



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 40 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MUSEMBI NZIOKI.....1ST ACCUSED

FESTUS MUTUA.....2ND ACCUSED

J U D G M E N T

1. **Musembi Nzioki and Festus Mutua Nzioki**, hereinafter the 1st and 2nd Accused person respectively are charged with the offence of **Murder** contrary to **Section 203** as read with **204** of the **Penal Code**. Particulars of the offence are that on the **21st day of June, 2014** at **Matithini Village, Kyanika Location** in **Nzambani District** within **Kitui County**, jointly with others not before Court, murdered **Shadrack Kasee Nzioki** (Deceased).

2. Facts of the case are that on the **21st day of June, 2014**, PW1 **Elijah Kitemi** was asleep inside his house with his wife, PW3 **Josephine Kiteme** when they were woken up at midnight by their aunt **Naomi Musembi** who gave them information about his brother, the Deceased. They ran to the nearby **African Inland Church** and found the two (2) Accused persons assaulting the Deceased amidst accusations of being guilty of theft. One **Joshua Mwaniki** arrived and assaulted him on the neck. In the meantime the matter was reported to the police. PW2 **No. 86255 Corporal Julius Kibet** of Nzambani Police Station got a call from the police at Kitui Police Station regarding a suspect who attempted to break into the **Matindini African Inland Church**. He went to the scene and found the Deceased already injured. The crowd dispersed. Only PW1 identified himself as the Deceased's brother. The Deceased was taken to Hospital for treatment. Being a suspect he was taken to the police station. However, his condition deteriorated whereafter he was taken to Kenyatta National Hospital where he was admitted. Five (5) days later, he died. Investigations were carried out that culminated into the Accused being arrested and charged.

3. When put on their defence the 1st Accused stated that on the night of **21st June, 2014** he returned from school where he used to teach having passed by his favourite pub and slept. The following day he got information that his nephew had been beaten as he attempted to break into the church. To the best of his knowledge his nephew was away in Garissa. A day after, some two (2) gentlemen who went to his home and introduced themselves as police officers sought to know why he did not follow up the matter. He was prompted to notify his sister the mother of the Deceased who lived in Garissa. She gave him **Kshs. 200/=** that he used to reach Kitui District Hospital but found the Deceased having been taken to Kenyatta National Hospital. Four (4) days later he learnt from his sister the passing on of the Deceased. He denied having disagreed with his nephews.

4. The 2nd Accused stated that he heard screams at midnight. He went to the church to find the Deceased having been made to sit down. He sought to know when the Deceased returned from Garissa but he did not answer him. The police took him away.

5. At the close of the case, the defence sought to rely on submissions filed at the close of the Prosecution's case.

6. This being a case of murder the Prosecution had a duty of proving:

- i. The fact of death of the Deceased.
- ii. The cause of death.
- iii. That the death was caused by the Accused.
- iv. That the unlawful act or omission that resulted into the death was committed with malice aforethought.

7. The body of the Deceased was examined by PW5 **Andrew Kanyi Gachie**. It had external injuries. There were multiple bruises on the face, both the upper and lower limbs. Internally the left 7th – 10th ribs were fractured. The trachea mucosa was hyperemic and lungs were congested. On the nervous system the Doctor noted multiple intra-cerebral haemorrhage with signs of raised intracranial pressure. He opined that the cause of death was the head injury due to blunt force trauma. The fact of death was not in dispute.

8. It is not in doubt that the Deceased was found near a church at about midnight. When the incident occurred both PW1 and PW3 eye-witnesses had retired to bed. On being woken up they ran to the scene and witnessed what transpired. PW1's evidence that both the Accused had sticks that they were using to hit the Deceased whom they accused of pretending to be of unsound mind as he stole people's properties was confirmed in material fact by the evidence adduced by PW3.

9. They mentioned a third individual that they saw assaulting the Deceased, one **Joshua Mwaniki**. It was argued by the defence that failure to avail the person in the case by the Prosecution entitled the Court to draw an adverse inference that the Accused could not be linked to the offence. They cited the case of **Republic vs. Ndegwa Juma Iddi (2014) eKLR** where **Odero J** stated thus:

“The fact that the prosecution failed to produce this witness in court persuades me that he would not have confirmed these claims linking the accused to the murder. The court is entitled to draw an adverse inference from the failure by the prosecution to avail this witness.”

It is worth noting that the alleged individual was mentioned as an accomplice to the act of assault. He allegedly participated in the act of assaulting the Deceased who by then was helpless.

