



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 28 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MWANGI NYANJAU.....ACCUSED

JUDGMENT

1. The Accused Person, Joseph Mwangi Nyanjau (“Accused Person”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Martin Mulwa Ndolo (Deceased) on 20/05/2016 at Captain Pub – Gachororo within Juja Sub-County within Kiambu County.

2. The uncontested facts that emerged from the seven Prosecution witnesses and the unsworn statement by the Accused Person is as follows. The Deceased was a boda boda mechanic in Ruiru. On 19/05/2016, the Deceased closed his garage and, accompanied by Simon Mutuku (PW2) went to have drinks at Makuti Bar. They had a number of drinks until around 11:00pm. At this point, their other friend, Justus Wambua (PW1) came looking for the Deceased. Justus, a boda boda operator, wanted the Deceased to go fix his boda boda which had developed some mechanical problem.

3. The three friends (Deceased; Mutuku and Justus) headed from Makuti Bar to the stage where Justus’ boda boda was parked. It was also adjacent to the Deceased’s garage.

Upon inspection, the Deceased concluded that the boda boda could not possibly be repaired that night: the mechanical fault was bad enough to require attention the following day during daylight.

4. Justus requested the Deceased to request the Accused Person, the operator of a pub nearby if they could park the boda boda inside the pub so that they could retrieve the next day. Justus wanted the Deceased to make this request because both he and Mutuku knew that the Deceased was a good friend to the Accused Person. So, off the three friends trooped to Captain Pub – the nearby pub operated by the Accused Person.

5. At Captain Pub, they found the Accused Person. Mutuku remained outside the pub because he had an earlier disagreement with the Accused Person and was, apparently, not permitted into Captain Pub. On that day, the Accused Person was actively serving customers since one of his waiters had asked for a day off. The Deceased made the request on behalf of Justus and the Accused Person acquiesced. The three friends then parked the motor cycle inside Captain Pub.

6. While inside Captain Pub, the Deceased offered to buy Justus a beer. Justus readily accepted. Mutuku remained outside the pub as the Deceased and Justus sat at a table to take their beer. They ordered for a glass of keg beer each. The Accused Person served them. Then, in a space of twenty minutes, they ordered a second and a third glass of keg beer. By all accounts, they were drinking quite quickly.

7. It would appear from the evidence of both Justus and the Accused Person that the Deceased was inebriated by this time. The Deceased accidentally knocked the milk of a fellow customer who was seated at an adjacent table. It is not clear if the milk was in a plastic satchel or a glass bottle, but all are united that the milk splashed sending the customer into paroxysm of angry complaints against the Deceased. When the quarrel was threatening to turn violent, Justus paid their fellow customer Kshs. 30/= as compensation for the spilt milk.

8. This act of generosity on the part of Justus apparently drove the Accused Person over the edge. He got upset and continued angrily and loudly shouting at the other customer. This drew the attention of the Accused Person who was at the counter all along.

9. The agreement on the facts between the Prosecution witnesses and the Accused Person ends here.

10. According to Justus, when the Accused Person came from the counter to resolve the minor spat between the Deceased and the other customer, the Accused Person was already furious. Justus testified that the Accused Person picked up an empty bottle of liquor and threw it at the Deceased. Somehow, and quite miraculously, he missed – considering that the Deceased was already quite inebriated. The bottle hit the wall and shattered. Justus then explains that the Accused Person grabbed the Deceased by the chest and dragged him outside through the back door. According to Justus, the Accused Person then momentarily stepped back into the pub and picked up a stick which was about 3 metres long and went with it outside again. Justus says that the Accused Person then locked the pub from outside so that he (Justus) and the other five or six customers who were still inside the pub could not leave since the front door had already been locked as early as 11:00pm when Justus and the Deceased first arrived at the pub.

11. Justus says that it was not until after about 15-20 minutes that the Accused Person came back to the pub. He then ordered everyone out and he closed the pub. Justus testified that at this point he walked home – to the house he shared with the Deceased and Mutuku. He did not see the Deceased outside the pub and neither did he see him on his way home. He also did not find him home –although, by his own rendering, Justus was too drunk to notice that the Deceased was missing.

12. It was only the following morning that Justus knew that something was wrong. He got the sobering news that the Deceased had died when their mutual friend, Muthemba came knocking on their house expressing shock that he (Justus) was still asleep yet their mutual friend was dead.

