



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO 27 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ANDREW WANYONYI WAMALWA.....ACCUSED

J U D G M E N T

1. The accused was charged with the offence of **Murder contrary to section 203 as read with Section 204 of the penal code**. The particulars of the charge were that **on the 5th of July 2012 at Kipsongo estate within Trans Nzoia County murdered Caleb Deriet Ebei**.

2. The accused denied the charge and the prosecution called 4 witnesses to establish its case. The brief summary of their evidence is as hereunder.

3. **PW1 Deriet Ebei Ngilino**, the father to the deceased testified that the deceased had absconded school and he was a street urchine (chokora). He received a report that he had been beaten by a mob. He took him to the hospital but he succumbed to his injuries. He also identified his body during post mortem exercise.

4. **PW2 Medina Shariff** testified that she was from the club at around 3.00 am when she found many people attacking the deceased. The accused in particular was cutting him with a panga as well as beating him with a club. She heard that the deceased had stolen a phone.

4. **PW3 Dr. Alex Wanyonyi Barasa** produced a post mortem though he did not conduct the exercise. The conclusion was that the deceased had died as a result of cardiopulmonary failure due to severe head injury.

5. **PW4 P.C. Kenneth Katama** took over the investigation from P.C. Bosire who had been transferred. From the report the deceased had been beaten by a mob after stealing a phone from a farmer.

6. When placed on his defence the accused gave unsworn evidence denying the charge. He said that the deceased broke his house while he slept and when he raised alarm the neighbours came and apprehended the deceased and beat him up.

7. At the conclusion of the matter both counsels filed written submissions which I have perused extensively. Pursuant to Section 203 of the penal code, the three critical ingredients to establish the offence of murder are:-

i) Proof of the fact and cause of death.

ii) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused.

iii) Proof that the said unlawful act or omission was committed with malice aforethought.

8. Black Law Dictionary 10th Edition has described malice aforethought to be;

“ The requisite mental state for common law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life, or (4) the intent to commit a dangerous felony (which leads to culpability under the felony – murder rule).”

9. There is only one eye witness to the incident and that is PW2. She said that she came from the club and on the way she found the deceased being beaten. One of the persons assaulting the deceased was the accused who had both a panga and a club. She saw him cutting

the deceased as well as beating him up. The other witnesses were Not called. She admitted that she was from the club and was drunk, but not very much. She further said that there were lights from the motorcycle she was using.

10. She further said that the deceased was being beaten over allegations that he had stolen a phone from the accused.

11. Although there was a possibility of a mistaken identity as there was a crowd, the evidence of PW2 appeared clear and straightforward. She spent sometime with the deceased including the fact that she took him to a house where he slept though he was bleeding from the head.

12. The unsworn evidence by the accused clearly spoke of an intruder who definitely was the deceased. He said that he raised alarm and the neighbours came and beat up the deceased. I find that the fact that the deceased had attempted to steal from the accused is clearly in line with PW2 evidence. The mob that beat up the deceased included the accused. He did not deny the fact that he was among the mob. More particularly, it was his house and his phone that the deceased had stolen from.

13. The weapons used were by the accused. There was no suggestions that it was not him who had the panga and the club. His unsworn defence did not accord the prosecution the opportunity to cross examine him.

14. The injuries as per the post mortem report were consistent with those of the weapons held and used by the accused.

15. In a nutshell, there was malice aforethought on the part of the accused. He did not call any witness to buttress the fact that it was a mob that assaulted the deceased. Those people who responded to the alarm raised by the accused were his immediate neighbours. Surely he should have even attempted to call one. He did not.

16. In the premises I find that the accused intended to cause grievous harm to the deceased who allegedly stole from him. His consequences led to his death. I do find that the prosecution proved its case against the accused beyond reasonable doubt under the provisions of Section 203 of the penal code.

Judgment read, delivered, signed and dated at Kitale this 26th day of September, 2018.

H.K. CHEMITEI

JUDGE

26/09/18

In the presence of:

Mr Kakoi for the State

Mr. Bororio for the Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.