



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 28 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

LOSSI WAMBULWA WANEMA.....ACCUSED

JUDGMENT

1. On the night of 20th April 2011, Henry Silungai Kaskon (hereafter *the deceased*) and the accused walked into the house of Peter Juma Makokha (PW1). It was about 9:30 p.m. Each of them ordered a drink of *chang'aa* worth Kshs 10. A quarrel erupted between them. The accused claimed that the deceased hit him on the back with a stick. The accused stepped outside; returned and hit the deceased with a sharp stone on the head. The deceased was taken to hospital. He succumbed to the injuries on 22nd April 2011.
2. The State brought information to the High Court charging the accused for murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 21st April 2011 at around 9:30 p.m. at Chimoi Market, Lwandeti Sub-Location, Lwandeti Location, in Lugari District of the Western Province, he murdered Henry Silungai Kaskon.
3. The accused pleaded *not guilty*. The prosecution lined up eight witnesses. The evidence of the first *three* witnesses was taken by Azangalala J (as he then was). Two of the prosecution witnesses were inadvertently styled as PW3. I will refer to Andrew Silungai as PW3 "A" and to Dr. David Chumba as PW3 "B". On 20th November 2014, I explained to the accused his rights under section 200 (3) as read with section 201 of the Criminal procedure Code. He elected to proceed from where my predecessor had left the matter. I proceeded to record the evidence of the other five witnesses.
4. Peter Juma Makokha (PW1) knew the accused and the deceased. They were his neighbours and regular customers. He testified that he sells *chang'aa* from his house. On 20th April 2011 at about 9.30 p.m. he was in the house with his wife Violet Nabwire (PW5). The accused and deceased came to the house and bought *chang'aa*. The house is a one-roomed structure. There was some light from a tin lamp. The accused told the deceased that "*I can manage you even with your money from sale of land*". The deceased replied that the money and the land were his. They continued quarreling. The deceased then warned the accused not to go through his compound.
5. PW1 said the accused went outside. Shortly thereafter he returned with a stone and hit the deceased with it on the head. The impact was on the right side near the ear. PW1 said the stone was sharp. The accused took off. PW1 gave chase but could not keep up with him. When he returned to the house he found the deceased bleeding. The stone was missing. They decided to report the matter to the Administration Police Post at Chimoi. An officer advised the deceased to go to hospital. PW1 returned to his house. He learnt later that the deceased was admitted in hospital where he died.
6. Upon cross-examination, he said he is employed as a watchman. He had initially left for duty at

