



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 32 OF 2012 (MURDER)

REPUBLIC.....PROSECUTION

VERSUS

DANIEL NZIOKA.....1ST ACCUSED

SIMON MAINA.....2ND ACCUSED

J U D G M E N T

1. The accused persons face the charge of murder contrary to Section 203 as read with 204 of the Penal Code. It was alleged that on the 27/12/2011 at Muchanga shopping centre in Mbeere South District of Embu County they murdered one Bernard Kimathi Kiara. A plea of not guilty was entered and the case proceeded for hearing.

2. The prosecution called 9 witnesses who testified to the effect that the accused persons together with one Muriithi Mbigu Njoka went to the home of the deceased on the material day at around 10.00 a.m. PW1 was in the company of PW3 and PW6 when the accused person arrived and inquired on the whereabouts of the deceased. PW1 directed them to the miraa farm where the deceased was working about 30 – 50 metres from the home of PW1 and PW3.

3. The three men confronted the deceased and started beating him up as they accused him of stealing sheep. PW1, PW3 and PW6 were attracted by screams and went to the scene. The hands of the deceased His hands were then tied up with a rope as he was being beaten. He was then pulled with the rope to Machanga shopping centre where the assault continued.

4. PW3, the mother of the deceased testified that she was walking towards her home when she met the accused persons dragging and beating the deceased accusing him of being a thief. PW6 testified that she saw the accused persons beating the deceased at his home and that he was given deceased dirty water. The deceased was found dead at Machanga market the following morning.

5. The matter was reported to the police on 28/12/2011 and PW4 visited the scene later in the day. He made some inquiries at Machanga and was told that the deceased had been beaten on allegation that he had stolen a sheep.

6. PW2 Dr. Thuo produced the mental assessment report to the effect that the two accused persons were found fit to plead. The postmortem report of Dr. Ngari was produced by PW5 showing that the deceased died of head injuries.

7. The 1st accused person denied the offence. He testified that on the 26/12/2011 around 1.00 p.m. his livestock came home from the grazing field and he noticed that one sheep was missing. He went looking for it until the following day when his cousin one Muriithi brought him a skin of a sheep which he identified as that of his lost sheep. Carrying the skin and the rope, the 1st accused went with Muriithi to the house of the deceased who was the suspect. He then found PW3 the mother and his brother one Mbugi.

8. He further stated that he found the deceased hiding behind a tree stump armed with a panga. Muriithi inquired from him where the sheep meat was so that they could take it to the police as an exhibit. PW3 screamed attracting neighbours whom the accused informed about what had happened. The crowd grabbed the deceased from the accused persons and beat him up. According to the 1st accused, he took the exhibits to the police station and reported about the stolen sheep which report was booked in the Occurrence Book (OB) at around 3.00 p.m. When the 1st accused returned to his home, he was informed that the deceased had been assaulted and abandoned at Machanga market.

9. The 1st accused said that he returned at his place of work at Eldoret on the 28/12/2011. He was later telephoned by the chief of Mavuria location who informed him that the deceased had passed on and that investigations were on-going. He then returned home and was arrested on 28/08/2012 as a suspect in the murder of the deceased. He was charged together with the 2nd accused with the offence of manslaughter in Siakago Criminal Case No. 589 of 2012. The case was later withdrawn and murder charges were preferred against the two accused herein.

10. The 2nd accused person testified that on 27/12/2011 at around 10.00 a.m. he met PW1 a neighbour and a brother to the deceased who

requested him to take his jacket to his house. On arrival at PW1's home, he found the 1st accused and one Muriithi there and on their request he assisted them to tie the deceased who was a suspect in a theft case with a rope.

11. The 2nd accused further stated that PW3 screamed and attracted a crowd who came shouting that the deceased was a thief prompting the 2nd accused to run away. It was later on that he heard that the deceased had died. He was arrested on the 28/08/2012 and charged together with the 1st accused. He denies having run from home for six (6) months as alleged and insists that the deceased was assaulted by a mob.

12. The accused persons called DW3 the chief of Mavuria location as their witness. He testified that the deceased was assaulted by a mob at Machanga market on the allegations that he had stolen a sheep. The matter was reported to him by PW3 the mother of the deceased who did not give names of any suspects. DW3 learned later that the deceased had passed on.