At first, Justus remarked to Muthemba (who was not called as a witness) that the Deceased was sleeping without realising that the Deceased had never come home.

13. In his unsworn statement, the Accused Person's version of the events differs from the point at which he went to the Deceased's table following the Deceased's altercation with a fellow customer. He says that he found the Deceased very drunk and he ordered him to leave the pub. According to the Accused person, the Deceased left the pub and so did Justus. The Accused Person says that is the last he saw the Deceased. He narrated that he did not throw a bottle at him. Neither did he drag him out or beat him.

14. It would have been Mutuku who would have buoyed the Prosecution's narrative. However, he did little to do so. Mutuku was a singularly unreliable witness: physically shifty and even worse in terms of consistency of his evidence. The Prosecution applied to have him declared a hostile witness and I granted its wish. But this did not save his testimony. He was at once unsure whether he actually saw the Accused Person beating the Deceased or not. It should be recalled that he was outside the pub at the front door which was locked. No evidence was placed before the Court to demonstrate how he could have seen the Accused Person beating up the Deceased at the back of the pub. However, it was the ultimate evidence of Mutuku that he heard the commotion in the pub and then saw the Deceased being thrown out by the Accused Person. He also testified that he heard a woman saying "stop beating him". Still, Mutuku headed home – the home he shared with the Deceased – ostensibly leaving the Deceased receiving a beating from the Accused Person. By his own rendering, Mutuku neither sought help nor tried to assist the Deceased. He simply went home and was astonished and shattered the following morning to learn that the Deceased had died.

15. This is all the evidence the Court received of those who were present when the alleged incident happened. The other witnesses were either formal in nature or were simply told by Justus and Mutuku their versions of the story.

16. Hence, APC Benard Mburu Murachia testified that he was at Gachororo AP Post when he received a report that someone had died at Gachororo. He dashed to the scene and indeed found a dead body of a male adult lying near Savannah Club. Police from Juja Police Station had already arrived at the scene. APC Murachia contradictorily testified that later on the said day he received a report that a man had been arrested by the members of the public and they were beating him up. He then rushed to High-Point and rescued the man and took him to the Police Post. It turned out that that man was the Accused Person. He stated that the crowd was saying that it was the Accused who had killed the Deceased. He also testified that on the same day, he had arrested PW1 and PW2 to record statements since they had indicated that they knew who had killed the Deceased. It turned out, however, that the Accused Person was not arrested until about three weeks after the incident. Similarly, Justus and Mutuku did not record their statements until mid-June. It is worthy noting that the Court remarked on the record the following: “The Court notes that the witness seems hesitant and unsure of his testimony. It is not clear if he is being evasive or he has cognitive challenges.”

17. PC Jackson Kemboi testified as PW6. He stated that while at Juja Police Station his work place, he received a report from an unknown person that someone had been killed at Gachororo in Juja. He headed there with his colleague and found a body of a male adult which had injuries on the back of the head. He protected the scene of crime and called the scenes of crime people who came and took photos. Later they took the body to General Kago Funeral Home. He carried out investigations in regard to the murder.

18. PC Timothy Boinnet was the investigating officer in this case. He documented statements from the officers who visited the scene and also from the witnesses present. He later compiled a case file which he forwarded to the DPP who advised him to prefer murder charges against the accused person.

19. Joseph Ndolo is the Deceased’s father. He is the one who identified the body to Doctor Muthami at Thika Level 5 General Hospital. He testified that he saw injuries on the back of the head and on the face particularly the cheeks. The autopsy was carried out in his presence.

20. It was the testimony of the Pathologist that had the biggest surprise, however. Dr. Josephine Muthoni Muthami is the pathologist who did the autopsy at General Kago Funeral Home in Thika. The body was identified by Joseph Ndolo Mulwa and Kisili Munyao in the presence of a Police Officer Watford Muli.

21. Dr. Muthami found that it was the body of an African adult male dressed in red and black underwear. He was of medium built and fair status of nutrition. He had been preserved well. Externally, the doctor noted abrasions on the right arm, the right side of the face, cheek bone, above the right eye and on the left side of the back. He also had a bruise on the right upper abdominal region. Further the doctor noted, that there was a scalp laceration on the left side of the head and that the eyes were red.

