



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 10 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MWANGI WAIRIMU.....ACCUSED

JUDGMENT

Joseph Mwangi Wairimu, the accused in this matter, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The charge is drawn as follows:

JOSEPH MWANGI WAIRIMU: On the 3rd day of January 2018 at Gikomba along new Pumwani Road in Nairobi within Nairobi County murdered Alex Kimenju Maigwa.

The accused has denied committing this offence. He is represented by Mr. Danstan Omari and Ms. Masake.

The prosecution called a total of ten (10) witnesses in support of its case. The totality of the evidence reveals two scenes relevant to this case. The first scene is at a Pub known as *Kwa Magda*. It is located at Gikomba area in Nairobi. It was described as being situated near a cemetery. In that Pub on the evening of 3rd January 2018 at about 7.30PM several people including Kennedy Michuki Wachira (PW1) Daniel Mutugu Mwangi (PW2) and Alex Kimenju (the deceased) were drinking and watching news. At about 7.40pm the accused, Joseph Mwangi Wairimu, entered the Pub and called the deceased. Both went outside. This evidence was given by Kennedy and Daniel. Both witnesses said they knew the accused and the deceased. They told the court that the accused had hired the deceased as a driver of his (accused's) motor vehicle. Kennedy and Daniel thought that the accused was calling the deceased to go outside and reconcile the accounts for the day. The two witnesses told the court that after a few minutes, a customer entered the Pub and told the woman manning the counter that there were people fighting outside and one of them was wearing a red coat. Kennedy and Daniel overheard this and thought the person described as wearing a red coat must have been the deceased. The two witnesses in company of other patrons went outside. They found that the people fighting were the accused and the deceased. Kennedy said he found the deceased having been assaulted with accused holding his neck, hitting the deceased with fists on the head and hitting his head on the wall. The deceased was bleeding on the face. Kennedy said he wiped blood off deceased's face. Daniel equally told the court that when they went outside he saw the accused beating the deceased using fists and hitting the deceased's head against a wall. Daniel too said he helped to wipe blood off the deceased's face. Both witnesses said that the deceased was injured. While Daniel said he saw the deceased bleeding without describing the injuries the deceased may have sustained, Kennedy said on cross examination that he saw the deceased with injuries on the face and an injured lip.

The second scene relevant to this case is the Kajiado Guest House in Eastleigh. According to Kennedy and Daniel, the deceased told them that he was able to go home without assistance. He left the scene at *Kwa Magda* and told them that he was going home in Shauri Moyo. He did not go to Shauri Moyo according to the evidence. At 9.00pm the same evening of 3rd January 2018, the deceased arrived at Kajiado Guest House, Eastleigh. He was a regular customer at the Guest House according to the evidence of Cosmas Kibuthu Wachira (PW3). Cosmas was the person in charge of renting out rooms to customers at Kajiado Guest House. The deceased, who was known to Cosmas as their regular customer, arrived at the Guest House at 9.00pm. He rented a room from Cosmas for Kshs. 300. He was allocated room number 2B and was given a key to the room. Room 2B is one of the rooms without a toilet inside according to the evidence of Cosmas. It was situated near the office occupied by Cosmas. The deceased went out shortly after getting the room. He bought soda at a shop in front of the Guest House and returned to this room. Cosmas said that the deceased was alone. Cosmas testified further that on the morning of 4th January 2018 at about 7.00am he saw the deceased come out of his room and go to the toilet. Cosmas saw the deceased return to his room. At around 8.00am the same morning, Cosmas heard someone struggling to breath and making unusual noise. He went to check and found that the noise was in room 2B occupied by the deceased. It was the deceased struggling to breath and making the strange noise. Cosmas found the deceased lying down with his legs stretched out and foaming in the mouth. He went to seek help. He looked for deceased's friend but failed to find him. He did not say who the friend was. Cosmas then went to call Wangechi (PW4) the manager of Kajiado Guest House. Wangechi accompanied Cosmas back to the Guest House. She found the deceased lying on the ground and foaming in the mouth and moving about. He called an AMREF Ambulance. She also called CIP George Mithamo (PW5) the OCS of Eastleigh Patrol Base upon request by the AMREF personnel. By the time CIP Mithamo arrived at the scene he found that the deceased had been pronounced dead. He learned that the deceased died as the nurses from AMREF were trying to resuscitate him.

