



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 10 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT NACHOI.....ACCUSED

J U D G M E N T

1. **Robert Nachoi**, the Accused, is charged with the offence of **Murder** contrary to **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **24th and 25th December, 2011** at **Kivani Market, Kivani Location** of **Makueni District** within **Makueni County** he murdered **Martin Musyoka Wambua** (Deceased).

2. Facts of the case are that on **24th December, 2011**, PW1 **Titus Matata Wambua**, his brother-in-law, PW4 **Lewis Munyao Musyoka**, and others were drinking alcohol at **Jamhuri Bar**. They left the pub at about **7.30 – 8.00 p.m.** They went to **Kivani Market** and drunk alcohol at **Mwangaza Bar** until **9.30 p.m.** From there they went to **Checkpoint Bar** then decided to go home. They went to the bus stage where they disagreed with a conductor of the public service vehicle that they were to board over the fare payable. PW3 **Mathew Mutisya Wambua** and PW4 were arrested by the Accused, an Administration Police Officer attached to **Kivani Administration Police Camp** following an accusation by a lady known as **Koki** that they were thieves. They were placed in custody. The Deceased and PW1 followed them. They encountered the Accused and the Deceased demanded to know why he had arrested the two (2). He chased after him and the Deceased ran towards the thicket on a cliff. He was found having fallen down the cliff. Subsequently a postmortem was done on the body of the Deceased. The cause of death was stated to have been asphyxia due to pressure on the neck caused by manual strangulation. Investigations were carried out which resulted into the Accused being charged.

3. When put on his defence the Accused denied having committed the offence in question. He stated that on the fateful date he was on duty and his colleagues were away. He heard screams, people were seeking help. He answered the call of distress by going there. He saw a motor-vehicle speeding off. He encountered two (2) people who were drunk and disorderly who he identified as PW1 and PW3. There were no lights therefore he used a torch. They walked uphill where the AP Camp was located. As they approached the hill he saw some other two (2) people from behind them shouting asking where he was taking the two? The two (2) individuals under his escort reacted by running away into different directions. He went to the camp to wake up **Corporal Marete**. They rushed to the scene only to find the Deceased having fallen down. PW4 was crying asking for help. He made a call on a cell phone. Police Officers came to the scene and the Deceased's family members. They took away the body of the Deceased. Thereafter he was asked to record a statement. Six (6) months later he was arrested and charged.

4. This being a case of murder the Prosecution must prove:

- The fact of death.
- That it was caused by an unlawful act or omission committed by the Accused.
- That the act or omission was caused with malice aforethought.

5. The body of the Deceased was found having fallen down the cliff. The body was identified to the Doctors who conducted the postmortem by **Joseph Wambua Syuki**, PW6 his father and **Leonard Maweu** his uncle. The time of death was estimated to **11.00 p.m.** on the **24th December, 2011**. PW9, **Dr. Fredrick Okinyi** who conducted the postmortem confirmed the fact of his death.

6. The Deceased, PW1, PW3 **Mathew Mutisya**, PW4 **Lewis Munyao Musyoka** were already drunk when they went to **Checkpoint Bar** where PW5 **Faith Koki Kimayu** was an attendant. She sold to them more alcohol. They left the bar on seeing **Sergeant Dennis** per the testimony of PW5. Later on they had an altercation with a matatu conductor, PW3 and PW4 were arrested for being suspected thieves and placed in cells. The Deceased followed and demanded to know why they were placed in custody. According to PW1, the Accused chased after him and returned wondering aloud if he had reached downhill. In his defence the Accused denied having pursued the Deceased. He stated that he was escorting the two (2) suspects that he had arrested when two (2) other persons followed them shouting, asking why he had arrested them. The suspects reacted by running away into different directions.

7. PW7 No. 20924 Corporal Daniel Marete was on duty at the Kivani Chief's Office at 1.55 a.m. when the Accused reported to him that the young men he arrested had overpowered him and escaped. They moved to the scene and found the Deceased lying beside the road.

8. PW9, the Doctor who conducted the postmortem formed the opinion that the cause of death was manual strangulation.

9. The Accused was the last person seen pursuing the Deceased who was fleeing from him. However he was not seen strangling the Deceased. Evidence against him is therefore circumstantial. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated principles upon which a conviction can be founded on circumstantial evidence. It had this to state:

“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

3. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

10. The Deceased was drunk therefore chances of him having fallen off the cliff were probable.

11. The Accused reported the incident to PW7 who moved to the scene. He found the Deceased on the ground. The only observation he made was that the head was dusty.

12. PW8 the Investigation Officer found the Deceased lying beside the road. He observed and noted bruises on his body. Following his investigations he formed the opinion that either the Deceased was pushed down the cliff or ran down the cliff resulting into the fall.

13. PW9 who conducted the postmortem found the Deceased having injuries. The neck was contused with haematoma and oedema. There was severe mucosal haemorrhage and congestion on the cardio-vascular system. The cartilage was contused. The arytenoid and vocal cords were congested and bruised. The lungs were congested. The pericardium and endocardium had multiple petechiae haemorrhage. He formed the opinion that the cause of death was asphyxia from pressure in the neck caused by manual strangulation.

14. The findings of the Pathologist suggested that there was pressure exerted on the neck of the Deceased with human hands. I do take equivocal care of the fact that other than petechiae on the chest wall there were no other external injuries noted but at the same time remember that there was presence of general signs of asphyxia.

15. The question to be asked is who exerted the pressure that resulted into cardiac inhibition that occurred to the Deceased?

16. The Deceased confronted the Accused who had arrested his brother and brother-in-law. In his drunken stupor he ran away and was pursued by the Accused. The only person who could have the opportunity of using his human hands to compress the neck of the Deceased manually was the Accused herein. Therefore the reasonable conclusion I draw is that the act that resulted into the death of the Deceased was caused by the Accused.

17. Malice aforethought is defined by **Section 206** of the **Criminal Procedure Code** 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.”

18. An emphasis of what malice aforethought is was made by the Court of Appeal in **Nzuki vs. Republic (1993) KLR 171** thus:

“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.”

19. A person who strangles another manually would ordinarily expect the person to die or at least sustain serious injury like grievous harm. This is indication of an intention to either cause grievous harm or kill. In the premises the Accused acted with malice aforethought.

20. From the foregoing I find the Prosecution having proved the case against the Accused beyond doubt. He is guilty and I convict him for the offence of murder as charged.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 21st day of June, 2017.

L. N. MUTENDE

JUDGE