22. Internally, Dr. Muthami found that the Deceased’s lungs were markedly enlarged and the cut section of the lungs was oozing blood. In the cardiovascular system, the heart was normal. There were markedly distended blood vessels in the digestive system. The genital urinary system was found to be normal. Further, there was no skull fracture or brain injury. The spinal column of the bones was found to be intact. As a result of her exam, she concluded that the cause of death was asphyxia. However, Dr. Muthami could not tell what exactly had caused the asphyxia. She testified that asphyxia could be caused by many things. She added that battering could **not** have been the only cause of death, that there was another contributory factor. Notably, Dr. Muthami also concluded that in her opinion, the external injuries on the body of the Deceased could not have been caused by beating with an object like a stick. The injuries, she concluded, were caused by beating with bare hands. This is because, she concluded, an object like a stick would have inflicted much more severe injuries than the injuries inflicted on the Deceased.

23. Dr. Muthami filled out the Autopsy Report with her findings and produced it as evidence.

24. It was on the basis of this evidence that the Prosecution hoped that the Court would conclude that it had established its case beyond reasonable doubt.

25. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

26. Consequently, in order to successfully obtain a guilty verdict in a murder charge, the Prosecution the Prosecution needed to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

27. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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;
- c. Intent to commit a felony; or
- d. 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.

28. Can we, in this case, make a conclusive determination that the three elements are all proved beyond reasonable doubt?

29. There is no doubt that the *actus reus* was proved. Indeed this was not contested.

30. It is the second element: a demonstration that it was the unlawful acts of the Accused Person that caused the death that is more problematic. I begin by noting that the only direct evidence we have here is that of Mutuku who claims he saw the Accused Person beating the Deceased. I have found Mutuku to be an unreliable witness. I entertain serious doubts whether he actually saw what he claims he saw. First, it was unclear if one could actually see what was happening at the back of the pub when standing outside the locked front door of the pub. Secondly, Mutuku's subsequent conduct invites much doubt. It seems odd that one would leave their friend and house-mate being beaten by another person and just casually walk home without worrying about their safety. It seems even more implausible that even after allegedly witnessing the beating, he went home and slept and only expressed surprise in the morning that the Deceased did not come home.

31. What about the testimony of Justus? In my view, the testimony of Justus was a tad more reliable. However, it cannot do the heavy work of linking the Accused Person with the killing of the Deceased. All that Justus saw was the Accused Person dragging the Deceased outside the pub. He then allegedly saw the Accused Person coming back to pick up a stick. He did not witness any assault on the Deceased. The theory, then, would be that the Accused Person must have used the 15-20 minutes he locked the door to fatally beat up the Deceased Person.

32. However, this theory appears to raise some reasonable doubts as to its plausibility. First, Dr. Muthami

concluded that the cause of death was not physical assault but asphyxia. Second, Dr. Muthami concluded that the injuries on the body of the Deceased were **not** caused by a blunt object like a stick but were more likely caused by being struck by the bare hands. Third, it appears quite improbable that Justus saw his friend and house-mate being dragged out by the Accused Person and ostensibly assaulted with a stick yet Justus did nothing to assist the Deceased or report the matter. It seems equally improbable that Justus patiently waited for 20 minutes inside the pub as the Accused Person beat up his friend and house-mate with a stick. Lastly, it is even more improbable that even after the door was opened, Justus simply walked home without worrying about his friend.

33. What seems more probable is that Justus cannot clearly remember the events of that fateful night due to the fog of inebriation. He admitted that he was quite drunk; so much that he even forgot that he had not walked home with the Deceased the night before when Muthemba woke him up in the morning. In my view, therefore, it would be quite unsafe to convict the Accused Person based only on the version of events provided by Justus. Since the other available evidence – notably that of Dr. Muthami – is inconsistent with the narrative provided by Justus (and Mutuku), the only conclusion warranted by the law and the facts is that the Prosecution has been unable to establish the link between the death of the Deceased and the Accused Person beyond reasonable doubt. In other words, the Prosecution has not proved beyond reasonable doubt the second element needed to establish the offence of murder: *That the death of the Deceased was caused by an unlawful act or omission by the Accused Person*. Having failed to establish the second element, it follows that the Prosecution cannot establish the third element.

34. This leaves the Court with only one option: it must find the Accused Person not guilty and acquit him of the charges of murder. It hereby so does. The Accused Person is acquitted under section 306 of the Criminal Procedure Court. He shall be released from prison unless he is otherwise lawfully held.

35. Orders accordingly.

Delivered at Kiambu this 28th day of September, 2017.

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JOEL NGUGI

JUDGE