



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 100 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN BOSIRE ANGWENYI.....ACCUSED**

**JUDGMENT**

John Bosire Angwenyi, who shall be referred to in this judgment as the accused, is facing a charge of murder brought under Section 203 as read together with Section 204 of the Penal Code. It is stated in the particulars of the charge that the accused committed this offence on the night of 17<sup>th</sup> and 18<sup>th</sup> August 2013 at Kibera Karanja Road within Nairobi County.

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 duty of the prosecution in a criminal trial is to prove beyond reasonable doubt the allegations made against an accused person. This legal duty referred to as the burden of proof does not shift from the prosecution. In other words, the accused person does not bear the burden of proving any allegation made against him. He is not duty bound to prove his innocence. He is however at liberty to tender any relevant evidence in his favour that may tend to create doubt in the mind of the court because this works in his benefit. Otherwise, he can sit pretty and wait for the court to decide the outcome of the case as presented by the prosecution all the time being hopeful that the case against him is not watertight.

In a case of murder, the prosecution must prove the act of death of the deceased; that the death was caused by the accused person who is under trial; that the death of the deceased occurred due to a direct consequence of an unlawful act or omission on the part of the accused person and that in causing that death the accused possessed malice aforethought. Malice aforethought is been defined under Section 206 of the Penal Code which definition includes the intention to cause the death of or to do grievous harm to any person whether that person is the one killed or not. These are the ingredients of murder which this court will be determining whether they have been proved by the prosecution in this case.

The prosecution called nine (9) witnesses to testify against the accused. According to the evidence before the court, the accused and the deceased were friends prior to the death of the deceased. The accused used to frequently visit the deceased. Both lived on Karanja Road in Kibera and their respective homes were not far from each other. On the night of 17<sup>th</sup> and 18<sup>th</sup> August 2013, past midnight which means it was already 18<sup>th</sup> August 2013, the accused and the deceased were inside the room of the deceased playing cards. The deceased's room was one of the four rooms occupied by him and other family members. A dispute arose between the accused and the deceased. It is not clear from the evidence what caused the

dispute but it seems that it was over money. The deceased is said to have shouted in Kiswahili in a loud voice: “*utanirudishia mia tano zangu*” loosely translated in English as: “*you have to return or refund or pay back my 500 shillings*”. This shouting was loud enough to be heard by Hilali Abdallah Amur, PW1, (Hilali), and Ali Hussein, PW2, (Ali). The noise also woke up Hidayya Mzee Muthami, PW7 (Hidayya) who was asleep together with her sister Amina (not a witness).

Hilali and Ali, brother and son of the deceased respectively, rushed towards the door of the room in which the deceased and the accused were. The door was locked from inside and the two could not gain access. Hilali told the accused and the deceased to open the door but they did not. Hilali left briefly to ask Hidayya and her sister, who had come out of their room, to go back and sleep. In the meantime, Ali broke the door open and found both the accused and the deceased on the floor with the accused lying on top of the deceased holding the deceased by his neck. The deceased was foaming in the mouth and his eyes were bulging and according to the evidence of Ali, the deceased had no strength to stand. Ali tried to lift him and with the help of Hilali and another brother of the deceased referred to as Juma (not a witness and said to have passed on) they took the deceased to St. Mary’s Clinic nearby. They were referred to Kenyatta National Hospital. They decided to take the deceased to Mbagathi Hospital because it was nearer. The deceased was pronounced dead on arrival at the Hospital. The accused is said to have left the scene.

The matter was reported at Kilimani Police Station on the same day 18<sup>th</sup> August 2013. The police visited the scene and recovered playing cards from a dustbin (Ex. 4) and the shoes said to belong to the accused (Ex. 3). The body of the deceased was taken to the City Mortuary. It was examined by Dr. Bernard Midia on the same day. The doctor’s findings are that the deceased died due to blunt trauma to the neck consistent with strangulation as shown in the Post Mortem Report produced in court as Exhibit 2.

The court analysed the evidence by the prosecution and formed the opinion that it establishes a prima facie case against the accused. He was placed on his defense. The accused was the sole witness for the defense and in his statement given under oath, he denied killing the deceased. He testified that he and the deceased were friends and that during the period in issue he had been preparing movie videos for the deceased. He testified that on 18<sup>th</sup> August 2013 at about 10.00pm he was going home from a workshop about 150 meters from deceased’s house; that as he passed by the deceased’s house, the deceased called him and told him to wait for him inside a room; that the deceased returned and found him seated on the edge of one of the beds near the door; that the deceased stood in front of him and asked him why he (the accused) was joking with him (the deceased); that the deceased closed the door and pushed the accused down as the accused tried to stand; that the accused fell down; that the accused started screaming for help calling deceased’s brother and son and that the deceased held him on the middle from behind while struggling.