- 7:00 p.m. but returned at 9:00 p.m. for supper. He said that the accused and deceased did not come in together; rather, they followed one another. He said there were no other customers. He said the accused and deceased were sober when they came to his house. He conceded that he and his wife (PW5) were arrested as suspects but later released.
7. PW5 largely confirmed the narrative by PW1. She said the house was lit by a tin lamp. Regarding the quarrel, she said the deceased told the accused “*eat and go to sleep*”. The accused retorted “*now that you have sold land you are proud*”. It is at that point that the accused stepped outside. He returned and hit the deceased on the head with the stone and took off. On 22nd April 2011, PW5 and her husband were arrested by the police. PW5 said that the deceased’s widow had filed a complaint. PW5 was held in police custody for two weeks. She was not charged with any offence.
 8. PW2 is the widow of the deceased. On the material day her husband, who was also a watchman, left for duty at 6:00 p.m. She went to bed. At about 1:00 a.m. she was woken up. When she opened the door she found her son Andrew (PW3 “A”) and PW1. They were with the deceased. The deceased was screaming saying he had been hit with a stone on his head. She put on the light and saw the injury on the head. She said the deceased’s clothes were bloodstained. She testified that the deceased told her he was hit by the accused.
 9. PW2 administered some first aid on the deceased. She said that by morning, the condition of the deceased had deteriorated. She hired a motor cycle to the bus stage and took him to Webuye District Hospital. They were later referred to Moi Teaching and Referral Hospital. The deceased was admitted but succumbed to the injuries while undergoing treatment. He died on 22nd April 2011. On cross-examination, she denied that the deceased had injured his head in a fall.
 10. PW3 “A” was Andrew Silungai, a son of the deceased. On 20th April 2011 at about 9:00 p.m., he was woken up by PW1 who informed him that the deceased had been injured. He accompanied PW1 back to his house. He found the deceased lying down; his clothes bloodied. The deceased told him he was attacked by the accused. PW1 assisted him to take the deceased back home. He said the deceased and accused were friends and would occasionally drink together.
 11. PW3 “B” was Dr. David Chumba. He is a pathologist at Moi Teaching and Referral Hospital. On 26th April 2011 he performed an autopsy on the body of the deceased. He found a laceration on the right side of head measuring 3x2 cm. It had been stitched. There was a fracture on the right parietal wall with massive brain haemorrhage. In his opinion, the cause of death was a blunt head trauma causing the brain haemorrhage. He produced the postmortem report (exhibit 1).
 12. PW4 is a clinical officer. On 6th May 2011, he examined the accused for medical fitness. He testified that the accused’s mood, memory and concentration were okay; and, his abstract reasoning (speech and judgment) was normal. He found him to be of sound mind. His report was produced as exhibit 2.
 13. PW6 was Chief Inspector of Police Lawrence Nalwa. He recorded a statement under inquiry from accused. The accused told him that on 20th April 2011 he was at Chimoi taking *chang’aa* in the company of the deceased. An argument arose between him and deceased. The deceased took a stick and hit him on the back. The accused picked up a stone and hit him on the head. He said he thereafter left the place. PW6 said that on 22nd April 2011 the accused was arrested at Webuye by the public. He was first taken to the Administration Police Camp at Chimoi. Later, he was taken to Lumakanda Police Station where the statement under inquiry was taken. PW6 cautioned the accused on the statement. He made a certificate confirming the statement was obtained voluntarily. He produced the statement and certificate (exhibit 3). Defence counsel did not object to the statement.
 14. The last witness was Corporal Edward Oketch (PW7). He took over the investigations from another officer. Upon cross-examination, he confirmed he was working in Mandera at the time of the offence. He conceded that he met only *one* witness, PW4. He *never* visited the scene. He said the deceased was first taken to Lugari or Lumakanda Hospital. I found his evidence to be sketchy and unhelpful.
 15. When the accused was placed on his defence, he elected to give sworn evidence. He protested his innocence. He denied being at the house of PW1 or drinking with the deceased on the material night. He denied running away to Webuye. He said the following-

“I used to live in Chimoi before this case. On 20.4.2011 at 7.30 p.m. in the

evening I was at Chimoi. I was a turn boy. I was in Mumias at 7.30 p.m. I was not at home. So I can't tell what happened. I was getting molasses for my employer at Mumias. I know the deceased as a neighbour. I was not with the deceased on 20.4.2011. We were not together. I was at Mumias. We only got the molasses on 24.4.2011 as there were long queues. I never beat up the deceased or caused his death. I did not see the deceased on either 20th April 2011 or 21st April 2011. I have never had a disagreement with the deceased, his wife or family”

16. I have considered the evidence. I have also considered the written submissions by the Republic filed on 10th February 2016; and, those by the defence filed on 22nd February 2016.
17. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.
18. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

“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.”

