



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT CR CASE NO 12 OF 2015
(FORMERLY MERU FILE NO.66 OF 2012)

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN MUGENDI MURUNGI.....ACCUSED

JUDGMENT

1. On the morning of 8th July, 2012, Kenneth Muriithi Musyoka (“the deceased”) was found unconscious in a trench in Mukuuni market. His father, David Musyoka Muratha (PW4) with the assistance of the area Assistance chief rushed him to Chuka District Hospital where the deceased passed on at about 19 hours on the same day.

2. On 10th October, 2012, the state lodged information before the High Court charging Martin Mugendi Murungi (“the accused”) with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the night of 7th July, 2012 at Mukuuni market Mukuuni sub location in Tharaka Nithi County, jointly with another not before court, the accused murdered the deceased. The accused denied the charge and the prosecution lined up six (6) witnesses to prove the charge.

3. Doreen Kendi (PW1) recalled how on 7th July, 2012 at about 20 hrs she was in a bar at Mukuuni market. In that bar, there were many patrons who included the accused and the deceased. A quarrel arose between the deceased and a lady by the name Gaceri whereby the latter hit the deceased with a glass bottle on the forehead. The deceased and Gaceri were thrown outside the bar whereby the accused asked the deceased to accompany him home. The deceased hit the accused and the two began to fight. They were however separated by PW2 and PW3 who took the deceased to his father PW4 who was at the time within the vicinity. The following day, PW1 saw the deceased lying in a trench with his father trying to administer first aid on him. She later learnt that the deceased had passed away. In cross-examination, she told the court that the accused did not have any weapon when he was fighting with the deceased on the night of 7th July, 2012. She did not know where the deceased went after being taken to his father (PW4).

4. Kinyua Thuiru (PW2) and Marclus Murithi (PW3) were strolling on the streets of Mukuuni market on the night of 7th July, 2012. At around 20.30 hrs they heard a commotion from a nearby bar. They decided to go and see what was happening. The deceased emerged from the bar with the accused in hot pursuit. When the accused caught up with the deceased, he started beating him with his fists. PW2 and PW3 separated the two. They took the deceased to his father who was in his butchery within the vicinity. The deceased complained that the accused had taken his phone and money. They left the deceased with his father and went home. They later learnt that the deceased had passed away the following day. In cross-examination, they confirmed that on the night of 7th July, 2012, the deceased walked on his own to where

his father was and that he did not have any visible injuries.

5. On his part, the father of the deceased, PW4, told the court how PW2 and PW3 brought the deceased to his butchery on 7th July, 2012 at about 21.00 hrs. That at the time, the deceased was walking on his own. He was complaining about his phone and money which the accused had taken. That his pleas to the deceased to go home and sort out those issues the following morning fell on deaf ears. He left the deceased there and went home. The deceased did not come home that night. The following morning he was called to the market where he found the deceased lying in a trench unconscious. He was assisted by the area assistant chief to take the deceased to Chuka District Hospital where the deceased sadly passed on at about 19.00 hrs. He reported the matter to Chuka Police Station on the 9th July, 2012 and attended the post mortem of the body on 20th July 2012. He thereafter took the body for burial. In cross examination, he stated on the night of 7th July, 2012, the deceased had no visible injuries; that the deceased looked different in the morning of 8th July, 2012 than he was the previous night and that where he was lying that morning there were signs of there having been a struggle.

6. Dr. Justus Kitili (PW5) carried out the post mortem on the body on 20th July, 2012 at the Chuka District Hospital Mortuary. The body had bruises on the left palaeal and frontal parts of the sculp. Internal examination revealed, fractures of the frontal skull bone. He formed the opinion that the cause of death was cardio pulmonary arrest due to severe head injury inflicted by a blunt object. PW6 P.C Richard Obwoye investigated the case. He received a report of the murder on 9th July, 2012. He visited the scene but found that the deceased had already been removed to hospital. He established in his investigations that on the night of 7th July, 2012, the deceased had fought with the accused and a lady by the name Gaceri. That the latter hit the deceased with a glass bottle on his head while the accused had beaten the deceased with fists. That while the said Gaceri was at large, the accused was arrested in Embu on 4th October, 2012. In cross examination, he confirmed that his investigations revealed that the accused was not armed with any weapon when he fought with the deceased.

7. In his defence, the accused recalled the events of that fateful day. Earlier on in the day, he was drinking with his sister's boyfriend and the deceased at the home of the deceased. They once again met in the evening at the bar belonging to the accused's sister. Since he was drunk, the accused fell asleep. He was woken up when a commotion arose only to find the deceased engaged in a tussle with Gaceri. The latter hit the deceased with a bottle on the head. People pushed the two outside the bar. When he went out, the accused asked the deceased to accompany him home but the deceased slapped him hard. The accused fell to the ground and when he woke up, the deceased once again slapped and they held each other. Then PW2 and PW3 came and separated them. The accused thereupon got a chance to free himself and went home. He was not armed at the time. He denied taking the deceased's phone or money. The following morning, he learnt that the deceased was at Mukuuni market unconscious. When he went there, he found that the deceased had been taken to hospital. He was shown where the deceased was found lying which was about 200 meters from where he had left him the previous night. In cross examination, the accused stated that he was too drunk to fight the deceased.

8. It was the submissions of Mr Muriithi, learned counsel for the accused that there was no evidence that the accused was armed at the time there was a confrontation between him and the deceased. That the cause of death as contained in PExh 1 cannot be the alleged blawl by the accused on the deceased; that the deceased was found with soil in the mouth and nose in the morning of 8th July, 2012 and that no motive was ever established. To Ms Ndombi, the learned prosecutor, the prosecution had established the charge as required by law. That the cause of death was consistent with the testimony of PW1 of the accused blawls on the deceased; that the accused disappeared from home until he was arrested on 4th October, 2012. That the prosecution was relying on circumstantial evidence and the accused should be found guilty.

