the deceased. PW1 and PW2 saw all of them take part in the assault.

31. (b) Mens rea

Mens rea is a latin noun defined by wex legal Dictionary as;

" The state of mind indicating culpability which is required by Statute as an element of a crime "

The google dictionary define it as;

" The intention or knowledge of wrong doing that constitutes part of a crime opposed to action or conduct of the accused. "

The big question to be determined is whether the unlawful actions by the accused persons in subjecting the deceased and PW1 to beating with a view to either meting out "**mob Justice**" or finding out the whereabouts of the stolen money, were carried out with guilty mind or malice aforethought. The provisions of **Section 206** captures this principle as it provides;

" Malice aforethought shall be deemed to be established by providing any one or more of the following;

a) An intention to cause 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 which that it may not be caused..... "

The 1st accused was obviously an angry man. Angry because his bar had been broken into and some money (Kshs.30,000/-) reportedly stolen. From the evidence tendered he appeared to be a man possessed with a mission. The mission being to nail the suspect (s) and that mission was directed at his employees, the deceased and the PW1. That is why he marshaled support and roped in the 2nd to 5th accused. The Assistant Chief arrived at the scene and he told this court that the 1st accused appeared to be the leader of those engaged in assaulting the deceased and PW1. The weapons used which were tendered in evidence clearly indicated that the assailants were intent at causing great pain and anguish. The Doctor who performed the post mortem found that the scrotum of the deceased was bruised and swollen indicative of the malicious and reckless intent by the assailants - the accused persons herein. Their behaviour was not only crude but inhuman as well. The deceased must have died a painful death. I find that based on the evidence tendered and the application of the law cited above, the prosecution's case against all the accused person has been proved beyond reasonable doubt. They chose to take the law into their hands instead of following the lawful procedures and in the process caused the death of the deceased herein in the most gruesome manner. I find each and every one of them guilty as charged and accordingly they are all convicted of the offence of murder.

Dated, signed and delivered at Chuka this 24th day of October, 2019.

R.K. LIMO

JUDGE

24/10/2019

Court:

This court has considered the mitigation of all the accused persons. The law (**Section 204**) provides for one sentence for the offence of murder is Death penalty following the decision of the Supreme Court in the case **Murutetu & others**, the mandatory nature of the sentence was declared unconstitutional. Following the ratio decidendi of that decision I find that the convicted persons herein do not deserve to die for what they did though as I have observed in the judgment they were brutal to the deceased. They have asked for leniency owing to their relative young age but they were a bit gruesome in the manner in which they beat the deceased person. The first accused holds more responsibility for what happened to the deceased and for that he is sentenced to serve 20 years in jail. The 2nd, 3rd 4th and 5th accused persons shall serve 14 years imprisonment each. They all have 14 days Right of Appeal.

R.K. LIMO

JUDGE

24/10/2019