



**KTI.NO.364/2018**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL CASE NO. 62 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHRISTOPHER WALTA.....1<sup>ST</sup> ACCUSED**

**LEONARD LAGAT.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

1. **Christopher Walta** (1<sup>st</sup> Accused) and **Leonard Lagat** (2<sup>nd</sup> Accused) are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **1<sup>st</sup> day of May, 2014** at about **10.00 a.m.** at **Nzangathi AP Camp, Kyalele Location in Kitui County**, murdered **Mwangangi Mwanzui** (Deceased).

2. Facts of the case are that on the **1<sup>st</sup> day of May, 2014**, the Deceased was arrested and taken to the Administration Police Camp following allegations of theft of his mother's crop and creating a disturbance. He was assaulted until he lost consciousness and ultimately died.

3. To prove the case the Prosecution called ten (10) witnesses. PW1 **Ruth Mwanzia**, the mother of the Deceased disagreed with him because he was stealing from her. She testified that after they took the Deceased to the AP Camp, the police took him into custody and used whips to assault him. He lost consciousness and passed on. She identified the Accused persons as officers who beat up her son. On cross-examination she stated that the Deceased had been stealing her crops for a duration of five (5) years. Previously she reported the incidents to the village elders, chairman of their clan and area Chief. A Community Policing agent known as **Mutema Matheka** and his brother were involved in the arrest of the Deceased. The Deceased who was known to be violent was restrained with ropes. She denied the allegation that the Deceased was taken to the Administration Police Camp after being assaulted and that the Accused persons declined to take the Deceased into their custody as he was already beaten up. She concluded that the Deceased passed on while outside the AP Offices after the Accused persons tried giving him glucose to lick but he could not.

4. PW2 **Josiah Muema Muthuka** a cousin of the Deceased who received a Complaint from PW1 stated that they restrained the Deceased with ropes and took him to the Administration Police Camp. They handed him over to the 2<sup>nd</sup> Accused who caused them to untie him. He was handcuffed and taken inside the office where he saw through the window the Deceased being beaten by the two (2) Accused persons for about two (2) hours. On realizing that the Deceased was in a bad state the 1<sup>st</sup> Accused carried him outside the office. They advised them to buy for the Deceased lucozade but by the time it was brought it

was too late for he was unconscious.

5. PW3 **Dr. Patrick Mutuku** conducted the autopsy on the body of the Deceased.

6. PW4 **Munyao Mbungu** identified the body of the Deceased to the Doctor who performed the postmortem.

7. PW5 **Raphael Mbuvi**, Chief, **Kyalele**, stated that he initiated the arrest of the Deceased following the complaint that he received from his mother. He was at the AP Camp when the Deceased was taken there. As he presided over another case the Deceased was taken to the office of the District Officer where he was beaten by both Accused persons. He left going home as they assaulted him. At **2.30 p.m.** he learnt of the Deceased's demise. He reported the matter to the OCPD who caused the police to collect the body from the scene and also record statements from witnesses.

8. PW6 **Nzule Mutua** of 'Nyumba Kumi' initiative participated in the arrest of the Deceased. It was her evidence that the two (2) Accused persons beat up the Deceased. By the time they took him outside the office he was overwhelmed. He died before they carried him away.

9. PW7 **Mutua Mwanzi** a brother of the Deceased was one of the persons who took the Deceased to the D.O's office having tied up his hands. He stated that while 30 metres away he saw the Accused persons beating up the Deceased.

10. PW8 **Monica Salim** stated that she followed her family members on hearing that the Deceased had been apprehended. She witnessed when the Accused persons assaulted the Deceased using rubber whips. At the point of taking him outside he was not stable as he could not walk properly. He was thirsty, he asked for water that he was given by the Accused. She prayed for him and he died.

11. PW9 **No. 64510 Corporal Livingstone Katui** of Scenes of Crime Support Section visited the scene and took photographs that he adduced in evidence.

12. PW10 **No. 235382 I P Peter Munene** investigated the case and formed the opinion to charge the Accused persons.

13. When put on their defence, the 1<sup>st</sup> Accused denied having committed the offence. He stated that on the material date he was on duty at the **Nzanghati Division**. He worked until **10.00 a.m.** when he left going to the shopping centre. While there he got a telephone call from **Mr. Raphael Mbuvi**, the Chief, informing him that he was required as a suspect had been taken to the AP Division following allegations of stealing. He returned to the station and found the person whose hands had been tied with sisal ropes. The Complainant was stated to be the suspect's mother. The suspect who sat under a tree outside the office said he was in pain. He asked for water to drink. He advised the people to take him to hospital. They complied, on reaching the gate he saw people giving him milk. Then upon reaching the stage he saw people turn back. They carried the person back to the precincts of their offices saying the person seemed to have passed on. They put him on the ground. He rang the Chief Inspector of AP, **Nzambani Sub-County** (The District Administration AP Commander) and reported the incident. The OCPD, **Nzambani**, moved to the scene at **4.00 p.m.** and recorded statements from them. He ordered them and his co-accused to leave the station. They were to continue discharging their duties from the Sub-County Headquarters. They worked for three (3) months until **24<sup>th</sup> July, 2014** when they were ordered to report to the OCPD Kitui where they were arrested and subsequently charged.

