



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE 13 OF 2006
REPUBLIC PROSECUTOR
VERSUS
KENNETH MUTAI WANJOHI.....ACCUSED

JUDGEMENT

The Accused KENNETH MUTAI WANJOI is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 13th December 2005 at Mwichiune Market, Igoki Location in Meru Central District he murdered Ceaser Riungu M'Iringo.

The facts of the prosecution case are that on 13th December, 2005, the deceased and Micheni PW3 travelled in the same matatu to Mwichiune Market. The deceased entered Mwichiune bar where he borrowed 30/- which he used to pay for his fare. The deceased then entered the bar and had a drink with Douglas PW1. The accused who was in the bar asked the deceased for some money which the deceased declined. After having their drink, the two PW1 and accused walked out of the bar. The accused walked upto where the two friends were and hit the deceased with his fist on the right side of the head. The deceased fell down bleeding from the ears, mouth and nose. He was taken by PW1 and others. Before going to the hospital the deceased and accused in company of APC KIMATHI MWONGERA (not a witness) reported to Cpl Mukangai, PW6 at Nkubu Police Station at around 4.30 pm. The deceased died five days later at Kenyatta National Hospital where his son, Peter Kaaria PW5 had transferred him from Meru General Hospital. The post mortem examination results were that the deceased died of head injuries due to a blunt trauma on the right side of the head.

The accused gave a sworn defence. He told the court that on the 12th December 2005 he spent the day working at his shamba 15 km from Mwichiune where his home is. That on the next day he spent the day at home alone. That that afternoon a Police Officer went to his home and arrested him accusing him of beating a person at Mwichiune Market that same day. The accused denied hitting the deceased and said that he did not know the deceased before.

I have carefully considered the entire evidence adduced by both the prosecution and defence and the

submissions by counsels on both sides.

The accused faces a charge of murder. The prosecution has the evidential burden to prove beyond any reasonable doubt:

- (a) That the accused did an act which caused injury to the deceased as a result of which injuries he died.
- (b) That the accused action was motivated or actuated by malice aforethought.

Section 203 of the Penal Code defines murder as:

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

Section 206 of the Penal Code gives circumstances which constitute malice afore thought 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.”**

The prosecution has to establish at least one of the circumstances set out under S. 206 of CPC in order to prove the offence charged.

There was one eye witness of the incident, PW1. PW2 bar attendant where accused and deceased had been prior to the incident was declared a hostile witness after he contradicted his statement to the police while testifying in this case. His evidence was therefore unreliable as it was shown that to the police he had said he saw accused and deceased collide as they left his bar. PW2's evidence in court was he did not witness any collision between accused and deceased neither did he see accused hit the deceased.

I have carefully considered the evidence on record in this case and find that there was one eye witness to the incident. This was PW1. They had been with the deceased in the bar. They walked out of the bar together. The accused approached them outside the bar, and with his fist hit the deceased on the right side of the head. Immediately he was hit, the deceased started bleeding from the ears, mouth and nose.

The evidence of PW1 was that prior to the attack, the accused had asked for some money from the deceased but the deceased declined to give him. PW1 said that the deceased explained later that the accused had formed a habit of begging money from him.

The issue of identification is important in the case.

In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to 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 the possibility of error.”

I find that the evidence adduced by PW1 was direct eye witness evidence. I have considered that the incident took place in broad daylight, being in the afternoon. PW6 a corporal at Nkubu Police Station received the deceased and PW1 at the station at 4.30 p.m. PW6 said that the accused was escorted to the police station by Administrative Police in company of PW1 and the deceased. PW6 said he arrested the accused for assaulting the deceased who was at the time unconscious.

I find that PW1 the eye witness, reported the case against the accused person at the first opportunity. I find this evidence of consistency on PW1's part. I also find that it confirms that the accused was arrested immediately after the attack as the culprit.

I also considered the fact PW1 knew the accused since birth as they came from the same village. The incident took place in broad day light. I find that the circumstances of identification by a single witness was conducive for positive identification. I find the identification by PW1 safe and free from the possibility of error or mistake.

The injuries sustained by the deceased as noted during the post mortem was a trauma injury to the right side of the head. I find those injuries consistent with injury caused by a closed fist to the right head as described in the evidence of PW1. That corroborates the evidence of PW1 as to how and in which part of the body the deceased was injured.

In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, 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.”

The accused put forward an alibi as his defence. He denied hitting the deceased or being at the place at the time he was injured.

I find the alibi defence was shaken in that the accused was arrested immediately after the attack. His defence that he was not present at the market where the incident occurred has been disproved. I reject his defence in total.

The prosecution have to prove accused action was premeditated and or that he had formed the necessary malice aforethought.

MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR) stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

The accused hit the deceased once. It was just after the deceased declined to give him money. I find that the prosecution was unable to establish malice aforethought.

The evidence is clear it was one blow which the accused inflicted on the deceased with bare hands. I

find that that evidence establishes the lesser charge of manslaughter contrary to section 202 of the Penal Code. I substitute charge against the accused from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code.

I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 30th DAY OF MAY, 2012.

**LESIT, J
JUDGE.**