



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL CASE NO. 47 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

PHINIUS GIKUNDA M'ITHIRI.....ACCUSED

JUDGMENT

The accused, Pinius Gikunda M'Ithiri is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (cap. 63, Laws of Kenya).

The particulars of the offence were that the accused on the 14th day of May 2006 at Gatimbi Location in Meru Central District within Eastern Province, murdered Francis Mutua M'Gitwamikwa.

Section 203 of the Penal Code provided that "any person of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". The essential ingredients of murder are therefore-

- (1) *malice aforethought,*
- (2) *an unlawful act or omission, and*
- (3) *death resulting from the ingredients (1) & (2).*

Under section 206 of the Penal Code "malice" is deemed to be established if any of the following ingredients are proved by evidence:-

- (a) *intention to cause death 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 harm is caused or not, or by wish that it may not be caused,

(c) Intention 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.

According to the evidence of PW5 (Dr. Isaack Macharia), the deceased “suffered massive subdural haematoma on the right temporal region, but had no skull fracture.” And as a result of his examination of the deceased body (post-mortem), the cause of death was “infra cranial hemorrhage caused by blunt head injury”. The questions or issues therefore are whether the accused caused those injuries upon the deceased, and whether those injuries led to the death of the deceased. The next question is whether the deceased caused those injuries or grievous harm with malice aforethought as defined by Section 206 of the Penal Code. To answer both of these questions, we must turn to the evidence of the prosecution.

PW1, a former councilor testified that he was at his home on 14th May 2006 at about 5.00pm when he heard screams, one person chasing the other and he found that it was the deceased who was being chased by the accused. They entered his home, and when he inquired what their problem was the deceased informed him that it was the accused who was chasing him for some money. He ordered them out of his compound.

A little later, the same day PW1 heard screams from the deceased that the accused was beating him. PW1 in the company of two other people went to the scene of the screams and found the deceased standing and he told him to report the matter to the Police if he had been beaten. PW1 testified that he met the deceased the next day, and he confirmed to him that he had reported his ordeal to the Police. He heard 2 months later that the deceased had died.

In cross-examination, PW1 reiterated that after the accused and the deceased left his compound, he heard the deceased say he had been beaten by the accused.

PW2 was the deceased’s wife. The deceased, her husband, told her that “he had been hit seriously by Phinius Gikunda. This had happened at about the home of the Councillor. He was hit on the backside of the neck and his teeth losing one tooth.”

PW2 testified that after spending the night at home he reported the matter to the Police at Kariene Police Base the next day, and the deceased also attended the local clinic where he was examined and given drugs for 5 days. The deceased fell ill after 5 days, and he was taken to Meru General Hospital where he was admitted, and PW2 returned home. The next day, on going to check on him, she found that her husband had died, and the body removed to Meru General Hospital Mortuary where the body was later identified for post-mortem by his son.

In cross-examination by Mr. Mburugu counsel for the accused, PW2 testified that though accused was not a near neighbor, she had known him before the 14th May 2006. The accused was also a family friend of the deceased. He had taken care of their sons when they were initiated. The deceased had pain all over his head. The deceased may also have been drunk, he smelt of beer.

PW3 was son of the deceased. He was returning home from a church pre-wedding meeting when he met

Karemi (PW1) who informed him that his father, the deceased had been cut on the road by the accused. He went to his father's home and the deceased confirmed to him that he had been hit by the accused. PW3 corroborated the evidence of PW2 that the deceased did not seek treatment on the material day but did so the next day, and later reported the incident to Kareine Police Base. PW3 also corroborated the evidence of PW2 that the deceased fell sick after one week, and they took him to Meru General Hospital where the deceased died. PW3 identified the deceased's body for the purposes of the post – mortem.

