



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 14 OF 2008

LESIT. J.

REPUBLIC.....PROSECUTOR

-VERSUS -

JUDAH KIOGORA NGARUTHI.....1ST ACCUSED

WILFRED GATOBU.....2ND ACCUSED

JUDGMENT

1. The two accused **JUDAH KIOGORA NGARUTHI**, hereinafter the 1st accused and **WILFRED GATOBU** the 2nd accused are jointly charged with one count of **murder** contrary to **Section 203 Penal Code**. The particulars of the offence are:

“On the 18th day of January 2008 at Mariene sub-location, Mariene location in Meru Central district within Eastern Province, murdered PATRICK MURIERA”.

2. The prosecution called seven witnesses. The facts of the prosecution case is that at 10.00 p.m. on the 18th January 2008, the two accused and one Kamonde went to PW1, deceased’s mother and asked her where the deceased was. She told them that he was in his house. The three walked to the house the deceased and PW2 shared. The three carried away the deceased and PW2. The 1st accused cut the deceased on the left hand, a severe cut, and then all three of them beat up the deceased by kicks and blows. They then carried the deceased to his bed and threatened PW2 not to sleep in that house that night. PW2 heeded their warning and went to sleep in the house of the brother of the 2nd accused, who is also the cousin.

3. The next day the deceased was taken to Meru Police Station by his mother PW1, his sisters PW4 and 5. After the deceased reported the assault by both accused and Kamonde, the three relatives took him to Meru Hospital where he was admitted. The deceased died two days later. The post mortem examination report shows he died of severe head injury due to blunt trauma.

4. Each of the accused gave a sworn defence and put forward an alibi as their defence. The 1st accused testified that he worked as a matatu driver. He stated that on the 1st January 2008 he went to work as usual where he worked until 8.00 p.m. When left work, he went back home. He bathed, ate, and then slept since he had to wake up early the next morning. The next morning he went to work as usual. The 1st

accused stated that it was on 22nd January 2005 at 2.00 a.m. that the Area Chief summoned him to his office. He went there next morning and was arrested. He was eventually charged with this offence on 27th February, 2008.

5. The 2nd accused in his sworn defence stated that he carried out a fruit sales business in Isiolo but that he bought the fruits he sold in Meru Town. He stated that he also lived in Isiolo. The 2nd accused stated that on 18th January 2008 he bought fruits in Meru Town but could not return because the vehicle he had hired did not return. He had to sleep in his brother's house that night.

6. The 2nd accused stated that while in that house at midnight, his cousin PW2 knocked on the door. When he opened he saw PW2 standing there and that he was out of breath and anxious. The 2nd accused stated that PW1 told him that the deceased had been disciplined by some people who were his age mates for insulting his mother. The 2nd accused stated that PW2 told him that eventually the deceased turned against him (PW1) accusing him of being on the side of his attackers. PW1 told him that his mother and sisters, PW1, 4 and 5, rescued him and he needed to spend the night there.

7. I have carefully considered the entire evidence adduced in this case by the prosecution and the defence. I have also considered the submissions by Mr. Omari for the accused and Mr. Mulochi for the State.

8. The accused persons face a charge of Murder contrary to **Section 203** of the **Penal Code**. The Section creating this offence provides as follows:

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

9. Malice aforethought is an essential ingredient for the offence of murder. The circumstances which constitutes malice aforethought are set out under **Section 206** of the **Penal Code** in the following terms:

“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.”

10. The burden lies with the prosecution to prove the case against the accused persons beyond any reasonable doubt. The prosecution has to adduce evidence to establish that the accused, acting with one common intention, unlawfully and by some act or omission caused death to the deceased.

11. The family of the deceased have testified and stated that the two accused were well known to them because the 1st accused was a neighbor and the 2nd accused the cousin of the deceased, PW2, 4 and 5. They were therefore well known to them. It is the evidence of PW1 the aunt to the 2nd accused and mother of the deceased that at midnight on the material night, both accused and one Kamonde. They woke her up and asked for the deceased. PW4 and 5 were attracted by the sound of knocking and went

tout to see the accused persons and their accomplices go to the house of the deceased and take away the deceased and his brother, PW2.

12. PW2 confirmed that he was taken away by the accused and Kamonde and that at the time they appeared to have come in peace. It was when he and his brother followed them that the three beat up his brother and then returned him home and warned PW2 not to sleep in the house he shared with the deceased. The next day the deceased was taken to hospital, after passing by the Police Station to report the matter.

