



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 46 OF 2012

REPUBLICPROSECUTOR

VERSUS

MARTIN WAFULA MAKOKHAACCUSED

JUDGEMENT

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 offence was that on the **17th day of October 2012 at Kiminini Trading Centre within Trans Nzoia County Murdered Marko Wamukhota**. The accused denied the charge and the prosecution called several witnesses to proof its case. Their evidence can be summarised as hereunder;

2. **PW1 Amos Wanjala** testified that he was a Public Service vehicle conductor. That on 17th October 2012 he was with the deceased heading home at around 10.30 pm.

3. As they reached where they were staying, he opened a neighbours house for the deceased to sleep that night. The said neighbour was in police custody. While in his room he heard the deceased quarrelling with the accused who was his neighbour also. He rushed outside and found the accused assaulting the deceased. He attempted to rescue him but he took off. He picked the deceased who was now injured and brought him to his house. Later the police came and arrested him together with the deceased and were placed in the cells. While in the police cells the deceased condition worsened and was taken to hospital, Kitale District hospital where he died while undergoing treatment. He said that the deceased was hit on the head by the accused using a hammer which was not recovered.

4. **PW2 Metrine Wafula Nanjala PW1's wife** testified that she was heading home that night with the deceased as well as her husband. While they were in their house they had the deceased quarrelling with the accused. As they got out they found the deceased bleeding. The accused fled from the scene. Later the police came and arrested the deceased as well as PW1. She went to the police station the following morning and found the deceased in a bad situation. He was released together with PW1 and the deceased was taken to hospital.

5. **PW3 Gilbert Simiyu Nyongesa** also a Matatu conductor knew the deceased as his workmate. He testified that on 17/10/2012 he was together with the deceased and PW1 heading home. They parted ways and each went to their respective homes. The following day he heard that the deceased had been injured. Together with others they transferred him to Kitale District Hospital and participated in the arresting of the accused.

6. **PW4 Said Baraza Waliongo** also a Matatu conductor worked with the deceased. He participated in

taking the deceased to the hospital on 18/10/2012 and apprehending the accused.

7. **PW5 Dr Godfrey Obara** produced the post mortem report on behalf of his colleague Dr Odhiambo who opined that the cause of death was cardiorespiratory arrest secondary to severe head injury.

8. **PW6 P.C. Paul Ngesa** investigated the matter. He testified that on 18/10/2012 members of the public escorted 2 persons at the station, who included the accused and the deceased. The accused was placed in custody and the deceased referred to hospital. On 20/10/2012 he visited the deceased at the hospital and recorded his statement. He explained to him how the accused had assaulted him the previous night. He said that the accused picked a quarrel with him as was not from that area. The deceased insisted that the accused claimed that he had broken and stolen from his house. He then hit him on the head. He produced the deceased statement.

9. The witness equally recorded statement from the Administration Police Officers at Kiminini where the accused had reported a case of burglary. Apparently he reported after the deceased had been injured. He also produced the coat which the accused claimed it was his although he could not prove. Earlier he had charged the accused with the offence of assault but he changed to murder after the deceased died. He further stated that the accused had claimed that in the burglary process he lost his beans, ½ sack of maize and the coat.

10. When placed on his defence the accused gave sworn evidence. He claimed that on the material day he had gone to visit his friend. When he arrived he found his house broken. He met 3 people standing and when he inquired from them they attempted to wrestle him down. He escaped and went to the Administration Police Camp nearby. One of the people he found standing not far from his house was PW1. He then rushed to the police who accompanied him back. They went to the PW1 house who agreed to accompany them to the house of the deceased. They found the deceased who resisted arrest and the police forcefully opened the door and there was an ensuing fight with the police. He also saw his suit and a tie on a hanger inside the deceased's house.

11. He said that the deceased was overpowered and handcuffed. He said that the third person PW3 was arrested the following day. The following day he went and found them at Administration Police place but not handcuffed and they committed themselves to bring back the accused beans.

12. At one pm he went to the stage and explained to his fellow "manambas" what had happened. PW4 said that they should go and see the deceased at the hospital. They found that he had been discharged at cottage hospital and taken elsewhere. They met Administration Police officers who placed him in their car and demanded KSHS 50,000/- which he did not have. He was then arrested and placed in the cells.

Analysis and Determination

13. Having read the entire evidence on record, the question is whether based on the facts as presented by the prosecution the accused participated in fatally assaulting the deceased. The primary evidence in my view is that of PW1 and PW2.

There is no doubt that the deceased slept that night or was meant to sleep in a neighbouring house of a fellow conductor who was already in police custody. All the witnesses especially PW1, PW2 and PW3 were neighbours and they knew each other. The accused and the said witnesses knew each other.

14. Was there possibility that PW1, PW3 and the deceased broke and stole from the accused house? According to him his house was broken into and his beans, maize (½ a sack) and coat were stolen. The items found at the deceased house was a tie and the coat. The accused nevertheless was unable to prove that the coat which was recovered belonged to him.

15. The evidence of PW1 and PW2 were in my view very material. These were primary witnesses. They saw the accused assaulting the deceased and when confronted he took off. They then took the deceased to their house but were subsequently arrested by the Administration police officers on the ground that they

had broken and stolen from the accused house. There was no case of mistaken identity although it was at night.

16. Was there any justification from PW1 and PW2 to fix the accused? I do not see any. From the evidence, they clearly and peacefully parted ways with the deceased and in fact helped to settle him in the house of a neighbour who was in police custody. After a while a quarrel ensued and they saw the accused assaulting the deceased. I do not find any reason why PW1 and PW2 would simply accuse him.

17. It appears that the complaint he lodged with the Administration Police officers concerning the break into his house was fabricated. This in my view was desired to hoodwink the police into believing that he had been robbed. It is clear from the evidence of the investigating officer that the report was made after the deceased had been injured.

18. The statement given to the police by the deceased corroborates that of PW1 and PW2. From the said statement it appears clearly that the accused was the aggressor throughout. Why would he bother with the deceased who was simply a visitor in the neighbourhood that night?

19. The nature of injuries suffered by the deceased were corroborated by the postmortem report as well as PW1 and PW2.

20. In the premises I do not think the long defence by the accused holds water. The offence was premeditated. He did not sustain any injuries even as he allegedly fled from the scene. The report he made to the police was to hoodwink them into believing that he had been robbed, which was not true.

21. In my view all the ingredients of Murder were proved by the prosecution. There was malice aforethought on the part of the accused. He decided to fatally injure the deceased who was a stranger in the area.

22. I therefore find that the case has been proved beyond reasonable doubt and shall convict him as per the provisions of Section 203 of the Penal Code.

Delivered this 27th day of July, 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for the respondent present

Accused – present

Kirong/Silvia – Court Assistants

H.K. CHEMITEI

JUDGE

27/7/2017