9. I have carefully considered the evidence on record. Section 203 of the Penal Code that creates the offence of murder provides that the offence of murder is committed when a person, with malice aforethought, causes the death of another by an unlawful act or omission. In this regard, three ingredients

must be proved to exist to prove the offence of murder. Firstly, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of death; secondly, that the person charged committed an unlawful act or omission which led to the death, and thirdly, that in committing that act or omission, the person charged was of malice aforethought.

10. On the first issue of the death and the cause thereof, the testimonies of PW4 and PW6 were clear. That on the morning of 8th July, 2012, the deceased was found unconscious in a trench within Mukuuni market by members of the public. His father PW4 rushed there and attempted to apply first aid on him but the deceased did not respond. PW4 with the help of the area sub-chief rushed the deceased to Chuka District Hospital where he was admitted. At around 19 hours of the same day, the deceased passed away. Ever since he was found in the morning until passing on, the deceased did not utter a word. PW6 who performed the post mortem on the body of the deceased told the court that the external examination revealed bruises on the left parietal and frontal parts of the scalp. Internal examination revealed linear/straight fractures of the frontal skull bone in the head of about 4 cm. He concluded that the cause of death was cardio-pulmonary arrest due to severe head injury inflicted by a blunt object. To my mind, the prosecution did prove that Kenneth Muriithi Musyoka died on 8th July, 2012 out of severe head injury.

11. The second issue is whether it was the accused who caused the said death and if so, whether he was of malice aforethought. Section 206 of the penal code provides:-

“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)

(d)”

12. The testimony of PW1 was that on the material night, a disagreement arose between the deceased and a lady by the name Gaceri. In that commotion, Gaceri hit the deceased with a glass bottle on the head. The two were thrown out of the bar. PW1, PW2 and PW3 told the court that while outside, the Accused tried to intervene and a fight broke between him and the deceased. That the accused beat the deceased with his fists severally. PW2 and PW3 separated the two and took the deceased to his father (PW4) who was within the vicinity. Pleas from his father (PW4) that the deceased go home fell on deaf ears. As a result the deceased was left behind by his father. He was found the following morning unconscious from which he never recovered.

13. It is clear that on the material day, 7th July, 2012 at about 8.30 pm, the deceased was assaulted by one Gaceri who hit him with a glass bottle and the accused who hit him with fists. While Gaceri is said to have specifically hit the deceased on the head, it is not clear where the accused was hitting the deceased with his fists. PW2 and PW3 stated that when they took the deceased to his father (PW4), the deceased did not have any visible injuries. Further, there was no evidence that the accused assaulted the deceased with any weapon save for his bare fists. On the morning of 8th July, 2012, when the deceased was found unconscious at Mukuuni market, he had mud all over; he had soil both in his mouth and nose. While he properly and intelligibly canvassed with PW2, PW3 and his father (PW4) the previous night, on the morning of 8th July, 2012 he was unconscious, a state he remained in until he passed on at about 19.00 hrs that day. The place where he was found showed signs of there having been a commotion or a

struggle.

14. The question, is was the assault of the evening of 7th July, 2012 the one that caused the death of the deceased? The prosecution relies on circumstantial evidence against the accused. For a charge of murder to be sustained on circumstantial evidence, the prosecution must demonstrate that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. In **Republic .v. Kipkering Arap Koske & Anor [1949] EA 135**, The East African Court of Appeal held:-

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

15. In the latter case of **Abanga alias Onyango .v. Republic Cr. App. No.32 of 1990**, the Court of Appeal laid down the following principles on circumstantial evidence:-

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

(i) circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly be established,

(ii) those circumstances must be of a definitive tendency unerringly pointing towards guilt of accused; and

(iii) 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.”

16. The circumstances relied on in this case is that; the accused was seen assaulting the deceased on the night of 7th July, 2012. That the deceased died from severe injuries on his head the following day. After the fight with the accused at about 8.30 pm, the deceased walked on his own to where his father was. He spoke to amongst others, PW2, PW3 and PW4. He refused to go home and nobody knows where he spent that night until the morning when he was found lying unconscious in a trench in Mukuuni market. He had soil in his nostrils and mouth. There was clear signs of a struggle at the scene where he was found lying. There was no evidence that the accused met the deceased after they were separated by PW2 and PW3 on the night of 7th July, 2012.

17. To my mind, the circumstances in this case taken cumulatively cannot be said to point unerringly towards the guilt of the accused. There is a possibility that between 9 pm, when he was left behind by his father, there was enough opportunity for someone else to have assaulted the deceased. He was found unconscious the following morning with his surrounding having signs of a struggle. He had soil on his mouth and nostrils. There was no evidence to show that the fists by the accused, who is said to have been very drunk, would have caused the severe injuries that resulted in the demise of the deceased. There is a doubt as to what might have happened to the deceased between 9.30 pm of 7th July, 2012 and 7 am of 8th July, 2012. I will resolve that doubt in favour of the accused.

18. Accordingly, I find that the prosecution did not discharge its burden of proving beyond reasonable doubt that, with malice aforethought the accused caused the death of the deceased. The accused is not culpable. I find him not guilty and I hereby acquit him of the charge of murder.

Dated and delivered at **Chuka this 20th day of December, 2016**

A.MABEYA,

JUDGE.