



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 40 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MUTEMBEL.....1ST ACCUSED

DOMINIC KABERIA.....2ND ACCUSED

ERICK MUTHOMI.....3RD ACCUSED

J U D G M E N T

1. **PATRICK MUTEMBEL, DOMINIC KABERIA** and **ERICK MUTHOMI** (hereinafter “the Accused”), have been charged with the offence of murder contrary to *Section 203 as read with Section 204 of the Penal Code*. The particulars of the offence being that on the 8th March, 2012 at Mukululu Location in Igembe South District within Meru County, jointly with another not before court, the accused murdered JAMES KABERIA. They pleaded not guilty to the charge and the prosecution called six witnesses to establish its case against them.

2. **PW1 Festus Bariu** testified that on the material day at around 7.00 pm as he was walking towards Mukululu, he met four people and one was lying on the ground. He identified the four people as the three accused and one Henry Mugo. The deceased was lying on the ground at the time. Apart from two motor cycles which passed by, there were no other lights. He stood there for a few minutes and inquired about the deceased’s condition. Those present told him that the deceased was drunk whereby **PW1** decided to leave the scene and head home. The next morning as he was headed to work, he passed at the scene and observed that people had gathered there and the deceased was still lying there naked. He later learnt that the deceased had died.

3. **PW2 Sabina Ciolua** is the wife of the deceased. She told the court how her husband failed to return home on the night of 6th March, 2012. On the morning of 7th March, 2012, she received a call from the deceased’s sister (**PW4**), who informed her that the deceased was lying on the road. She accompanied **PW4** to the scene together with a brother of the deceased and took him to hospital. He had fractured his right leg on which a plaster cast was put and had a stab wound on the right eye which was bandaged at the hospital. After treatment, they took him home. Due to pain, the deceased was not talking.

4. At about 10.00 pm, the deceased spoke and told her that it was the accused and Henry Michubu who had beaten him. The following morning the deceased was in great pain whereby his brother and **PW4** took him to hospital where he was pronounced dead on arrival. **PW2** informed the chief and reported the matter to Maua Police Station. She did not know of any grudge between the accused and the deceased.

5. **PW3 Samuel Kainga Ngera** was an Assistant Chief at Mcaruba sub-location at the time of the incident. On the 8th March, 2012, he received a report from community policing that the deceased had been murdered. He asked that investigation be done with the help of community policing. He later found that the community policing had arrested the 1st Accused. The others were also arrested and taken to the police station.

6. **PW4 Charity Kawira** is a sister to the deceased. She recalled having received information that that her brother was lying on a road half naked and beaten up. She went to the scene and found that the deceased looked beaten. She also found **PW2** and one of her brothers who is now deceased. They took the deceased to hospital. While at the hospital, the deceased asked for water and thereafter started talking. He informed her and the other deceased brother that he had been involved in a fight with the Accused and Henry Mugo. After treatment, he was discharged but the following day, his condition worsened and was returned to hospital where he died. She reported the matter to the police. A month later she heard that the accused persons had been arrested by the community policing.

7. **PW5 NO. 65301 PC Albanus Kivilu** was the investigating officer. On 8th March, 2012 at about 11.00am, he booked the report of the murder of the deceased from **PW4** and Stanley Mithika. He also accompanied the deceased’s relatives for the post-mortem. Later, the assistant chief for the area brought him five witnesses, being **PW2, PW3, PW4**, Faith Mbacha and Stanley Mithika. That the said witnesses

implicated the accused in the murder of the deceased.

8. **PW6 Dr. Thakumu C. Mwiraria** performed post mortem on the body and produced the post mortem report as **PEXh1**. The body had bruises on the lateral side of the right thigh, anterior abdominal wall, chest wall and on the back. He also had a compound fracture of the tibia, haematoma in the pelvic wall and swollen kidneys. He formed the opinion that the cause of death was cardiopulmonary arrest, secondary to renal shutdown due to massive bleeding.

9. When placed on their defence, the accused gave sworn testimonies and called one witness. The **1st Accused** testified that he was a carpenter and that on 6th March 2012, he was at Martin's home building a house. At 6.00 pm he left and went to the canteen at Mukululu where he left at 7.00 pm and retired to his home. He did not see anybody on his way home. He also denied either being with any of the co-accused or assaulting the deceased. He knew the deceased by appearance and not by name and they had no grudge.

10. The **2nd Accused** told the court, that on the material day, he was at Mtube stage packing up miraa to take to Muringe. He left the stage at 4.00 pm to take the miraa to the market at 6.00 pm. He left there at 9.00 pm. On his way home, he never saw anyone nor was he in the company of any of his co-accused. He did not have any dispute with the deceased. He was with people in the market but did not wish to call any of them as a witness.

11. The **3rd Accused** testified that on the material day, he was selling miraa at Kangeta market. He left at 9.00 pm and went to Joseph's hotel. At around 8.00 pm he left and went home to sleep. He denied being with any of his co-accused. He also denied seeing or beating the deceased on the material day.

12. **DW2 No. 48469 PC Peter Muli** is stationed at Maua Police Station. He was sent by the OCS Maua Police Station to present a signal touching on the matter in question of which he produced as an exhibit. He told the court that there was a fire breakout which burnt down the police building and store and all that was inside. The police belongings and documents like OBs were destroyed. That those destroyed included the Occurrence Books for 8th, 12 and 14th March, 2012, respectively. The Signal, however did not have the particulars of the OBs that were destroyed in the subject fire.

