



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 72 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH WANJOHI NDUNG’U.....ACCUSED 1

NAFTALI MWAIKA LIMBOLO.....ACCUSED 2

STEPHEN MUCHOI LIMUKI *alias* ASKOFU.....ACCUSED 3

J U D G M E N T

1. **Joseph Wanjohi Ndung’u, Naftali Mwaika Limbolo and Stephen Muchoi Limuki *alias* Askofu**, hereinafter “accused 1, 2, and 3” respectively are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence being that on **12th day of January, 2012** at **Bissil Trading Centre in Kajiado District** within **Kajiado County**, jointly murdered **Mwanzia Kalivu** (deceased).
2. Facts of the case are that on the night of **11th and 12th January, 2012**, the accuseds herein retired to their place of residence from a social place. They hurled abuses at people. Accused 1 in particular demanded for a spoon from the deceased who was already asleep. When he opened the door a scuffle ensued. The deceased who was fatally injured was pronounced dead on arrival at the hospital.
3. To prove the case the Prosecution called twelve (12) witnesses. PW1 **John Kariuki Mburu** lived on the same plot with Accused 1, Accused 2 and the deceased. On the night of **11th and 12th January, 2012** he was woken up from sleep at about midnight. He heard the voice of **Wanjohi** (Accused 1) accusing another of having extracted his tooth. He also heard the voice of Accused 2 but was not able to comprehend what exactly he stated. Thereafter he heard Accused 1 demanding a spoon from ‘Elo’. He did not go outside. The following morning he heard of death that had occurred.
4. PW2 **No. 87083398 I P Wilson Kityaka Mwalili** found the deceased already injured. He arrested Accused 2 and Accused 1. Accused 1 was asleep inside his house. He recovered the murder weapon (knife) which was blood stained from Accused 1’s house.
5. PW3 **No. 60100 Corporal Soy Minaa** the Officer in Charge of Bisil Patrol Base saw the deceased when he was already injured.
6. PW4 **Koipitat Nkuruna** and PW5 **Jackson Pesio Nkuruna** identified the body of the deceased to the Doctor who performed the postmortem.
7. PW6 **Bernard Lesingo Rakwa** a cousin of the deceased went home and found him already asleep. He woke him up at about **11.00 p.m.** At midnight they heard noise. He heard **Wanjohi**