10. It was further argued that their allegation that they saw **Joshua Mwaniki** cut the Deceased on the neck was disapproved by evidence adduced by PW5 who did not observe such an injury. Per the postmortem report, the head on the scalp had contusion. There was no mention of the neck. The argument of the defence was that the contradiction has raised serious doubts if the witnesses were at the scene. In the **Ugandan** case of **Twehangane Alfred vs. Uganda Criminal App. No. 139 of 2001 (2003) UGCA 6** the Court stated that:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

11. The incident happened at night, PW2 stated that when they arrived at the scene people dispersed. Only PW1 volunteered the information that they got. DW2 stated that he was at the scene but he did not engage the police. The intensity of security lights that were at the church that aided witnesses in seeing was not given. In the course of the scuffle, it was possible for witnesses to tell that the blow landed on the neck when indeed it was on the head that was injured. Such a minor contradiction would not make the Court dismiss evidence adduced as untruthful or form an opinion that the act did not occur and the witness was not at the scene.

12. The Prosecution called evidence to the fact that the Accused persons were not the only ones that participated in the act that resulted into injuries sustained by the Deceased that he succumbed to. For instance **Joshua Mwaniki** was mentioned. In particular, the Accused were stated to have been armed with sticks that they used to hit the Deceased.

13. PW2 found the Deceased having been tied and people dispersed such that they could not give him any information. Only PW1 availed himself and at the outset he mentioned the Accused as some of the people who had assaulted the Deceased. In his defence the 1st Accused denied having been at the scene of the incident on the fateful night.

In the case of **Republic vs. Sukha Singh s/o Wazir Singh and Others (1939) 6 EACA 145** the East African Court of Appeal stated that:

“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 earlier possible moment it will give prosecution the opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

14. Throughout the Prosecution's case it was not alleged that the 1st Accused was elsewhere at the time the Deceased was being assaulted. Therefore his alibi defence that was raised at the defence stage is viewed as an afterthought as he did not give the Prosecution the advantage of interrogating the allegation and possibly carry out investigations regarding it.

15. The Accused herein are blood relatives of PW1 and PW3 who were aided by security lights from the church to see. They were well known to them such that they could not be mistaken to their identity. The 2nd Accused admitted having been present but denied having committed the act that resulted into the death of the Deceased. However, PW1 and PW3 were categorical that they participated in assaulting the Deceased whom they accused of theft.

16. A perusal of the entry on the postmortem form by the police clearly show that the Deceased was assaulted by a mob of people. This means that the Accused were not the only assailants of the Deceased. The question to be answered is whether the Accused had a common intention to injure the Deceased. **Section 20(1)** of the **Penal Code** provides thus:

“(1)When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, *and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.*”

17. In the case of **Republic vs. Tabulayenka s/o Kinya (1943) EACA 51** the Court of Appeal stated that:

“.....common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from assault.”

18. In **Njoroge vs. Republic (1983) KLR 197, 204** the Court of Appeal stated that:

“If several persons combine for an unlawful purposes and one of them in the process kills a man, it is murder in all who are present whether they actually aided or abetted, or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object.”

19. The mob that gathered on the fateful night took the law into their hands by administering an injustice to the Deceased. Their action of beating him up was an unlawful act.

20. At the point of assaulting the Deceased, it is stated that the Accused argued that he pretended to be of an unsound mind as he stole people’s property. Therefore, just like other assailants they were responsible for the injuries the Deceased sustained as a result of the assault. The Deceased died some five (5) days later. He succumbed to the injuries he sustained on the 21st June, 2014. They did cause his death (**See Section 215 of the Penal Code**).

21. The question to be posed is then whether they acted with malice aforethought? **Section 206** of the **Penal Code** defines malice aforethought thus:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

—

(a) an intention to cause the 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 a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

22. In the case of **Nzuki vs. Republic (1993) KLR 171** the Court of Appeal held that the Accused must have had:

“ - The intention to cause death .

- Intention to cause grievous harm.

- Where the Accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse It does not matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

23. In his defence the 1st Accused stated that the last time he had seen the Deceased was when he facilitated him to travel to Garissa. That no bad blood existed between them. PW1 on the other hand explained that previously the Deceased had stolen the 1st Accused’s utensils and chicken an act that caused them to beat him up and hand him over to the police. On the material date they accused the Deceased of theft and pretence as they assaulted him.

24. Therefore at the point of assaulting him they were fully aware that their conduct may have resulted into grievous harm.

25. It was argued by the 1st Accused that he escorted PW4, **Mary Nzioki** the mother of the Deceased to the mortuary when she went to

identify the body of the Deceased. That a person who has participated in the murder of the person could not have done so. Looking at the conduct of both Accused persons, they were not concerned after the Deceased was injured. They made no effort of even finding out what happened to him after the police took him away until his mother asked the 1st Accused to try and find out his condition.

26. Evidence adduced proves beyond reasonable doubt that both the Accused had at least the intention to cause the Deceased grievous harm. In the premises they acted with malice aforethought. The case against them is therefore proved to the required standard. They are guilty. Accordingly they are convicted of the offence of **Murder**.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of May, 2018.

L. N. MUTENDE

JUDGE