



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 66 OF 2011

REPUBLICPROSECUTOR

VERSUS

SIMON MULEI MUNYASYAACCUSED

JUDGMENT

1. The accused **Simon Mulei Munyasya** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which was that on the night of 11th day of August, 2011 at **Mukuru Kwa Njenga** in Embakasi Division within Nairobi Area murdered **Munyao Kwako**.

2. He pleaded not guilty to the said charge and to prove its case the prosecutor called a total of six witnesses and when put on his defence, the accused gave unsworn statement.

3. The prosecution case was that the accused and the deceased were operating together a water distribution business using an handcart owned by the accused. On the 11th day of August 2011 at about 9.00 pm as per the evidence of **Pw1 Reuben Kilonzo Musyoka**, he witnessed a fight between the accused and the deceased both who were his friends and it was his evidence that the deceased had broken the wheel of the accused handcart while removing Jericans there from which he promised to repair.

4. **PW1** further testified that the accused went to his house and returned shortly with an iron rod with which he hit the deceased on the neck and hence causing him to the fall down. The people who were around assembled and took the deceased who was then unconscious to the Health Centre which was about 200 meters away.

It was his evidence that he had known both the accused and the deceased for a period of three years. It was his evidence on cross examination that based on the friendship between the accused and deceased he did not think their quarrel would lead to a physical fight and therefore did not take any preventive measures.

5. This evidence was corroborated by that of **Pw4 Pius Munene Njeri** who was also at Ngao pub on the material day and responded to noise which was coming from outside the pub and when he went outside to check out what was happening he saw a man lying down unconscious without any visible injuries. He rushed reported the situation to Imara clinic where the deceased was referred to. At the clinic He saw the accused and **PW3 Acting Inspector of Police JOSEPH KINYUA** whose evidence was that he has been called by a good Samaritan who informed him that the deceased had been referred to the clinic where he

was pronounced dead. From the member of the public he was told that there had been an exchange of words between the deceased and the accused who had also reported to the police station.

6. **PW5 Samuel Macharia Kabangi's** evidence corroborated that of the **PW3 and PW4** and confirmed that he was at Agao pub when he heard noise from outside and upon going to check he found the deceased who he knew lying on the ground whom they took to the clinic and while there, the accused called him on phone and he briefed him on his situation. He testified that the accused reported to the police that the deceased had fallen on the handcart.

7. **PW6 Corp JOSEPH OLUGE** re arrested the accused from villa police post and taken to Embakasi police, station he further stated that he attended to the post mortem where he saw an injury to the backside of the neck of the deceased corroborating the evidence of PW1.

8. **Pw2 Dr. Njau Mungai** conducted post mortem examination on the body of the deceased and produced post mortem report as **P Exb No. 1** in which he confirmed that the deceased had cyanosea bloody discharge from the nostrils and mouth, Abressive bruises right elbow and lower arm area, without fracture, Bruised posture and left neck, extends to medial area. On externally, on the spinal code, he stated that there was unstable spine with dislocated c2 – 3 and formed opinion that the cause of death was spinal and head injury due to blunt trauma assault.

9. When put on his defence the accused DW1 made unsworn statement and stated that his statement before the police be admitted as exhibit. It was his evidence that on 11/8/2011 there arose a dispute between him and the deceased and after that he left the place to go look for some of his money elsewhere and when he was called on phone he did not find the deceased where he had left him but found him at the clinic where he was asked to offer an explanation on what had happened and that together with PW4 they decided to take the deceased to Kenyatta National Hospital. When he went to check for a motor vehicle for that purpose he was arrested by police officer since he had a business relationship with the deceased. It was his evidence that he did not know how the deceased was injured.

SUBMISSIONS

10. At the close of the case it was submitted by the defence that the prosecution case was premised on circumstantial evidence which evidence must of necessity point irresistibly to the guilt of the accused person to the exclusion of any other person and that there must be no co-existing circumstances which tend to weaken or destroy the inference of the accused persons guilt. It was submitted that the testimony of the prosecution witnesses was full of contradictions and in particular the testimony of PW4, PW5 and pw6. In support of the submission herein the following cases were referred to:-

- a) **ELDORET HIGH COURT CR APPEAL CASE NO 247/2011 PIUS ARAP MAINA VS R**
- b) **NYERI HIGH COURT CR CASE NO 127/2003 R VS DANIEL GATHUMBI NDIYA & 2 OTHERS**
- c) **MOMBASA HIGH COURT CR CASE NO 37/2010 R VS RUMBA NYAWAWI & ANOTHER**
- d) **KAKAMEGA HCCC NO 34 OF 2007 R VS JOSEPH SHITANDI & ANOTHER**

11. It was further submitted that the investigating officer was never called as a witness and that the prosecution failed to produce a credible post mortem report or to call the doctor who had performed the same. It was therefore submitted that the prosecution failed to prove cause of death and the following cases were submitted in support:-

- a) **MOMBASA HCCR NO 22 OF 2006 R VS MBABU RAI ALIAS CHAKA RAI**
- b) **COURT OF APPEAL AT NAIROBI CR APPEAL NO 230 OF 2005 JOEL MUTISYA**

MWANZA VS R.