19. The first key question in this case relates to identification. PW1 and PW5 were *eye witnesses*. They knew both the accused and the deceased who were their neighbours and regular customers at their *chang'aa* den. The den was PW1's one-roomed house. From the evidence of PW1 and PW5, the room was *lit* by a *tin lamp*. The deceased and accused spent some time there. They were both drinking before an argument arose. The accused then stepped outside. He returned and hit the deceased on the head with the stone and took off. From that evidence, PW1 and PW5 clearly *recognized* the accused as the person who was drinking with the deceased; engaged in an argument with him; and, hit him on the head with a stone. Evidence of recognition is much stronger than mere identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & others v Uganda* [2009] 2 EA 333.
20. I have considered that the accused set up an *alibi*. He claimed he was away in Mumias at the material time. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501.
21. The *alibi* in this case was a red herring. It was discounted by the consistent evidence of PW1 and PW5 who corroborated each other. I am alive that PW1 and PW5 had at some point been arrested as suspects. But moments after the attack, the deceased also told his wife (PW2) and son Andrew (PW3 “A”) that it is the accused who hit him with a stone on the head. From the totality of the evidence, I entertain *no* doubt whatsoever that the accused was at the *locus in quo* and hit the deceased with a stone on the head.

22. The statement under inquiry made by the accused to Chief Inspector of Police Lawrence Nalwa (PW6) is *not* admissible by virtue of section 25A of the Evidence Act. Although it was made to a Police Inspector, there was no evidence of the presence of *a third party of the [accused] person's choice*. See Republic v Peter Njuguna, High Court, Eldoret Criminal Case 56 of 2011 [2015] eKLR. I thus completely *disregard* the statement.
23. Section 25A (1) of the Evidence Act provides as follows:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the person's choice.”

24. I have already found that the accused and deceased engaged in a petty argument over the deceased's sale of some land or whether he had become moneyed and full of pride. The accused stepped outside; returned and hit the deceased with a sharp stone on the head. The pathologist found a laceration on the right side of head measuring 3x2 cm. It had been stitched. There was a fracture on the right parietal wall with massive brain haemorrhage. In his opinion, the cause of death was a blunt head trauma causing the brain haemorrhage. That further *corroborates* the eye-witness account of PW1 and PW5. Learned counsel for the defence propagated a theory that the deceased was drunk; and, he may have injured his head in a fall. But it was not borne out by any cogent evidence. It remained simply that; a pure theory. Fundamentally, it never cast any serious doubt on the prosecution's case.
25. The accused acted with malice aforethought. Malice aforethought includes the *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*. Hitting the deceased with a stone was an unlawful act.
26. Although the information refers to the date of 21st April 2011, the evidence of all material witnesses showed that the attack occurred on the *night* of 20th April 2011 at about 9:00 or 9:30 p.m. From the evidence of PW2, PW3 “B” and the post mortem report, the deceased died on 22nd April 2011. I thus find that the accused attacked the deceased on 20th April 2011 at about 9:00 or 9:30 p.m.; and, that death occurred on 22nd April 2011.
27. The legal burden of proof lay throughout with the prosecution. See Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332, Abdalla Bin Wendo and another v Republic (1953) EACA 166, Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). From the evidence of PW1, PW2, PW3 “A”, PW3 “B” and PW5, I find that the prosecution proved *beyond reasonable doubt* that the accused hit the deceased with a stone on the night of 20th April 2011; that the act was *unlawful*; and, that the deceased succumbed to those injuries on 22nd April 2011.
28. I have also found that the defence set up by the accused is unbelievable and a red herring. His identity was *never* in doubt; and, there was also *no* evidence that he acted in self-defence. Even assuming the deceased hit him with a stick, the accused did not react immediately. He stepped out, returned after about *five minutes* and hit the accused with the stone. It would then be far-fetched to say he was acting in self-defence.
29. The accused may have been drunk on *chang'aa*; but it was *self-induced* intoxication. It would not afford a defence. See Kupele ole Kitaga v Republic, Court of Appeal, Nakuru, Criminal Appeal 26 of 2007 [2009] eKLR. Mental examination by PW4 confirmed the accused had a sound mind. In a synopsis, there was no *justification* for the attack upon the deceased. True, the stone was not produced in evidence. But that was not fatal to the charge.
30. In the end I am satisfied that the prosecution *proved* beyond reasonable doubt that the accused, *of malice aforethought caused the death of Henry Silungai Kaskon by an unlawful act*. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 15th day of March 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Okara for the accused.

Ms. Oduor for the Republic.

Mr. J. Kemboi, Court clerk.