



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 1 OF 2012

REPUBLIC.....PROSECUTOR

V E R S U S

DANIEL KINYUA KIIGE.....1ST ACCUSED

JACKSON WACHIRA KIIGE.....2ND ACCUSED

JAMES KARIMI NYAGA.....3RD ACCUSED

RULING

The three accused persons were charged with murder of Archangel Mwai Nyaga contrary to Section 203 as read with Section 204 of the Penal Code.

The prosecution called 3 witnesses,

PWI- Patrick Muremi Nyaga a brother to the deceased.

PW2 Nicholas Wanjohi a brother to the deceased.

PW3 Dr. Andrew Kanyoni Gatang’i a doctor who produced the postmortem report.

The accused persons are facing a charge of murder. The burden of proof lies squarely with the prosecution to prove the charge against the accused persons on the required standard of proof beyond any reasonable doubt. The prosecution needed to adduce evidence to establish the ingredients of the offence; which are that the accused person are the one who inflicted the injuries on the deceased and that the injuries led to his death, and further that at the time they inflicted the injuries on the deceased, they had formed the necessary intention to either cause death or grievous harm on the deceased.

Issues

1. Men Rea

Section 203 of the Penal Code

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

Section 204 of the Penal Code

Any person convicted of murder shall be sentenced to death.

Section 206 of the Penal Code:

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

In John Mutuma Gatobu –v- Republic (2015)eKLR

The Court of Appeal stated;

Malice aforethought in our law is used in technical sense properly defined under Section 206 of the Penal Code.....

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

Joseph Kimani Njau –v- Republic (2014)eKLR

The Court of Appeal stated;

In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution

In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes of death of another.

Dickson Mwangi Munene & Another –v- Republic (2014)eKLR

The Court of Appeal Stated:

As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the *mens rea* of the crime of murder.

In a charge of murder it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.

As per the evidence of PWI who was an eye witness, he testified that the deceased informed him on 15/5/2010 at 9 Pm that he had quarreled with the 1st accused. The deceased wanted PWI to accompany him to Kianderi Shopping Centre to sort out the quarrel but since the deceased was drunk he informed him he would do so the following day. The deceased went to his home about 20 feet from PW 1’s home. After about 20 minutes, he heard screams which were emanating from 1st accused’s home. On reaching the home, he found the 1st accused with an axe, the 2nd accused with a metal rod and the 3rd accused with a panga. The accused persons were brothers and the cousins of the deceased and PWI. He recognized them using the moonlight and a torch.

He could see the 1st and 2nd accused person hitting something on the ground. He went into the compound and the accused persons ran away. He saw his brother on the ground and he already passed away. He called the Assistant Chief and then went to report to the police. They found the accused persons who had gone to report that they had beaten a thief, they had blood stained clothes and were put in the cell. They collected the body and found the axe, metal bar and panga used and axe and metal bar were blood stained.

Having analyzed the evidence on record, I am satisfied that the prosecution proved beyond reasonable doubt that the deceased died through the unlawful and voluntary actions of the accused persons.

Under **Section 306(2) of the Criminal Procedure Code.**

The accused persons are informed that they have a right to address court either personally or through his advocate make unsworn statement and state whether they intend to call witness. The accused have a case to answer.

L. W. GITARI

JUDGE

Mr. Macharia:-

We wish to be heard in defence. We will ascertain whether we will be calling witnesses.

L. W. GITARI

JUDGE

Order:

In the circumstances, the accused to supply the State within 21 days from today with the statements containing the evidence in which they wish to adduce in their defence. If they wish to call witnesses, the statements of such witnesses be also served on the State within 21 days.

Dated and delivered at Kerugoya this 1st day of August 2018.

L. W. GITARI

JUDGE

Court:

Hearing on 10/10/18.

L. W. GITARI

JUDGE