- calling his cousin (deceased) demanding for his spoon. He checked through an aperture that he considered a window and saw the three accuseds. Accused 1 was throwing stones at the deceased's house. He (PW6) told the deceased to open the door and hand over the spoon and he complied. As soon as he opened the door and gave Accused 1 the spoon there was a commotion. He went out and found Accused 1 on top of the deceased who was already injured. Accused 1 held the knife in his hand. Two (2) people who were present ran away. Accused 1 who had a knife ran into his house and locked himself up. The deceased was bleeding profusely. He attempted to take him to hospital but was overwhelmed. He left him and went to seek assistance from the police. The police who answered his call of distress arrested Accused 1 and took the deceased to hospital.
8. PW7 **Shadrack Kipury** the owner of the plot where the incident occurred reached the scene after the occurrence of the incident.
 9. PW9 **No. 210105 Corporal Benard Mbuvi** participated in the arrest of Accused 1 and recovery of the knife.
 10. PW10 **Paul Mutwiri Mutia** showed the police the house of accused. Prior to the police arriving he heard **Wanjohi** asking for a spoon. He had seen the three accuseds together. He witnessed when the police entered the house of Accused 1 and recovered a knife. He also saw the deceased being taken away by the police while bleeding.
 11. PW11 **No. 47352 Corporal James Kimuku** investigated the case and charged the accused persons.
 12. PW12 **Dr. Bululi Kuloba Douglas** conducted an autopsy on the body of the deceased and formed an opinion that the cause of death was severe haemorrhage due to a cut wound on the neck that severed the internal carotid artery/External jugular vein.
 13. When put on their defence, Accused 1 stated that on the material date he was drinking alcohol with his co-accuseds at a bar within Bisil. Having drunk about nine (9) bottles of Allsopp beer they went home at about **10.30 p.m.** They ate at his house. He served his co-accuseds food. The deceased, a caretaker at the premises told him to reduce the volume of his radio as they were making a lot of noise. He reduced the volume and demanded for his spoon that the caretaker had. The deceased told him to forget about the spoon and reminded him that he had not paid rent. They argued as he had paid rent to the landlord. They ate and his co-accuseds left.
 14. The deceased was inside the house with another person. He could hear them talking. According to him the person was **Dan**, the brother of the deceased. They told him to go and get his spoon. When he went to collect the spoon it turned out the deceased had a knife instead of a spoon. He held the deceased's hand, pushed him and they fell down. He noticed **Dan** was carrying a panga. He retreated to his house having taken the knife with him. He locked himself up. He heard the deceased asking to be taken to hospital as he had been stabbed. Thirty minutes later he heard the sound of a motor-vehicle. A person identified himself as a police officer. He opened the door to find police officers outside. They recovered the knife and arrested him. He argued that **Bernard**, a cousin to the deceased was not present. He never disagreed with the deceased for the last two (2) years but he had disagreed with **Bernard**.
 15. On cross examination Accused 1 stated that the rooms they lived in were separated by iron sheets therefore it was possible for a person to hear what a person next door was saying. He stated that his co-accuseds left prior to their disagreement.
 16. Accused 2 stated that he is a bar manager and was at the bar with Accused 3. Accused 1 offered to provide some meat as they were hungry. He lived on the same plot with Accused 1. They went to his house at **10.30 p.m.** As they ate the meat, the deceased who was next door demanded for rent. After the meal, he left with Accused 3. He went to organize things at his place of work. Thereafter he left only to be arrested by the police who were on patrol.
 17. Accused 3 alluded to have been at the bar with his co-accuseds, having had a meal at the house of Accused 1 and having heard the deceased demanding for rent from Accused 1 who promised to pay up. He testified that he left for his house after eating meat where he slept. In the morning Maasais were avenging the death of one of their own. He was one of the persons assaulted but rescued by the police. He was taken to the police station where he found his co-accuseds.
 18. Final submissions filed by the defence have been considered.
 19. It is not in doubt that the deceased sustained a stab wound on the neck that severed the internal carotid artery/external jugular vein. The weapon that was used to inflict the injury was a knife.

20. Issues to be determined are therefore:

- Whether the unlawful act that caused the death of the deceased was inflicted by the accuseds.
- Whether they acted with malice aforethought.

21. PW1 was familiar with the accused persons. It was stated by Prosecution witnesses who resided on the plot and conceded by the accused persons that the rooms were separated by iron sheets wall such that sound could be heard by a person next door. Therefore when PW1 states that he heard voices of the three (3) accused persons who indeed admitted having been at the house of Accused 1 he must be believed. However, he did not come out of the house to see who were involved in the scuffle.

22. The only eye witness to what transpired therefore remains PW6. The defence put up a spirited argument that PW6 was not the person inside the house of the deceased on the fateful night. They alleged that it was **Dan**, a person well known to them. They went on to state that the witness was also known to them as the deceased's cousin.

23. In the case of **Kiilu & Another vs. Republic (2005) IKLR 174** it was stated thus:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from probability of error.”

24. In that vein I caution myself of the importance of ensuring evidence adduced by PW6 is not tainted with any possibility of error.

25. According to PW6, he was sleeping peacefully with the deceased when they were woken up by the three (3) accused persons who were making a lot of noise. He peeped through the window and saw them. There was moonlight and lights emanating from security lights that enabled him to see. Accused 1 threw stones at the deceased's house as he demanded for his spoon. He advised the deceased to give him the spoon. He complied and there was commotion. This prompted him to go out where he found Accused 1 on top of the deceased, they were on the ground. The deceased was already injured while Accused 1 held the knife in his hand. He ran into his house and locked himself up as his co-accuseds ran away. According to Accused 1, the deceased did not have any spoon. He carried a knife instead. His evidence is however disapproved by the fact that the spoon the deceased carried was actually recovered and was broken. Accused 1 alludes to having pushed the deceased after he held his hand, the consequent impact being falling down. He did not allege that the deceased fell on the knife. If both of them fell down as alleged there is no way he could have been found on top of him. The act of being on top of him is proof that he was assaulting him.