Further evidence shows that the body of the deceased was removed from the scene and taken to the City Mortuary. It was examined by Dr. Charles Muturi (PW9) on the 5th January 2018. The doctor noted an old scar on the right hand side of deceased's head extending from the front of the head to the side. From the information the doctor received, this scar was due to surgery performed on the deceased following an accident. The doctor noted lateral swelling around the sockets of the eyes and bruising more marked on the right side. He also noted bleeding within the eyes. The upper lip was bruised and swollen. Internally, the doctor noted multiple contusions on the right hand side of the brain. He noted an obvious skull fracture on the side of the previous surgical scar described above. He found extensive bleeding into the brain tissue with signs of increased pressure within the brain. After the examination, the doctor formed the opinion that the deceased died as a result of head injury due to blunt force trauma.

The accused was put on his defence. He chose to give a sworn defence. He denied ever owning a motor vehicle number KAL 175J or any other vehicle. He denied having been employed by Rachael Wambui (PW10). He denied having been involved in a fight on 3rd January 2018. He raised an alibi defence that on 3rd January 2018 he was at his rural home in Othaya Nyeri with his family after having left Nairobi on 31st December 2017. He said he returned to Nairobi on 5th January 2018. He denied having been at *Kwa Magda* Pub on 3rd January 2018. He denied that he knew the deceased and stated that Kennedy and Daniel lied to the court. He denied having employed the deceased to drive his vehicle because he did not own a vehicle. He denied fighting with the deceased or killing him. He further testified that he operates a showroom at Gatongóra in Ruiru. He told the court that he was charged because of a plot owned by his father in Gikonba where the sister of the officer in charge of CID at Kamukunji Police Station was a tenant.

On cross-examination the accused denied knowing Kennedy and Daniel and stated that he saw them first in court. He also denied knowing the deceased. He reiterated his evidence that he was being targeted by the officer in charge of CID Kamukunji because of his father's plot where the sister of the officer in charge CID Kamukunji is a tenant. He called Tabitha Njeri, his wife, as the second defence witness. Her testimony supported that of husband that they were not in Nairobi on 3rd January 2018. She said her they left Ruiru on 31st December 2017 and went home to Othaya Nyeri and that her husband did not leave Nyeri on 2nd January 2018. She said that they returned to Ruiru on 5th January 2018.

The accused called Josephat Mwangi Kimondo as the 3rd defence witness. Josephat told the court that he comes from the same area with the deceased and had known him since childhood. He said he was with the deceased at *Kwa Magda* Pub on 3rd January 2018 at 6.30pm. He testified that they took drinks with the deceased until 8.30pm and then left. He said that they walked to a place called Garage in Eastleigh then parted ways. He said that he did not witness any fighting concerning the deceased. He said that the deceased did not have injuries when they left nor did he complain to Josephat of any injuries. Josephat said he did not see the accused calling deceased to go outside. He denied knowing Kennedy and Daniel nor were the two sitting with Josephat and the deceased on the same table at the *Kwa Magda*.

At the conclusion of the case against the accused, Mr. Omari submitted that the prosecution has not discharged its duty of proving the case against the accused beyond reasonable doubt. He submitted that the accused was not in Nairobi when the alleged offence took place but was in his rural home in Nyeri. He submitted that the accused was not employed by Rachael, PW10, as her driver and that the police did not conduct an identification parade for witnesses to identify the accused. He submitted that the investigations were poorly conducted and that other than Cosmas, there is no other witness from Kajiado Guest House who was called to testify. He also testified that the matter was investigated by the DCI Kamukunji when he had no jurisdiction over the matter. He submitted further that the deceased could have been assaulted on his way to Eastleigh or by any other person while he was inside the Kajiado Guest House. Further submissions by Ms. Masake emphasize on the defence of alibi. Ms. Masake cited ***Republic v. Solomon Mulove Musyoki [2018] eKLR*** and ***Jonathan Mutisya Valau v. Republic [2001]eKLR*** on the defence of alibi.

On the other hand the prosecution submitted that they have proved all the ingredients of the offence of murder against the accused person; that the evidence places the accused at the scene of the offence. It was further submitted that the defence of alibi comes at the earliest opportunity not as an afterthought. The prosecution urged that this court finds the case proved beyond reasonable doubt and convict the accused for murder.

I have analyzed all the evidence and the authorities cited. The offence of murder is committed when any person who of malice aforethought causes the death of another person by an unlawful act or omission. The onus is on the prosecution to prove the crime of murder. The standard of proof is beyond reasonable doubt. The prosecution must prove death of a person. It must prove the unlawful act causing that death. It must prove the identity of the person who has caused that death and it must prove that the person causing the death had intended to cause it.