14. The 2<sup>nd</sup> Accused similarly denied the charge. He stated that while on duty as a Sentry Officer he saw a group of people, one of them was restrained with sisal ropes. The person who was being pushed was alleged to have assaulted his mother and was also a thief. The only person he knew among the crowd was the Chief, **Raphael Mbuvi**. He interrogated the suspect who said he was in pain. He held his abdomen as he asked for water. His co-accused the in charge had gone to the market. The Chief rang him so that he would address the problem. The suspect was frail. He handed over the case to the 1<sup>st</sup> Accused when

he arrived. He advised the people to take him to hospital as they could not accept him in custody. He denied having taken the person into custody and stated that he did not make any entry in the Occurrence Book. When the people ultimately decided to take him to hospital they walked a distance of 50 metres and the person fell down. They carried him back to the camp and said that he had died. When the OCPD arrived and recorded statements from witnesses it was alleged that they (Accused persons) were at fault for causing the death of the Deceased. They were re-deployed immediately. They worked for three (3) months prior to being charged.

15. **Section 203** of the **Penal Code** defines **Murder** thus:

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

16. The Prosecution has a duty of proving ingredients of murder namely:

(a) That death occurred.

(b) That the Accused committed the act that caused the death of the Deceased.

(c) That the unlawful act/omission that resulted into the death of the Deceased was with malice aforethought (**Also see Republic vs. Andrew Omwenga (2009) eKLR**).

17. All witnesses who testified, the Accused persons inclusive stated that the Deceased passed on prior to being taken to any medical facility. Thereafter, a postmortem was carried out on the body of the Deceased by PW3 **Dr. Mutuku**. He confirmed the death of the Deceased. This was proof that death did occur.

18. Witnesses who testified were eye witnesses. PW1, PW2, PW6 and PW7 who were relatives of the Deceased confirmed that he was a habitual offender and would become violent. For that reason they restrained him using ropes and took him to the Administration Police Camp. They were emphatic that on arrival at the AP Camp, the Deceased was assaulted by the Accused persons. His mother PW1 begged them to stop but they disregarded her plea. PW5 who ordered the arrest of the Deceased was at the District Officer’s office when the Deceased was handed over to the Administration Police. He was not a relative of the Deceased but a Law Enforcer and/or Administrator who worked with the Accused persons. He stated that it is the 2<sup>nd</sup> Accused who pulled the Deceased into the office and started beating him at the outset while he (PW5) handled a matter with the 1<sup>st</sup> Accused in a nearby office that was opposite the one the D.O. used to occupy in which the Deceased had been taken. The 1<sup>st</sup> Accused then joined the 2<sup>nd</sup> Accused. Both of them assaulted him using a whip. He begged them to stop but his plea fell on deaf ears therefore he left going home.

19. All eye-witnesses who testified were categorical that the Accused persons are the ones who assaulted the Deceased. The weapon stated to have been used was a whip. It was however not recovered.

20. PW3 stated that on examination of the body of the Deceased, externally, it had bruises on the face especially on the left side. The upper limb was swollen on the shoulder and deltoid muscle region. There was a large bruise on the right forearm. Internally he had a bruised scrotum. His findings prompted him to form the opinion that the cause of death was cardiopulmonary shock due to severe pain.

21. The Chief (PW5) just like other witnesses who were present heard the Deceased screaming and by the time the two (2) released him he was unable to walk. Although in their defence the 2<sup>nd</sup> Accused stated that he did not take the Deceased into custody upon arrival as he seemed weak there is evidence that they did handcuff him. A person does not get handcuffed voluntarily. The Deceased was already at the Administration Police Camp. By handcuffing him the officers demonstrated that he was already in their custody.

22. In their defence the Accused persons did not allege that the Deceased had already sustained injuries stated by the Doctor who performed the autopsy. The only reasonable conclusion I can therefore draw is that the injuries were sustained following the thorough beating. Evidence on record points to the Accused persons as the ones who acted unlawfully by assaulting the Deceased. The shock that he suffered was a result of the severe pain occasioned by the Accused persons.

23. **Section 21** of the **Penal Code** provides thus:

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

24. In the case of **Wanjiro d/o Wamerio and Another vs. Regina (1955) 22 EACA 521** cited by the State, the Court of Appeal stated that:

*“Common intention generally implies a premeditated plan, but it does not rule out the possibility of common intention developing in the course of the event thought it might not have been present to start with.”*

25. It is stated that the person who started assaulting the Deceased was the 2<sup>nd</sup> Accused who was later joined by the 1<sup>st</sup> Accused therefore there was no premeditated plan. The intention of beating up the Deceased developed as the events unfolded. Therefore each of the Accused is deemed to have committed the act that resulted into the death of the Deceased.

26. To be guilty of murder one must have acted with malice aforethought. **Section 206** of the **Criminal Procedure 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.”*

27. In the case of **Bonaya Tutoi & Another vs. Republic (2015) eKLR** the Court of Appeal stated that malice aforethought is *mansrea* for the offence of murder and it is the presence or absence of malice aforethought which is the decisive factor in determining whether the unlawful act amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution depends on the particular facts of each case.

28. In the case of **Roba Galma Wario vs. Republic (2015) eKLR** the Court of Appeal stated that:

*“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”*

29. The circumstances of this case are that the Deceased was a suspect who was handed over to the Accused persons. The individual was a habitual thief, who was chaotic at home, ever offending his mother PW1. The Accused person decided to correct his behavior by beating him. And on realizing that he was becoming weak, they panicked and even caused him to be given glucose to ensure he had the necessary energy. These were not persons who could be stated to have had the intention to either kill or cause grievous harm to the Deceased. Malice aforethought was absent.

30. Therefore I find them guilty of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and accordingly convict them.

31. It is so ordered.

**Dated, Signed and Delivered at Kitui this 31<sup>st</sup> day of July, 2018.**

**L. N. MUTENDE**

**JUDGE**