He testified further that the door was pushed open by force and hit both of them; that both fell down with the deceased still holding him; that Hilali and Ali, deceased’s son, entered the room and the deceased told his son to remove items including money from accused’s pocket; that he gave the deceased money and the deceased released him; that the deceased was struggling to breathe and his relatives accused the accused of having attacked him and told him to leave. He said that he left the deceased alive and well and that the deceased’s brother took his shoes from him.

I have carefully examined and analyzed all the evidence on record. Other than Hilali, Ali and Hidayya who were at the scene, all the other prosecution witnesses were not present. Halima Mzee Muthami, PW4), sister to the deceased was away in Buruburu that evening. She received a call about the death of the deceased and travelled back to Kibera. Yusuf Mzee Ali, PW4, brother to deceased, was away on night duty as a guard at Kibera Girls’ Soccer Academy when the incident causing the death of the deceased occurred. He too was informed about it after the fact. Dr. Joseph Maundu, PW5, produced the report on behalf of Dr. Kamau, certifying that the accused had been examined and found mentally stable to stand trial. Dr. Bernard Midia, PW7, examined the body of the deceased and confirmed the cause of death as blunt trauma to the neck consistent with strangulation. CPL Dickson Gitonga Nthiga, PW8, took part in arresting the accused and PC Wesley Sigei, PW9, investigated this case.

I have also read with care and considered rival submissions by counsel. Ms Ikol for the prosecution urged

that the prosecution has proved its case beyond reasonable doubt that the accused who was the only person inside the house with the deceased is the only person who could have strangled the deceased and that the accused must have known that by strangling the deceased, it would cause death or grievous harm to him. On the other hand, Mr. Genga for the accused submitted that the prosecution has failed to prove the case against the accused beyond reasonable doubt. He submitted that no other witness save for PW2 who testified to finding the accused strangling the deceased. He submitted that PW2 contradicted himself by stating that he found the deceased unable to talk and that the deceased told him to pick Kshs 500 from the accused's pocket. He further pointed out the contradictions between the evidence of PW1 and PW2 who testified that they found the deceased alive while PW9 the Investigating Officer testified that death of the deceased was instant. Mr. Genga further submitted that the accused did not intend to go to deceased's house and that he went there because the deceased had called him and started demanding Kshs 500 from him. Counsel submitted that the accused could not have intended to kill the deceased when he was aware that the relatives of the deceased were present. He submitted that the prosecution has failed to prove motive which been relevant to show that the accused had intended to kill the deceased. Counsel urged the court to find the accused not guilty and acquit him.

There is no dispute that the deceased died. This fact has been proved by the evidence of Dr. Midia who examined the body of the deceased and concluded that the cause of death was blunt trauma to the neck consistent with strangulation. The only issues for determination therefore are whether the accused caused the death of the deceased and whether he had intended to cause that death.

The defense of the accused is that he was struggling with the deceased after the deceased held him and that both fell down face up after they were hit by the door after it was forcefully pushed open. He said that the deceased was hit by the bed and injured.

I have no doubt in my mind, going by the evidence of Hilali, Hidaya and Ali that they were attracted by the loud voice of the deceased demanding money from the accused. The three witnesses knew the accused as a friend of the deceased. They all referred to the accused by his nickname "Jonte". Ali knew both his father the deceased and the accused were inside the room playing cards. When the door of that room was opened Hilali also saw the accused inside the room with the deceased. Hidaya too told the court that she saw the accused inside the house. Hilali testified that he confronted Hidaya and her sister Amina and told them to return to their room. It is not clear therefore whether they returned to their room before they saw the accused and the deceased. That the accused was inside the room with the deceased is admitted by the accused himself so it is not in dispute. Whether the accused had been invited to that room by the deceased or not I have no doubt that both of them were inside the room. I also do not doubt that they had a dispute over money.