That Alex Kimenju Maigwa died is not in dispute. The cause of death was head injuries due to blunt force trauma. The doctor who examined his body found that the deceased had injuries. The doctor found lateral swelling around the sockets of the eyes and bruising more marked on the right side of the head. He found bleeding within the eyes. He found swollen and bruised upper lip. The major injuries were internal. The deceased had an old surgical scar on the right side of his head about 3 years old as a result of surgery to the head following an accident. This evidence was according to what the relatives of the deceased informed the doctor. The doctor found an obvious skull fracture on the side of the previous surgical scar with extensive bleeding into the brain tissue with signs of increased pressure within the brain. This is the injury that caused the death of the deceased. To my understanding of the doctor's evidence, it seems that the skull fractured along the old surgical scar. There must have been a trigger of this injury. This court did not benefit from the evidence from the doctor or any other expert as to what causes foaming in the mouth. The court did not benefit from the evidence of an expert as to whether an head injury to the magnitude of the injury suffered by the deceased could prevent one from moving from point A to point B as was the case in this case. The court did not benefit from evidence of an expert as to how long a person can live after sustaining an injury like the one suffered by the deceased. Despite this, the court finds proved the fact that the deceased died as a result of an unlawful act.

Kennedy and Daniel told the court that they knew both the accused and the deceased. The two witnesses were with the deceased at *Kwa Magda* Pub on the evening of 3rd January 2018 drinking. They testified to seeing the accused enter the bar and call the deceased. They testified to going outside to find out what was happening after they overheard a patron telling the counter woman that there was a fight outside the Pub. They testified to finding the accused assaulting the deceased, hitting him with fists on his face and hitting the deceased's head against a stone wall. Both testified to seeing injuries on deceased's face. Their evidence was discredited by the defence counsel who termed as pure lies. The fight is said to have occurred around 7.30-7.40pm. At around 9.00pm the deceased arrived at Kajiado Guest House

in Eastleigh. Cosmas said he did not see any injuries on the deceased nor did he see blood stains. On re-examination, Cosmas said he was attending to the customers through a small opening and he could only see a bit through the hole in the window.

The defence took issue with the evidence of the prosecution that the deceased was assaulted elsewhere or even inside the Kajiado Guest House. Cosmas said that the deceased was alone. There is no evidence to show that he was attacked at the Guest House.

The evidence shows that the reason why the accused assaulted the deceased is because the deceased had caused an accident on a motor vehicle belonging to the accused. Kennedy and Daniel did not give the registration number of this alleged vehicle. Daniel said it was a DX 102. The evidence is not clear how Rachael, PW10, is connected to the case. She denied knowing the accused or having employed him. She denied that her vehicle KAY 874J was ever driven by the accused. Her evidence was in favour of the defence and therefore she was not cross-examined at length by the defence counsel. She was asked about her statement which she said was written for her by the police and was in English which she did not know. I have taken liberty to read that statement. In it Rachael states that on 3rd January 2018 at about 10.00pm she reported on duty. She does not say where she was reporting on duty. She said she found accused's motor vehicle KAY 874J parked at her parking place. The accused who was employed by Rachael as manager of her bar at New Pumwani Road told her that his car had been damaged by someone whom he had given the vehicle. It is not clear why the prosecution let Rachael get away without explaining this statement even if it would have meant declaring her a hostile witness. I say this because it is obvious to me that Rachael was lying to the court. From the contents of her statement it seems that she refers to her reporting on duty at the bar where the accused was working as the manger.

Dennis Wahiu Maigwa, PW6 and brother to the deceased told the court that he knew the accused and knew that the accused worked in a bar in Gikomba. He said he knew that the accused owned a motor vehicle he described as G-Touring. He said he could not remember the registration number. CPL Joash Wawire, PW8, testified that he arrested the accused from a bar in Gikomba.

The accused has denied having been in Gikomba testifying that he operated a workshop in Ruiru where he lived. He said that he did not own a car and that he was not at *Kwa Magda Pub*. He said he was in Nyeri on 3rd January 2018. His wife told the court the same story. DW3 Josephat Mwangi said he did not see Kennedy or Daniel at *Kwa Magda Pub* and that he was sitting on the same table with the deceased and that the deceased was not assaulted that night. After observing this witness testifying and comparing his evidence with that of the prosecution witnesses specifically Kennedy and Daniel, it is my believe that this witness was lying to the court. It did not escape my attention that throughout these proceedings, the defence counsel did not cross-examine Kennedy and Daniel about Josephat, DW3, specifically on the issue of DW3's presence at *Kwa Magda Pub*. His evidence comes as a surprise and in my view as an afterthought on the part of the defence. It is also worth noting that the accused did not say anything about his having been arrested at Gikomba. He remained silent on this issue.