PW3 reiterated his evidence in- chief when cross-examined. The accused was a family friend. He had taken care of him and his brother on their initiation. He reiterated that his father, the deceased told him it was the accused who hit him, and did not at the time appear to be seriously injured. PW4, a Police Officer, testified that the deceased made a report of an assault to Kariene Police Station on 15th May 2006, a day after he had been assaulted by the accused on 14th May 2006, that the assault was “with blows and kicks on the right of the ear”, and had also knocked out one lower tooth.”

PW4 also testified that after about one week, PW3 on 24.05.2006 reported to the Police (under OB No. 13 of 24/05/2006) that the postmortem after the body was identified by PW3. They carried out investigations, but the accused disappeared for over 2 months till 2nd August, 2006 when the accused surrendered to the Police.

PW4 reiterated his evidence in –chief when cross- examined by Mr. Mburugu counsel for the accused, that the Police had sought the accused from 21/05/2006 but that the accused had disappeared.

PW5, as earlier noted was Dr. Isaac Macharia. In cross – examination by Mr. Mburugu for the accused, testified that the bleeding by the deceased could not be caused by a broken vessel, but could also be due to a violent fall. Bleeding from a broken vessel could only occur from a person suffering from high blood pressure.

PW6 was the deceased's brother. The deceased had summoned him to tell him that it was the accused who had beaten him. He had lost a tooth. He corroborated the evidence of PW2 that the deceased complained of headache. He took the deceased to hospital on a Saturday, and the deceased died on Sunday. He denied inventing the evidence when cross – examined.

With that evidence, the prosecution closed its case. After considering the submissions by Mr. Mburugu, learned counsel for the accused and the evidence adduced by the prosecution, I found that the prosecution had established a case to put the accused on his defence.

After reminding the accused of his rights under Section 306 of the Criminal Procedure Code, to give evidence on oath and be cross – examined and to call witnesses, or to give an unsworn statement and be not subject to cross- examination, or to remain silent, the accused elected to give sworn evidence.

The evidence of the accused tallied in all material respects with that of both PW1, PW2 & PW3 that the deceased and accused were family friends. The accused had lived with the deceased's sons during their initiation, that they were together on 14th May 2006, that they went to the home of PW1 (the Councillor) who chased them away as they were drunk. The material difference in the evidence of the accused, and that of PW2 and PW3 in particular, is that he he did not assault the deceased but that the “deceased collapsed” and later rose and they parted, each one of them going to his own home.

The accused also denied disappearing from home. He was a logger, and was attending to his work at Maua, and that upon being informed that the Police were looking for him, he presented himself to the Police.

When cross – examined by Mr. Kimathi, learned State Counsel, the accused testified that neither he nor the deceased had any weapon. He attributed the deceased's injuries to a “fall” as “they drunks” fall all the time, and even he falls after drinking and that there were stones at the scene.

When pressed as to why he had disappeared between the 14th May 2006, and till 2nd August 2006, the accused explained that he, as a logger, works from place to place, and that he did not know his friend had died. The accused did not call any independent witness. That was the respective evidence of the prosecution and the accused.

COUNSEL'S SUBMISSIONS

Mr. Mburugu learned counsel for the accused submitted that the prosecution had not established its case beyond reasonable doubt. The prosecution did not produce any eye witnesses who saw the accused assault which the deceased made to PW1, PW2, PW3 and PW6. The deceased said that the accused hit him but did not say with what weapon. Counsel submitted that the complaint made by the deceased to the four witnesses must be treated as a “dying declaration” and submitted that a dying declaration has to be corroborated by other evidence, and a dying declaration made to several witnesses cannot corroborate each other.

Counsel submitted that in this case, there was no such corroboration, and that idea of reference to a “rungu” (a club) was unsustainable without evidence. Counsel referred to the evidence of PW5 (the doctor) that there were no external injuries, and attributed the deceased's injuries entirely to a fall, leading to complications and prayed that the accused be acquitted.

On his part Mr. Kimathi learned State Counsel submitted that the prosecution had proved its case beyond reasonable doubt and urged the court to find so.

