



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 30 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH WAMBUA MUTUA.....ACCUSED

JUDGMENT

1. **Joseph Wambua Mutua** alias **Rasta** hereinafter, the accused, is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars thereof being that on the **1st day of May, 2010**, at **Ndithini Village, Kiteta Location** within **Mbooni East District** of the **Eastern Province** murdered **Mutinda Wambua**.
2. The facts of the case were that the deceased was the son of the accused person. On the **1st day of May, 2010** **PW4, Stephen Mutiso** a brother to the accused was asleep when he was woken up at about 11.30pm. He heard noise emanating from his brother's house. He decided to check on what was happening. On arrival he found the accused and the deceased shouting and threatening to beat each other. The accused was armed with a walking stick. He hit the deceased once and he fell down. In company of his wife they carried the deceased to his house in an endeavor to take him to hospital. He however passed on.
3. **PW9, No. 219163, I.P Samuel Kimathi** received the report of the incident and moved to the scene. He was able to recover the murder weapon. The accused was arrested. The body of the deceased was taken to **Tawa Mortuary**. A postmortem was conducted by **PW7, Dr. Titus Ndeti** who formed an opinion that the cause of death was intracerebral hemorrhage due to fractured skull as a result of assault. Investigations were concluded which culminated into the accused being charged.
4. When put on his defence the accused stated that on the material date they buried his aunt. Thereafter he went to the club and drank alcohol with his cousins. On arrival at home he found the deceased having switched on a radio. The volume was high. He sent his wife to request him to switch off the radio. The deceased then came out. He had quarreled with his wife therefore she ran out screaming. The deceased who looked agitated came out with a stick. He used it to hit him. He (*accused*) snatched him the stick and the deceased ran going towards his house. He threw the stick at him, it hit him. His brother came to the scene and sought to know if it was within his knowledge that he had injured the deceased. He was however too drunk to tell what transpired. He went looking for a motorcycle to take him to hospital. On reaching the roadside he was overwhelmed. He sat down. He was found and arrested at that point.
5. In his submissions counsel for the accused stated that the accused had no intention of killing the deceased. It was as a result of a fight between them. Further, he stated that although the *actus reus* of the offence had been proved the accused did not act with malice aforethought. He prayed for the acquittal of the accused.
6. In response thereto the learned State Counsel **Ms Kefa** submitted that the conduct of the accused person who armed himself with a rungu, chasing his wife and finally attacking the deceased was

evidence that he intended to cause death or at the very best grievous harm which made him culpable of the deceased's death.

7. Issues to be determined are:-

- i. Whether the accused caused the death of the deceased by an unlawful act or omission?
- ii. Whether it was with malice aforethought?

8. It is not in dispute that the accused herein hit the deceased using a stick. Hitting a person is contrary to the law. Having violated the legal duty of the society and laws, he acted unlawfully. The cause of death was intracerebral hemorrhage due to a fractured skull. PW4 said the accused hit the deceased on the head. His action therefore caused the deceased's death.

9. With regard to second issue, it must be established that the accused acted with malice aforethought. In the case of *Nzuki Versus Republic [1993] KLR 171* the Court of Appeal set out principles of determining whether the intention to commit murder is proved as follows:-

“1). Malice aforethought is a term of art and is either an express intention to kill or implied whereby a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as a result.

2). Before an act can be (murder) it must be aimed at someone and must be an act committed with one of the following intentions;-

- a. **to cause death;**
- b. **cause grievous bodily harm ; and**
- c. **whether the accused knows that there is a serious risk that death or grievous harm will ensue from the acts, and commits these acts deliberately**

3). Without an intention of one of these types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.

4).”

10. **Section 206** of the **Criminal Procedure Code** gives circumstances that constitute malice aforethought as:-

- 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 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 wish that it may not be caused.**
- c. **An intent to commit a felony.**

11. PW4, an eye witness to what transpired before the deceased passed on stated that he heard noise and when he went to the scene, the accused and the deceased were shouting. Their voices were raised. Each one threatened to beat the other. And indeed the accused struck the deceased just once and he fell down.

12. The fact that each threatened to beat the other is a suggestion that there could have existed the intent to strike another but not necessarily cause grievous harm.

13. In his defence the accused stated that he was intoxicated. Other than his assertion that he was intoxicated there is nothing per the evidence adduced to suggest that he was incapable of forming an intention due to the intoxication. In his defence he stated that he threw the stick at the deceased as he ran. He claimed that it was the deceased who had come out of the house agitated carrying the stick. His action of hitting the deceased following a shouting match between them may not

necessarily mean that he even intended to strike him. He acted on the spur of the moment. This was unforeseen. There is nothing to suggest that the accused acted with some indifference as to whether the act would result into death or grievous harm. Therefore he had no mens rea for the offence of murder.

14. In the circumstances what is proved is the fact that the accused unlawfully caused the death of the deceased but without an intention to kill. I therefore find him having committed the offence of manslaughter and accordingly reduce the charge to manslaughter pursuant to the provisions of **Section 179** of the **Criminal procedure Code**. He is therefore found guilty and convicted under **Section 202** as read with **Section 205** of the **Penal Code**.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF JANUARY, 2015.

L.N. MUTENDE

JUDGE