26. When the doctor who did the autopsy testified it was not suggested that the stab wound was consistent with a fall on an object that caused the injury. The neck was severed. If at all the accused simply snatched the knife and they fell down it was unlikely that it could cause a stab wound that was sustained. I therefore find that circumstances that prevailed point at the Accused 1 as the person who stabbed the deceased and took away the knife, the weapon that he used which was recovered from his house. He is the one who committed the unlawful act that caused the death of the deceased.

27. Was he actuated by malice aforethought? Malice aforethought is defined by **Section 206** of the **Criminal Procedure Code** 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 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.”

PW11, the Investigating Officer stated that following his investigations he established that the accused persons were drunk. Accused 1 in particular testified that he had taken nine (9) bottles of Allsopp an alcoholic drink. It is submitted that the Prosecution pointed out that the three (3) accused persons were drunk on the material night as they were making a lot of noise, were a nuisance and went on shouting which was evidence that they were inebriated. Although the Prosecution witnesses did state that they were drunk no evidence was called to prove beyond any reasonable doubt that they were affected by too much alcohol.

28. Intoxication may be a defence to a criminal charge. **Section 13** of the **Penal Code** provides thus:

“(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

This is a case where the accused did not put up a defence of intoxication. Although all along he wished to plead to the lesser charge of manslaughter as correctly submitted, an offer that was accepted by one state counsel and later declined by another, in his defence he changed his mind and denied having even caused the death of the deceased.

29. Probably he did so because even as he entered his house he could tell what was going on. He stated that he could hear the deceased begging to be taken to hospital. He however locked himself up in the house. He even alleged that he saw PW6 armed with a panga. This means that he was mentally stable.

30. Accused 1 and his co-accuseds were making a lot of noise on the fateful night. They alleged that

the deceased told them to reduce the volume of their radio and they complied. However, according to PW6, Accused 1 called out the deceased because he wanted his spoon. They were eating but they lacked a spoon. Accused 1 not only demanded for his spoon but also insulted him. He acted further by throwing stones at his house. It was at that juncture that PW6 urged the deceased to return the spoon.

31. The Accused demanded for what belonged to him but he did it in a hostile manner. There was commotion as soon as the deceased opened the door which resulted into the deceased being fatally injured – which means that the Accused acted with a homicidal intent.
32. He alleged that he acted in self-defence. There was proof that the deceased went out with a spoon but not a knife. He had no reason to believe that the deceased would attack him with a spoon. In the case of **DPP vs. Morgan (1975) 2 AU ER 347** it was stated that the essential element of self defence is that the Accused believed that he was being attacked or was in imminent danger of being attacked but this belief should be based on reasonable grounds. (**Also see Roba Galma Wario vs. Republic (2015) eKLR**). There is no evidence adduced to suggest that the Accused 1 who was chaotic that night faced any imminent danger from the deceased such that he had to use weapon as a knife to defend himself.
33. Evidence adduced proves beyond any reasonable doubt that the Accused who had a stable mind knew that by using a kitchen knife he would at least cause grievous harm to another person. Basing on the unprintable insults he was hurling at the deceased it was obvious that he did not care if there were any repercussions. This was proof that he acted with malice aforethought.
34. Accuseds are jointly charged. **Section 21** of the **Penal Code** provides thus:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In the case of **Dickson Mwangi & Another v. R 2014 eKLR** it was stated thus:

“.....where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a prearranged plan. Although common intention can develop in the course of the commission of an offence.....”

35. The accused persons went to the house of Accused 1 to eat meat. It was as a result of eating that they realized a spoon was required. It was not suggested that Accused 2 and 3 confronted the deceased. It is not alleged that they participated in the unlawful act that resulted into the death of the deceased. The evidence did not point at them as having had any common purpose of causing grievous harm or death to the deceased.

In the premises the Prosecution failed to prove the case against Accused 2 and 3 beyond any reasonable doubt. Therefore, they are acquitted of the charge of murder.

However, in regard to Accused 1, the case against him is proved beyond any reasonable doubt. He is guilty and convicted of the offence of murder.

Dated, Signed and Delivered at Kitui this 9th day of December, 2015.

L. N. MUTENDE

JUDGE