13. I have considered the submissions of the defence and those of the prosecution as well as the evidence on record.

14. In a case of murder, the prosecution must prove that the accused persons did the unlawful act that caused the death of the deceased and that they had the intention to kill. It was held in the case of **ANTHONY NDEGUA NGARI VS REPUBLIC (2014) eKLR** that prosecution must prove the following elements:-

(a) the death of the deceased and the cause of death;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had the malice aforethought.

15. Evidence was adduced to the effect that the two accused persons went to the home of the deceased on the material day looking for him as a suspect of a sheep theft case. The 1st accused said he was carrying the rope that had tied the stolen sheep and the sheep skin which an accomplice one Mwaniki had taken to him.

16. It was also established in evidence that they found PW1, PW3 and PW6 at the home and were directed to where the deceased was. The chain of events is clear from the evidence of PW1, PW3 and PW6 and was confirmed by the accused persons in their defence.

17. The three witnesses testified that after the accused persons and one Mwaniki went to the shamba where the deceased was about 30 – 50 metres from their home, they heard the deceased screaming. They proceeded to the scene to find out what was happening just to find the deceased already tied with a rope round the hands and legs. He was being beaten by the three men using rungs and fists. PW1 said the assailants were hostile and wanted to beat up the witnesses when they drew near.

18. PW1 and PW3 said that as a result of the beating, the deceased was already bleeding from the ears, nose and mouth. He was dragged to the home compound where he was given stagnant water by the 1st accused. He was then pulled with a rope to Machanga shopping centre where he was to die a few hours later. PW3 said that the deceased was left unconscious at Machanga shopping centre where he was found dead.

19. Although the accused persons denied assaulting the deceased, the evidence of PW1, PW3 and PW6 was overwhelming on the incident of the assault. The 1st accused states in his defence that he was with Mwaniki at the home of the deceased having accosted him at the shamba where he was hiding behind a tree stump. The defence said neighbours came they were attracted by the screams of PW3.

20. It is therefore clear from the evidence on record that the deceased had already been thoroughly assaulted by the two accused persons and Mwaniki before neighbours arrived, if they did so at all. The presence of any neighbours in the home at the material time was not supported by the prosecution's evidence save for the defence.

21. All the time the deceased was dragged away, he was already bleeding from the ears, nose and mouth which was consistent with the head injuries which caused his death. The assault and interrogation at the home of the deceased took about one hour according to PW1.

22. There was no evidence as to the identity of any other people who may have continued with the assault at Machanga started by the accused persons and their accomplice. The allegation that there were other people came from the defence. I found the evidence of the key witnesses credible, clear and precise on the assault on the deceased and did not mention that there were other people involved in the assault of the deceased at his home.

23. PW4 is the one who testified that he visited the scene at Machanga Trading Centre on 28/12/2011 upon receiving the report of a dead body found there. He did inquiries at the scene and was informed that the deceased was killed by a mob. This was the same information he gave to the investigating officer PW8 several months later. PW4 said that he later recorded the statements of the mother and the brother of the deceased and he learnt that the deceased was killed by three known people.

24. The defence of the 1st accused was that he went with Mwaniki to the home of the deceased to pick the sheep meat as an additional exhibit to take to the police. While at the home, a crowd came there and that he left them there and proceeded to make a report of the theft to the police. He was to learn of the death of deceased much later through DW3.

25. I did not find this defence credible in that the PW1 and two others assaulting the deceased whom they had already tied with a rope. The defence of the 1st accused places him at the scene of crime. He was already investigating the theft of his sheep and administering what he believed was justice to the deceased. Instead of making a report to the police, the 1st accused took the law in his own hands to assault the

suspect severely assisted by Mwaniki and the 2nd accused.

26. PW4 testified that there was no report of theft that was made at the police station until 3.44 p.m. on 28/12/2011 a day after deceased's death. It is highly provable that the late report was designed to prepare his defence to any criminal charges in the event that he was to be charged. There was no evidence of any grudge between the deceased's family and that of the 1st accused to raise a possibility of framing him.