13. The offence of murder is defined under section 203 of the Penal Code as :-

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

14. From the above definition, in order to prove the offence of murder, three ingredients must be established. These are; proof of the fact and the cause of death of the deceased; proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused and finally, proof that the said unlawful act or omission was committed with malice afterthought.

15. This being a criminal case, the onus is on the prosecution to discharge the burden of proof beyond reasonable doubt. This was explained in the case of **Miller v. Minister of Pensions [1947] 2 All E.R. 372** where it was held

“It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable.” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

16. With regard to the first ingredient of the fact and cause of death of the deceased, **PW2** and **PW4** testified that on 7th March, 2012, they found the deceased with injuries on his leg and eye. They took him to the hospital where he was treated and discharged on the same day. The following day, he was taken to hospital but he unfortunately died on arrival.

17. The body of the deceased was taken to the mortuary and a post-mortem was done in the presence of **PW4**, **PW5** and Stanley. **PW6** produced the report which showed the cause of death to be acute kidney failure due to excessive bleeding in the internal organs. The bleeding was as a result of the injuries the deceased had sustained. I am therefore satisfied that the prosecution had established ingredient to the required standard.

18. On the second issue, the prosecution bears the burden to prove that it was the accused that committed or omitted the act that led to the death of the deceased. This, the prosecution must establish beyond any reasonable doubt.

19. The evidence on record is that on the material day, while on his way home from work at about 7.00 pm, **PW1** found the deceased lying on the road and he was in the company of the accused and a fourth person. He spoke to them and they informed him that the deceased was only drunk. The next morning, the deceased was found at the scene lying by the roadside half naked with injuries on his leg and was bleeding from the eyes. While in hospital, the deceased told **PW4** that the accused and Henry Mugo had attacked him. Later that night, the deceased repeated the same thing to his wife, **PW2**.

20. On the other hand, all the accused testified that on the material day neither of them was with each other nor saw the deceased. They were at various places where they were with other people.

21. In his testimony, **PW1** was categorical on what and whom he saw on the material night at the scene where the deceased was found the following morning with injuries. **PW1** spoke to the accused and they told him that the deceased was drunk. After the incident, although the accused were arrested, Henry Mugo who is said to have been with the accused disappeared and had not been apprehended as at the time the

matter was being tried.

22. There was no reason for **PW1**, whose testimony remained firm, to frame the accused. His testimony placed the accused at the scene. They were the last people to be seen with the deceased.

23. On the other hand, the deceased was said to be in extreme pain on the 7th March, 2012. He was not talking for some time. When he spoke, he asked for water and told **PW4** and **PW2** separately, that he was beaten by the accused and Henry Mugo. The deceased passed on the following morning.

24. **Section 33 (a) of the Evidence Act Chapter 80 Laws of Kenya** provides:

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–

a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

25. In the case of **Philip Nzaka Watu v Republic [2016] eKLR**, the Court of Appeal held that:-

“Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

26. **PW1** stated that he found the accused with the deceased who was lying on the ground. He spent about five minutes there to confirm whether the deceased was unwell or drunk. He spoke to the accused who told him that the deceased was drunk and he decided to leave the scene. When **PW2** found the deceased the following morning, the deceased was smelling alcohol.

27. A dying declaration must be taken with caution as it is usually devoid of the test of cross-examination. The circumstances of the attack must also be considered. A sudden and vicious attack might surprise a person so as to cause him confusion.

28. In the present case, the deceased named the accused to two people, **PW2 and PW4** at two separate instances. **PW1** placed the accused at the scene where the deceased was found in the morning of 7th March, 2012 with the injuries from which he succumbed. The circumstances are that the dying declaration of the deceased was corroborated by the testimony of **PW1** in this case.

29. Since nobody witnessed the accused assault the deceased, the prosecution case was purely circumstantial. In **ABANGA alias ONYANGO V. REP CR. A. NO. 32 of 1990 (UR)** the Court of Appeal set out the principle to applicable when to rely on circumstantial evidence. The Court held:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

30. This court is alive to the fact that however strong a suspicion is, it cannot found a conviction. In this case, **PW1** saw the accused with the deceased on the night of 6th March, 2012. The following morning, the deceased was found at the same place with injuries from which he died. The deceased told both **PW2 and PW4** that it is the accused with one other person who had beaten him. The accused’s defence was a mere denial which did not displace the strong case that had been established by the prosecution against them. They narrated how they were at different places on the material time with different persons whom they chose not to call as witness. Accordingly, I am satisfied that it is the accused who caused the death of the deceased.

31. The third issue is with regard to proof that the said unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence. **Section 206 of the Evidence Act** defines what constitutes malice aforethought

32. The deceased had multiple injuries which inclines that the person(s) who committed the act wished to cause him grievous bodily harm. By inflicting the serious injuries on the deceased, the accused intended to cause him grievous harm. They knew or intended that the injuries inflicted on the accused would cause his death.

33. Accordingly, I find that with malice aforethought, the accused caused the death of James Kaberia and I convict them of the offence of murder.

DATED and DELIVERED at Meru this 30th day of May, 2018.

A. MABEYA

JUDGE