I have considered the accused's alibi. It is trite, as the authorities cited by the defence will show, that even where the accused raises a defence of alibi, he does not assume the duty to prove his case. The duty remains with the prosecution to prove beyond reasonable doubt that the accused committed the offence. The duty remains on the prosecution to disprove the alibi and prove the accused's guilt (see *Ssentale v. Uganda [1968] EA 36* and *Wang'ombe v. Republic [1976-80] 1 KLR 1683*). **Secondly, the legal principle where the defence of alibi has been raised is that an accused person must raise this defence at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi.** In *R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145*, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

Given that the defence did not cross-examine the prosecution witnesses on the issue of the accused's alibi, the probability of it being an afterthought is very high. I do not believe the accused when he says he was away in Nyeri on 3rd January 2018. I do not believe that the accused operates a workshop Ruiru. I do not believe him when he says he did not know PW10. As I have stated above, it is my believe that PW10 was lying to the court. I do not believe the accused when he said he was being targeted because the sister to the then Officer in charge of CID Kamukunji was a tenant in his (accused) father's plot in Gikomba.

For the reason that the accused did not raise the defence of alibi at the earliest opportunity to give the prosecution time to investigate it and given that the prosecution did not seek an adjournment to disprove that alibi, it is the duty of this court to weigh the evidence of the prosecution against that of the defence in order to arrive at a determination. It is my belief that the accused was at *Kwa Magda Pub* on the night of 3rd January 2018. He was known to Kennedy and Daniel. He was seen by the two witnesses assaulting the deceased. The injuries described by the two witnesses are consistent with the injuries the doctor found on the body of the deceased save for the internal injuries to the head which Kennedy, Daniel and Cosmas could not see. The evidence by Kennedy and Daniel that the accused hit the deceased's head against a stone wall seems to give credence to the injuries on deceased's head as confirmed by the doctor PW9. I am aware of the issue raised by the defence that the deceased could have been injured elsewhere. However my view is that the deceased arrived at Kajiado Guest House about 9.00pm within one hour after he was assaulted. Although this court does not have the evidence as to the means he used to get to Kajiado Guest House, whether by vehicle or by walking, I note that the time between the time the deceased was assaulted and the time he arrived at Kajiado Guest House is not long considering that the deceased had been drinking and had been injured. I have keenly analyzed the evidence of Kennedy and Daniel both in chief and in cross-examination. I note that their evidence is consistence save for failure to remember the registration number of the motor vehicle said to belong to the accused. Daniel described it as No. 102 DX. Daniel also referred to the Pub where they were drinking as *Kwa Wageni* but he clarified that the Pub is also called *Kwa Magda Pub*. It is worth noting that this court observed the demeanour of Kennedy and Daniel and they appeared to be telling the court the truth. Indeed I find no reason why they should lie to the court. Their evidence was not shaken in cross-examination.

I have considered the evidence by the prosecution witnesses, especially that of Kennedy and Daniel who are eye witnesses. I find their evidence reliable and consistent. The injuries they describe are consistent with the injuries sustained by the deceased. I am therefore convinced that the deceased received fatal injuries as a result of which he died the following morning. This evidence proves that it is the

accused who assaulted the deceased and caused a chain of circumstances that led to the death of the deceased. I find that the submissions that the accused may have been assaulted elsewhere does not create doubts in my mind nor does it shake the evidence by the prosecution that it is the accused that assaulted the deceased as described by Kennedy and Daniel.

The last issue to consider is the element of malice aforethought. I have considered the circumstances of this case. In my view I do not think that when the accused called the deceased outside his intention was to kill him. For whatever reasons he had for attacking the deceased I doubt that his intention was to kill the deceased. His actions of attacking the deceased and hitting him on the face and hitting his head against a wall were however uncalled for. I therefore arrive at a conclusion that the evidence does not disclose the offence of murder for lack of the necessary malice aforethought. Consequently, I find that the offence of murder has not been proved beyond reasonable doubt. The offence that has been proved beyond reasonable doubt by the available evidence is the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. As a result therefore I find the accused not guilty of murder as charged and acquit him forthwith. I however find him guilty of manslaughter and enter conviction against the accused. Orders shall issue accordingly.

Dated, signed and delivered this 28th November 2019.

**S.
Judge**

N.

Mutuku