27. The 2nd accused admitted being at the scene at the material time where he found the 1st accused and Mwaniki with the deceased. On their request, he helped them to tie the deceased with a rope. A crowd came to the scene after hearing PW3's screams. He further said that the deceased was fatally assaulted by a mob at Machanga market.

28. The 2nd accused said he had gone to the home of the deceased's brother PW1 to take PW1's jacket which he had given him on his way to Kiritiri hospital. This, he said supports his defence that PW1 was not at the scene.

29. There was evidence from PW1 and PW6 that he (PW1) was unwell on the material day. He may have gone to hospital on the same day probably after the incident.

30. The assertion that PW1 was not at home at the material time was disapproved by the evidence of the key witnesses and that of the 1st accused who said in cross-examination:-

If we (1st and 2nd accused) had done so (assaulted the deceased) his brothers would have intervened.

31. The statement demonstrates that there were more than one brother of the deceased who were present during the incident. One of them must have been PW1 and the other one Mbugi as stated in the 2nd accused's defence. The evidence of PW1 on the incident was clear and descriptive giving no suspicion that it was cooked. His evidence was supported by that of the other key witnesses. The 2nd accused also placed himself at the scene in agreement with the evidence of prosecution witnesses to that effect. There was evidence that the 2nd accused and his two companions assaulted the deceased.

32. The evidence of DW3 the chief of Mavuria location was indeed not reliable. He was not at the scene of crime in the first place. In his defence he the court that while he was away in Eldoret, it was DW3 who informed him on phone that investigations on the death of the deceased were on going. The question is what was the interest of PW3 was in the communication. In his official capacity, he ought to have been helping the police with the investigations but not to be feeding the suspect with information of what the police were doing.

33. DW3 said that when PW3 reported the death of the deceased to him, she said he was killed by a mob. He had no record of the report made to him and did not record a statement with the police. It is my considered opinion that he was at all material times determined to help the suspects to get off the hook.

34. The late investigation of this case reveals some interference or cover-up by the authorities concerned. Even after recording the statements of the known key witnesses, PW4 opened an inquest file. Later the police charged the accused persons with manslaughter and later with murder without any new evidence having been received.

35. PW8 testified that he was instructed to take over investigations of the case by the DCIO Kiritiri about seven months after the incident. The accused persons were arrested about one month after PW8 took over investigations. PW9 testified that the accused persons had run away from home after the incident. This is not material in the case, but the background of police reluctance in conducting investigations explain the late arrests of the accused persons.

36. The two accused persons assaulted the deceased together as shown by the evidence of the eye witnesses leads to the application of Section 20 of the Penal Code on common intention.

37. Section 20(1) provides:-

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence,

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

38. There is sufficient evidence to the effect that the two accused persons had common intention in the series of activities culminating to the assault incident.

39. I find the defences of the 1st and 2nd accused persons not plausible in view of the overwhelming evidence of the prosecution. It has been established that the accused persons and another not before the court jointly caused grievous harm to the deceased at his home on the material day. It does not matter that other people may have assaulted him further at Machanga after he was pulled with a rope and dragged there. Already, serious injuries had been inflicted upon him which was demonstrated by the bleeding from the ears, nose and mouth. The prosecution have established that the two accused persons did the unlawful act which caused the death of the deceased.

40. The court has to determine whether malice aforethought has been proved.

41. The deceased succumbed to the severe injuries inflicted on him the same day for he was found dead the following morning. Section 206 of the Penal Code describes malice aforethought as follows:-

Sec. 206: 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.

42. The evidence of the grave injuries and the repeated assault of three men against one armed with rungas or sticks and using fists demonstrates knowledge on the part of the accused persons that the unlawful act would probably cause death or grievous harm to the deceased. The cause of death was said to be the head injuries. This means that the deceased was repeatedly hit on the head. The severity of the said injuries ended his life less than one day after the assault.

43. I find that malice aforethought has been proved against the accused persons who had common intention in the commission of the crime.

44. The accused persons are guilty of the offence of murder as charged and are accordingly convicted.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF AUGUST, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Manyal for State

Ms. Muriuki for Ithiga for accused persons

Both accused present