ANALYSIS OF EVIDENCE AND CONCLUSIONS

It was the evidence of PW1 that he heard the deceased screaming that the accused was beating him. He went to the scene of the screams and found the deceased standing. The accused had walked away to his own home so there was no eye witness to the assault on the deceased by the accused.

The deceased however maintained that the accused assaulted him. He told his wife (PW2) his son (PW3), the Police (PW4), and his brother (PW6). Under Section 33 of the Evidence Act (Cap.80 Laws of Kenya) statements, written or oral, of facts made by a person who is dead (a dying declaration) or who cannot be found, has become incapable of giving evidence, or whose attendance cannot be procured without any amount delay or expense are admissible:-

“where inter alia the statement is made by a person as to the cause of his death, or as to the circumstances which resulted.

From both the evidence of PW1 (the Councillor), PW2(his wife), PW3 (his son) and PW6 (his brother), the deceased cried out that it was the accused who was beating him, and according to PW1, it was a dispute over money.

It is correct as observed by Mr. Mburugu that no one saw the accused beat the deceased. It is also probable that the type of injuries the deceased suffered on the head could result from a fall. PW5 (the doctor), ruled out that the bleeding was from a ruptured vessel, and that only occurs among persons suffering from high blood pressure. The Doctor ruled out the possibility that the deceased was suffering from high blood pressure.

The deceased also lost one lower jaw tooth. If the loss was due to fall, that fall could only have been frontal, and not only the mouth would have been injured but it is more likely that the deceased would also have suffered some conclusions on the nose, and face area. There was no evidence of such injury. The postmortem report states that “the body was well preserved with no external injuries.” It was however the Doctor's (PW5) evidence that the head had “massive subdural haematoma on the right temporal region (but) no skull fractures.”

The Doctor put the cause of death as "infracranial haemorrhage caused by blunt head injury."

"Massive subdural haematoma" which means "solid swelling of clotted blood within tissue" is consistent with the information given by the deceased to PW2, and therefore PW2's evidence. "Intracranial haemorrhage" is massive bleeding within the skull," and is also consistent with evidence of PW2 that the accused set on him with blows and kicks to the head. It is not reasonable to suggest that such injury was caused by a fall as the accused contended in his defense. It is also not reasonable to suggest that the deceased kept falling and hitting his head on the ground and crying that the accused was beating him. The only reasonable conclusion is that the accused beat the deceased repeatedly when the accused could not or failed to produce the 10/= he was demanding from him.

The accused testified that the deceased was a friend. He cited no other occasion when the deceased complained that the accused beat or was beating him. The most likely occurrence is that the accused was determined to beat up the deceased, and in the process caused him injuries which averted death of the deceased (even if he did not intend).

The prerequisites of malice aforethought under Sections 203 and 206 of the Penal Code are thus satisfied. After running for rescue to the home of PW1, and after being chased away by PW1 from his homestead (because he did not want drunkards in his home DW1- accused), the accused kept chasing the deceased within sight of PW1 who thus corroborated the deceased's "dying declaration" PW4 also confirmed that the deceased himself made an initial report to the Police, and that the accused went into hiding for nearly two months all point to the fact that it is the accused who caused the injuries to which the deceased succumbed and died.

There could have been a mitigating factor, that both the accused and deceased had been drinking for a long time, and both could have been drunk. The accused never however pleaded this possibility. In other words, by beating up the deceased and escaping from the area until the shores were clear, sufficiently demonstrates malice and intent to commit a felony on the part of the accused. On the circumstances I can find no mitigating factor on the conduct and actions of the accused. I find him guilty of the deceased's death and I convict him accordingly.

The law prescribes one punishment under Section 204 of the Penal Code for the offence of murder. I therefore sentence the accused to death as by law provided.

There shall be orders accordingly.

Dated and signed at Nakuru this 18th day of February, 2011

M.J ANYARA EMUKULE

JUDGE

Delivered at Meru this 23rd day of February, 2011

J.LESIIT

JUDGE