Ali was categorical that he found the accused strangling his father. Hilali found Ali holding the deceased and the deceased was foaming in the mouth. The accused was standing inside the room. Although the evidence that the accused was found holding the deceased by the neck strangling him is evidence of a single witness, Ali, I have examined it with care and find that it is cogent evidence. This evidence is confirmed by that of Hilali who arrived at the room immediately and found Ali holding the deceased and the accused inside the room standing. It is also confirmed by the evidence of both Ali and Hilali that before Ali broke open the door both had heard the deceased demanding money from the accused. Besides, the accused and the deceased were the only two people inside that room before Ali and Hilali joined them. The injuries sustained by the deceased have been confirmed by Dr. Midia. The evidence by Ali that the deceased was held by the neck causing blunt trauma that led to his death was corroborated by that of the doctor who confirmed death by strangulation. I am therefore doubtful of accused's defense that both he and the deceased fell face upwards with the deceases holding him from behind. His narrative in defense does not explain how the deceased sustained injuries to the neck. These were deep injuries to the neck. Dr. Midia captured this in his evidence as follows:

***"There was a medial bleed around the neck and within the muscles around the base of the neck. The amount of bleed was extensive. Deeper in the neck around the spinal column there was bleed within the tissues around the cervical spine (round the neck). I came to [a] conclusion that this was significant blunt trauma to the deceased that was consistent with strangulation."***

It is clear to me therefore that these injuries are not consistent with a fall as the one described by the accused. It cannot be true that the deceased sustained deep injuries around his neck from a fall. It is therefore settled that the accused caused the injuries suffered by the deceased.

I have considered the issues raised by the defense counsel in submissions. On the issue of the shoes, the evidence from both the accused and Ali is that the accused left both his shoes. The accused said Juma the brother to the deceased who is also deceased removed both shoes from him but Ali said that the accused removed his shoes and left them. This evidence is not clear but from the admission by the accused that he left his shoes after Juma removed them from his feet, I have no doubt in my mind that the shoes in issue are the same ones identified in court and produced as Exhibit 3. The lack of clarity as to whether the accused removed them and left them or whether it is Juma who removed them is a minor issue that does not negate the fact that the accused was inside the house with the deceased and that he caused the injuries to deceased's neck that culminated in his death.

I have also considered the issue raised by the defense in respect of the evidence of Ali. Ali testified that the deceased could not speak but also contradicted himself and said that the deceased asked him to remove Kshs 500 from accused's pocket. This is a minor contradiction in my view that does not affect the overall evidence that the accused caused injuries to the deceased.

Another issue raised by the defense is that the evidence of Hilali and Ali that the deceased did not die at the scene is contradicted by that of the Investigating Officer who testified that death of the deceased was instant. I have considered the evidence of the Investigating Officer. It leaves a lot to be desired. It is obvious that he did not do a thorough job of investigations. However, since the contradictions are from a witness who was not at the scene until after the fact, it is in my view not fatal to the prosecution case.

Turning to the remaining issue whether the prosecution has proved malice aforethought, it is my view that any person who holds another person by the neck and applies pressure on the neck must know that his actions may cause death at the very worst or grievous harm at the very least. Any pressure applied to the neck deprives the victim the ability to breathe leading to malfunction of some of the vital organs in the body. The effect of this to the body could be fatal. I cannot help but wonder what rage had possessed the accused to attack the deceased in such a brutal manner. He must have applied excessive force for him to have caused such deep injuries to the neck. I am convinced that the actions of the accused in holding the deceased by the neck and squeezing so forcefully as to cause the trauma to the neck as described by the doctor falls under the definition of malice aforethought as contained under Section 206 of the Penal Code. In my view this ingredient of murder, just like the others, has been proved beyond reasonable doubt.

The defense of the accused cannot be true. He raised it as an afterthought since he did not cross-examine the prosecution witnesses about it. Further, since Ali is said to have broken the door to gain entry and the force of the door is said to have pushed the deceased and the accused to fall down while the deceased was still holding the accused according to the defense, it was probable that Ali would have witnessed this. He was not cross examined about it and his evidence that he found the accused holding the deceased by the neck strangling him has not been shaken by the defense.

In conclusion, I am satisfied that the prosecution has proved all the ingredients of murder against the accused beyond reasonable doubt. Specifically, the prosecution has proved that the death of the deceased occurred as a consequence of an unlawful act (strangulation) perpetrated by the accused with malice aforethought. Consequently, I record a finding that the accused, John Bosire Angwenyi, is guilty of the murder of the deceased Hussein Muriuki Mzee. He is hereby convicted of the crime of murder as charged. Orders shall issue accordingly.

**Delivered, dated and signed this 18<sup>th</sup> day of January 2018.**

**S.N. Mutuku**

**Judge**