It was finally submitted that the prosecution failed to establish which aforethought and on the part of the accused who should therefore be acquitted for lack of evidence under section 322 of (I) of CPC.

12. On behalf of the prosecution it was submitted that the prosecution had established that the accused caused the fetal injuries on the deceased as per the evidence of PW1 and PW3 and that since it was established that the accused owned the handcart which was allegedly damaged by the deceased which led to the confrontation between them upon which the accused armed with an iron bar hit the deceased, it was submitted that the accused had knowledge that hitting the deceased with an iron bar between the neck and the shoulder would probably cause death or harm, the prosecution had established malice aforethought under section 206 (b) of the penal code.

ANALYSIS AND DETERMINATION

13. In a charge of murder, the prosecution is required to prove beyond reasonable doubt the following ingredients.

a) The fact and cause of death of the deceased.

b) That death of the deceased was a direct consequence of an unlawful act on omission or the fact of the accused – “ Actus reus”

c) That the said unlawful act or omission was committed with malice aforethought – “Mens rea”

14. The fact and cause of death of the deceased is not disputed **PW2 Dr. JOHN MUNGAI** testified that he examined the deceased and produced the post mortem report as **P exhibit No 1** in which he noted that the deceased had sustained unstable spine with dislocated c2 – 3 and formed opinion that the cause of death was spinal and head injury due to blunt trauma Assault. **Pw-3 Joseph Kinyua, Pw5 Samuel Macharia Kabangi** and **Pw1 Reuben Kilonzo Musyoka** testified that they were at the scene and took the deceased to **Imara Clinic** where he died. The accused in his defence confirmed that the deceased was taken to the said clinic. I therefore find and hold that the prosecution has proved the death of the deceased and the cause therefore beyond reasonable doubt.

15. On the issue of whether the said death was caused by unlawful act on the part of the accused, the evidence of **Pw1 Reuben Kilonzo Musyoka** was that he witnessed a conflict between the deceased and the accused upon which the accused left the scene only to return back with an iron bar which he used to hit the accused on the back of his neck and head causing him to fall down. This evidence is corroborated by that of **Pw2 Dr. Njau Mungai**. Both the accused and the deceased were PW1's friends and I see no reason why PW1 would have given false evidence against the accused. He was able to see what was happening since there was adequate lighting and the same was not drunk. **Pw3 Joseph Kinyua** placed the accused at the scene by testifying that he received information from members of the public that the accused had been seen exchanging words with the deceased.

16. **Pw1 – Pius Munene Njiru** testified that had responded to the noise which was coming from outside the bar and that upon reaching the place where the deceased was lying on the ground he heard people saying that the deceased had been hit by a colleague further corroborated the evidence of the **Pw1. Pw5 Samuel Macharia Kabanga** testified that the accused later on called him on phone and he briefed him of what had happened and the accused joined them at the clinic and to the police station where he reported that the deceased had fallen on the handcart thereby putting himself at the scene.

17. When put on his defence the accused admitted that on the material day there was a dispute between him and the deceased confirming the evidence of PW1. He further confirmed that he was in business relationship with the deceased though he denied causing his death. In his statement under inquiry which was produced as D Exhibit 1, he stated that it is PW4 who had informed him that the deceased had been

hit by the hand cart which statement is rebuked in material particulars by the evidence of PW4. I therefore find and hold that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused by unlawful Act on the part of the accused.

On whether the said unlawful Act was committed with malice aforethought:- section 206 of the penal code states as follows:

Malice afore thought shall be deemed to be established by evidence proving any one or more of the following circumstance

a) An intention to cause death 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 cause or not, or by a wish that it may not be caused

c) An intention to commit a felony.

19. As per the evidence of PW1, the accused was angered by the fact that the deceased had destroyed his handcart and despite the fact that the deceased had promised to repair the same, the accused went to his house which was nearby only to come back with an iron bar which he used to hit the deceased. The accused in his statement to the police indicated that the deceased had fallen on the said handcart causing injury to his head which evidence is rebutted by all the prosecution witnesses who were at the scene. I therefore find and hold that the accused defence is unbelievable.

20. The accused confirmed that there was a dispute between him and the deceased thereby confirm the evidence of PW1. The conduct of the accused where he reported to the police that the deceased had fallen on the handcart which was contrary to prosecution evidence on record clearly shows a guilty mind. I am therefore satisfied and hold that by hitting the deceased with an iron bar at the back of his neck and shoulder the deceased knew or ought to had known that his said action would lead to and indeed lead to the death of the deceased.

21. I am therefore satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused with malice aforethought hit the deceased with an iron bar intentionally and unlawfully and therefore find him guilty of murder as charged and hereby convict the same under the provisions of section 203 of the penal code and it is hereby so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of May, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Nduati for the State

Mr. Magero for the Accused

Accused present.

Tabitha court clerk