13. The evidence against the accused persons was direct evidence by four witnesses that the two went to deceased home and went away with him. PW2, the brother of the deceased with whom they shared a house gave direct evidence that both the accused and Kamonde set upon the deceased, the 2nd accused cutting him on the hand and then all of them setting upon the deceased with blows and kicks all over the body.

14. Regarding the direct evidence of PW2 that the accused were responsible for the deceased death. Both accused refuted his evidence alleging they never went for the deceased. However there were three other witnesses who testified that the accused had asked for the deceased and had taken him away. These were persons well known to each other, a matter the accused persons did not deny.

15. The issue is why would PW1, 2, 4 and 5 lie against the accused persons. The 2nd accused explained that PW4 had a grudge against him because of an incident two years earlier when he, the 2nd accused took police officers to her house after they paused as civilians. The 2nd accused stated that he led the two officers' right to PW4's illicit brew den and she got apprehended for the brew.

16. I noted that while cross-examining her, the defence did not pose any questions challenging her over any grudge, or over any allegation that she was lying. Neither was PW4 asked about having taken any police officers to her illicit brew den. The only explanation for that omission can only be that the accused defence was wholly an afterthought and therefore untrue. The same does not raise any doubt in the prosecution case.

17. Regarding PW2 the 2nd accused stated that it was PW2 who first told him about the deceased having been disciplined by his agetates for abusing his mother, PW1. The 2nd accused went further to state that discipline of a son who dishonored his mother was an accepted practice among people of that area.

18. I noted however that when cross examining PW1, no question was put to her that she had asked the deceased agetates to discipline the deceased for disrespecting her. PW1 in cross examination by the defence testified that there was no such thing as discipline of the deceased. However PW2 in his evidence stated that the accused persons and their accomplice told him that they were disciplining the deceased because of dishonoring his mother.

19. The mother of the deceased was asked whether her son was being disciplined for dishonoring her and she denied it. However from PW2's evidence, both accused told him that they had gone to discipline the deceased because of dishonoring his mother. That means that as early as the time the attack on the deceased occurred, the accused persons were stating that their intention of going for the deceased was to discipline him.

21. I find that the accused persons may have been disciplining the deceased when they inflicted the injuries on the deceased. That notwithstanding, no one can be allowed to cause death if one they claim they were disciplining. In any event, though the accused claim that the Meru peoples' culture recognized discipline of young men by their agetates where the person disciplined is found to have dishonored his mother that cannot be used as an excuse to commit grievous harm or death.

21. Regarding whether the prosecution proved malice aforethought I have considered some binding authorities. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O'KUBASU and

ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

22. In this case the accused persons kick and boxed the deceased all over the body after the 2nd accused cut him on the forearm. The doctor’s finding was that the deceased had multiple facial and scalp bruises, multiple bruises on the left shoulder and anterior chest and a deep cut on the forearm. These injuries are in tandem with the injuries that PW2 saw the accused person and their accomplice at large inflict on the deceased. The intention to cause death or grievous harm is not proved, the defence having raised a doubt that there was any intention to cause death or grievous harm on the deceased. Nevertheless the accused persons were busy bodies and had no authority to discipline the deceased for whatever reason, moral or cultural. There is therefore no defence available to the accused persons for the act they committed in this case.

23. In any event, whether the motive was to discipline or not lack to prove motive is not fatal to the prosecution case. I am guided by the court of appeal case of **Chogo vs. Republic (1985) KLR1**, where the court of appeal held as follows:

“Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

24. The accused have denied the charge and have put forward an alibi defence. The way to treat the defence of alibi was succinctly explained in the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, where the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

25. I have considered the accused alibi defence. I find that it has not created any doubt to the veracity of the prosecution case, neither has it created any doubt in the strength of the prosecution case. The accused persons were recognized going away with the deceased by PW1, 2, 4 and 5. The accused were seen assaulting the deceased by PW2. I have no doubt that the accused persons assaulted the deceased causing severe injuries which led to the deceased death.

26. I find however that the prosecution has failed to prove that the accused had formed malice aforethought to cause death or grievous harm to the deceased. In the circumstances I substitute the charge of murder contrary to **Section 203** of the **Penal Code** to manslaughter contrary to **Section 202** of the **Penal Code**.

27. I find the accused persons guilty of the substituted charge of manslaughter and convict him accordingly under **Section 322** of the **Criminal Procedure Code**.

DATED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

LESIIT, J.

JUDGE