



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 71 OF 2014

(Formerly Kisii High Court Criminal Case No. 76 of 2013)

REPUBLIC.....PROSECUTOR

-versus-

1. STEPHEN ROBI MARWA

2. DANIEL MARWA BOKE.....ACCUSED

JUDGMENT

1. **Stephen Robi Marwa** and **Daniel Marwa Boke** were jointly charged with the murder of **Solomon Adams Mwita**. It was alleged that on the 12th day of June 2013 at Kurutiange Market, Kuria West within Migori County jointly with others not before Court murdered Solomon Adams Mwita. I will refer to **Stephen Robi Marwa** as '**the first accused person**', **Daniel Marwa Boke** as '**the second accused person**' and **Solomon Adams Mwita** as '**the deceased**'.

2. The accused persons pleaded to the information on 26/06/2013 before **Sitati, J.** in the High Court at Kisii. They denied the offence and a trial was ordered. Before the commencement of the trial, this case was transferred to this Court upon the establishment of a High Court station.

3. In a bid to prove the information, the prosecution called a total of seven witnesses. **PW1** was **Margaret Boke**, a known girl friend to the deceased. **John Sabayo Wandwi** testified as **PW2** and he was a neighbor to **PW1** as well as the deceased. **PW3** was one **Pauline Mogesi Marwa** the wife of the deceased. **PW4** was one **Harun Mwita Makori**, the father to **PW1**. **PW5** was the mother to **PW1**. She was one **Robi Swagi** whereas **Dr. Vitalis K'Ogutu** testified as **PW6** and the Investigating Officer **No. 76041 PC Elias Tanui** testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The evidence of **PW1** and **PW2** was taken before **Hon. D.S. Majanja, J.** who left this Court station before completion of the trial. Upon compliance with **Section 200** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, parties agreed and indeed proceeded with the hearing from where it had reached. This Court therefore took the evidence of the rest of the witnesses.

5. The prosecution's case was that on 11/06/2013 at around 03:00pm as **PW1** returned to her house, where she used to prepare and sell the local brew known as *chang'aa*, she found the first accused person and one Charles Nyamohanga, who is now dead, inside her house. **PW1** thought that they wanted a drink, but they did not ask for such instead they started dismantling **PW1**'s radio and they appeared drunk. **PW1** asked them why they were doing so, and they decided to leave but it was not before the first accused person said that one person was going to die that day; either **PW1** or the deceased whom **PW1** used to live with in her house

6. As **PW1** wanted to go and attend to her tobacco nursery which was at the home of the deceased within the neighborhood, she started walking towards that home after the two left. **PW1** met the two on the road and they stopped her. They told her that they would not allow her to go to her boyfriend's home and instead they demanded that **PW1** must befriend the said Charles Nyamohanga. As **PW1** feared for her life she put down the bucket she was carrying and returned to her home. **PW1** however went to the nursery later.

7. **PW1** was back to her house by around 07:00pm and continued serving her customers until at around 09:00pm when the alcohol got finished and the customers left. **PW1** retired to bed with her boyfriend, the deceased herein and her three children. At around 10:00pm, **PW1** was woken up by a heavy knock at the door to her house and heard voices of three men asking her to open the door. Thinking that they were just normal customers who wanted *chang'aa* **PW1** insisted that she would not open since she had no brew. **PW1** recognized the voices as those of Charles Nyamohanga and the accused persons.

8. The house **PW1** was in was made of mud walls and thatched with rafters. There was some space between the wall and the thatched roof.

As PW1 talked to the three men who insisted that she opened the door and that one person was going to die, one of them passed a bow and an arrow through the space between the wall and the roof. One of them also passed his hand between the wall and the roof and lit the roof and said that PW1 was lucky as he had only carried one matchstick. The roof caught fire, but since it was raining it was burning at such a slow pace. PW1 restrained the deceased from going out of the house as he wanted to face the attackers.

9. As PW1 was adamant and would not open the door, the three people broke it and entered the house. All had small two battery torches and armed with knives, bows and arrows. PW1 saw and recognized the three attackers as the accused persons herein and the said Charles Nyamohanga. She knew all quite well. On seeing the deceased, the three assailants attacked him; stabbing him with the knives and piercing him with the arrows. PW1 screamed but her screams did not attract any attention as it was at night and raining heavily. The deceased fell, and the accused persons left the house. Charles Nyamohanga remained behind and followed PW1 while armed. PW1, while naked, ran out of the house screaming for help. She did not stop until she reached her grandmother's homestead in Nyahora which was quite a distance away. PW1 was afraid to go back home and stayed at her grandmother's place until when she attended the burial of the deceased. She only learnt that Charles Nyamohanga had also died.

