



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

VALIKI MWANZIA ALIAS KITHEKA VALIKI MWANZIA.....ACCUSED

J U D G M E N T

1. **Valiki Mwanzia alias Kitheka Valiki Mwanzia** (Accused) is 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 **28th day of July, 2014** at around **5.00 p.m.** at **Ndithini Village, in Kiangwa Sub-location, within Kitui County**, he murdered **Lenah John Mulonzia** (Deceased).

2. Facts of the case are that on the **28th day of July, 2014**, the Deceased and her husband, PW1, were at their kiosk when the Accused and another arrived. They accused him of damaging their reputation by calling them thieves. On realizing that they were drunk PW1 ordered them to leave. Instead of obeying the Accused took a catapult and used it to hit PW1. The Deceased tried to intervene only to be hit by the Accused who used the catapult. PW1 rushed the Deceased to the hospital. She was pronounced dead on arrival. The matter was reported to the police who arrested the Accused and charged him.

3. When put on his defence the Accused denied having killed the Deceased. In his testimony he alluded to the **15th June, 2014**. He testified that he left his place of duty at **4.30 p.m.** and went to the club where he drunk half a bottle of alcohol. He used a 'bodaboda' as his means of transport. Upon arrival at the **Kiangwa Market** he noticed a crowd of people standing around. They encountered PW1 who stopped them and told him to go and take the Deceased as he had information that she was cohabiting with him (Accused). He threatened to kill both of them. When he declined he (PW1) assaulted him. He was rescued by one **Monica Mwoke** who took him home and advised him to report to the police. At midnight he was arrested for allegedly killing the Deceased.

4. At the close of the Defence's case they opted not to tender any submissions.

5. The elements of the case of **Murder** were stated in the case of **Anthony Ndegwa Ngari (2014) eKLR** thus:

“(a) The death of the deceased occurred.

(b) That the accused committed the unlawful act which caused the death of the deceased;

(c) That the accused had malice aforethought.

These are the issues that I will be determining.

6. It is not in doubt that the Deceased was taken to **Mbitini Health Centre** and on being pronounced death she was taken to **Kitui District Hospital**. A postmortem was conducted on the body by PW6 **Dr. Patrick Mutuku**. The head had an opening on the right temporal side. The line that was 8cm in length had to be sutured. There was also subdural haematoma on the left temporal area. He opined that the cause of death was severe head injury secondary to assault. The fact of death was therefore proved to the required standard.

7. Although the Accused denied vehemently having assaulted the Deceased, PW1 identified him as the person who hit her using a catapult. The Accused and his mate confronted PW1 and accused him of slandering them. PW2 **Simon Nzukilu** was at the kiosk when the Accused and his mate arrived and hurled insults at PW1. He saw the Accused in possession of the catapult that he used to hit PW1 at the outset. He witnessed when the Deceased intervened and stood between the Accused and PW1, an act that made the Accused retreat. As he dodged the stones he heard people screaming. He moved near the door to the kiosk to find the Deceased having fallen down. PW1 moved to take the baby she was carrying on her back. PW3 **Monica Mwoke** also confirmed having seen the Accused at the kiosk. Even if the Accused came up with the allegation of the events of a date that was different from the date in question, evidence confirming his presence and the altercation that he had with the husband of the Deceased prior to the Deceased sustaining the injury was overwhelming. PW1 must be

believed when he states that it is the Accused who committed the act that left the Deceased injured, an injury that she succumbed to.

8. To be culpable the Accused must have 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.”

9. In the case of **Nzuki vs. Republic (1993) KLR 171** the Court of Appeal held that:

“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 the risk as a result of those acts. It does not matter in such circumstances whether the Accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s 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 (See Hyman vs. Director of Public Prosecution (1975) A C 55.”

10. In his defence the Accused stated that he had taken half a bottle of alcohol but he was not specific as to which alcohol he had taken. PW1 appreciated that he seemed drunk but the Accused did not plead a defence of intoxication therefore there is nothing to suggest that his responsibility was diminished.

11. What is however evident is the fact that the Accused and his mate claimed they had been slandered by PW1 and went ahead to attack him. They used a catapult and stones to pelt him. It cannot be discerned whether or not the Accused appreciated the risk of the nature of harm that would result.

12. In the case of **Roba Galma Wario vs. Republic (2015) eKLR** the Court held 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, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

13. The weapon that was used was a catapult. A catapult may be harmless as it is carried for purposes of killing small birds or animals for food for individuals or pets. This being the case the Prosecution had the duty of proving that the Accused who seemed intoxicated carried the weapon with the intent to kill or at least cause grievous harm to the victim. This evidence was lacking, therefore the Accused acted without malice aforethought. In the premises I find the Accused guilty of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** for which I convict him.

14. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of July, 2018.

L. N. MUTENDE

JUDGE