10. As PW1 was screaming while running away, her screams were heard by her mother PW5 who readily recognized PW1's voice which was calling for help. PW5 who was asleep with her husband PW4 in her house which was within the homestead peeped through the window and with the aid of a torch saw Charles Nyamohanga bleeding in his face and standing near the house PW1 used to sleep in which house was within the homestead. PW5 quickly rushed outside of the house where she saw the deceased lying on the ground within the homestead and Charles Nyamohanga standing next to him. PW5 raised alarm and Charles Nyamohanga disappeared. PW4 followed PW5 and went to request PW2 to take the deceased to hospital as he was injured and bleeding profusely. PW2 agreed to use his motor vehicle and assist the deceased only to realize on reaching at the scene that the deceased had already died. PW2 carefully observed the deceased and saw an arrow on the left side of the chest and several injuries all over the body of the deceased. PW2 who was accompanied by his wife PW3 knew the relatives to the deceased and he left to inform them of the occurrence. He also reported the matter to Kehancha Police Station while accompanied by some other villagers.

11. As the rains had stopped, the villagers heard the screams and many of them rushed to the scene. The police arrived at the scene around midnight and collected the body of the deceased and took it to Pastor Machage Memorial Hospital Mortuary for preservation and a post mortem examination. The police returned to the homestead the following day where several statements from potential witnesses were recorded.

12. Raged as the villagers were, they got hold of Charles Nyamohanga the day after the deceased had died. They also killed him, and his body was later collected by the police and taken to Pastor Machage Memorial Hospital Mortuary for preservation and autopsy. On 14/06/2013 PW6 conducted a post mortem examination of the body of the deceased. He saw 17 stab wounds all over the body. The heart had been pierced and collapsed. He formed an opinion that the cause of the death of the deceased was the injury to the heart. He filled in a Post Mortem Report and signed it. He produced it as an exhibit.

13. On completion of the investigations the accused persons were arrested, taken for mental assessment where they were found fit to stand trial and were charged. PW7 produced the P3 Forms for their mental assessment as exhibits.

14. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defenses. The accused persons opted for and gave unsworn testimonies. The first accused person discredited the testimony of PW1 and stated that he had a grudge with her which arose from his refusal to pay her debt of Kshs. 400/=. He also wondered how he could have committed the offence if he was helplessly drunk.

15. The second accused person stated that on the 12/06/2013 he went to his work as usual and returned home at around 01:00pm. That, his mother told him the police officers had come looking for him and since he knew he was a law abiding citizen he was accompanied by his mother to the police station only to be arrested despite the police saying that they were looking for one Limo and not himself. He was charged with an offence he knew nothing about. To him, PW1 fixed him out of their bad relationship and the allegation that he had sold PW1's phone.

16. The accused persons closed their cases without calling witnesses and the matter was left to this Court for a judgment.

17. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

18. It is not in dispute that the deceased person in this matter died. That position is confirmed by all the witnesses who testified except PW7 who took over the conduct of the investigations long after the accused persons were charged. The first limb is hence answered in the

affirmative.

19. As to the cause of the death of the deceased, PW6 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. The said report gave the possible cause of death of the deceased as the injury to the heart. Since there is no any other evidence contradicting that of PW6 on the cause of death of the deceased, this Court so concurs with that medical finding.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

20. This issue is aimed at establishing whether the accused persons caused the death of the deceased and if so, whether it was by an unlawful act or omission.

21. The incident that led to the death of the deceased was witnessed by a single witness; PW1. The time was around 10:00pm in the night on 12/06/2013. It was a night of darkness and it was raining heavily. PW1 knew the accused persons as well as Charles Nyamohanga. There is evidence that Charles Nyamohanga had befriended PW1 before the deceased overtook him. PW1 had met Charles and the first accused person at around 03:00pm at her house. The two had dismantled her radio and stated that either PW1 or the deceased was going to die that day. The two again met PW1 as she was heading to the home of the deceased to attend to a tobacco nursery. That was around 04:00pm. They stopped her and forced her to go back to her house. PW1 obliged.

22. PW1 again met the two at night. They were now accompanied by the second accused person. PW1 knew them quite well. They were her regular *chang'aa* customers and had previously dealt with them before. When the three went to PW1's house at night PW1 readily recognized their voices and took time talking to them as they ordered her to open the door. PW1 put on the lights in her house as she was adamant not to open the door. PW1 witnessed them lighting the roof of her house through the space between the wall and the roof. She also saw the bow and arrow which was passed through the space between the wall and the roof. The three people then broke the door and gained entrance. PW1 again saw them inside her house. They were armed with knives, bows and arrows. They jointly attacked the deceased. They stabbed him and pierced him with an arrow and the deceased fell. The accused persons then left Charles behind. PW5 also saw Charles who later disappeared. PW1 gave a very vivid account of how the ordeal took place.

23. On that background, this Court is under a legal duty to weigh the evidence of PW1, who is the sole identifying witnesses, with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

24. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

25. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

26. I have carefully addressed my mind to the facts and the law in this case alongside the defenses tendered. It is not in doubt that the accused persons were well known to PW1 being regular customers. PW1 had seen and talked to the first accused person twice during the day. It was hence the third time for PW1 to see and talk to the first accused person in the night of that day. Further, there was nothing that came to the fore to demonstrate that PW1 was mistaken on the voices of the accused persons or hindered the lighting inside the house. The testimony of PW1 was not shaken on cross-examination.

27. I have also considered the defenses. None of the accused persons denied knowing PW1. They all alleged grudges with PW1 due to their past dealings. Although the accused persons through their Counsel cross-examined PW1 on the alleged past dealings nothing came up that raised any reasonable doubt on the evidence of PW1. I find and hold that the defenses did not shake the prosecution's case.

28. Having cautioned myself on the dangers of relying on single-witness-evidence and in the circumstances of this case, I am satisfied that the evidence of PW1 on the recognition of the accused persons was water-tight and the defenses did not outweigh or create any reasonable doubts on that evidence. The accused persons were hence positively identified by recognition as the attackers, together with Charles Nyamohanga, who caused the death of the deceased. Their names were also readily given by PW1 (See the Court of Appeal case of **Simiyu & Another vs. Republic (2005) 1 KLR 192**). The identification was hence free from error. Needless to say, the joint acts of the accused persons were contrary to law and had no justification. The second ingredient is therefore answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice aforethought:

29. I will now consider the third limb as to whether there was malice aforethought on the part of the accused persons in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

“206. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

30. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

My Lordships in the above case went on to say that: -

*“In the case of **Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR)**, the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -*

*“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See **Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR**...”*

31. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known orought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances, we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”

32. In this case there is evidence that Charles Nyamohanga had befriended PW1 before the deceased overtook him. Charles was visibly unhappy and took steps to reverse the trend. On the fateful day, Charles and the accused persons were determined to end the relationship between the deceased and PW1 and made their intentions so clear in all the three instances they met PW1. They told PW1 that one person was to die that day; either the deceased or PW1. As early as 03:00pm there seemed to have been a deliberate effort to provoke the deceased through PW1. The radio belonging to PW1 was dismantled inside the house of PW1 and also PW1 was forced to return to her home as she was going to the home of the deceased.

33. The accused person together with Charles then armed themselves with knives, bows and arrows and went to PW1's house. They were well aware that the deceased used to stay with PW1 in PW1's house. There was an altercation between the three and PW1 at PW1's house as PW1 refused to open the door to her house. Determined to get hold of the deceased, the accused person and Charles torched the roof of PW1's house. Since it was raining, the fire on the roof was not spreading as they desired and the three instead broke into the house. On coming face to face with the deceased, they did not waste any moment. They jointly pounced on him and stabbed him with the knives they had carried and the bows and arrows. When the deceased fell, they knew they had accomplished their mission and the accused persons left as Charles pursued PW1.

34. It is therefore obvious that the accused persons and Charles were fully aware that death or grievous bodily harm will ensue from their joint venture. They had hence planned to kill or severely injure the deceased. I say so further to the number of times the deceased was stabbed. They were 17 times. A person cannot stab another 17 times all over the body and expect nothing less than death to occur. There is also the position of the injuries. In as much as the injuries were all over the body the heart had been pierced and it collapsed. The accused persons and Charles also attacked the deceased without any evidence of provocation or acting in self defence. There is therefore a clear manifestation of their intention to kill the deceased. Malice on the part of the accused persons and Charles was hence well demonstrated. This Court hence finds that the prosecution likewise proved malice aforethought in this matter.

35. As the prosecution has proved all the ingredients of the offence of murder against the accused persons, this Court now finds **STEPHEN ROBI MARWA** and **DANIEL MARWA BOKE** guilty of the murder of **SOLOMONS ADAMS MWITA** and each of them is hereby convicted accordingly under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Nyakweba Counsel for the Accused persons.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant