



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 55 of 2004

REPUBLICPROSECUTOR

VERSUS

GODFREY NGOTHO MUTISOACCUSED

J U D G M E N T

The accused herein, Godfrey Ngotho Mutiso, is before this court on information of the Attorney General on behalf of the Republic facing a charge of murder contrary to the provisions of Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 4th day of November 2004 at Mkomani Village in Kongowea Location of Mombasa District within Coast Province jointly with others not before court murdered Patrick Waweru Gachoki.

The prosecution called nine (9) witnesses in support of their case. The accused person gave an unsworn statement in his defence without calling for witnesses. Josephine Ayuma (P.W.3) a waiter with Corner Pub told this court that she was the girlfriend to the late Patrick Waweru Gachoki. She said that at about 6.45 p.m. on 4/11/2004, Godfrey Ngotho Mutiso, the accused arrived at the pub with his brother. She served them with drinks. P.W.3 said she overheard the accused inquiring from her manager, Daniel Mwema of the whereabouts of Patrick Waweru, deceased. The accused is said to have told Daniel Mwema that he suspected the deceased stole his two mobiles and that is why he was looking for him. The accused and his brother left. At 9.00 p.m., P.W.3 said Patrick Waweru arrived upon which she informed him that he was being looked for by the accused. Shortly, Ngotho's brother with two other men came. P.W.3 said she saw Ngotho's brother tell the deceased that he was being waited by the accused. The deceased then woke up and accompanied the three men. Within half an hour Charles Wambugu (P.W.7) and Anthony Gachoki (P.W.5) arrived at the pub whereby they informed P.W.3 that the deceased was being assaulted at the accused's residence. Charles Wambugu Muthige (P.W.7) told this court that at about 9.30 p.m. on 4/11/2004 he and Anthony Gachoki (P.W.5) had gone out to purchase some toothpaste. On the way the duo met one Peter Mwangi who told them that the deceased was being assaulted in the house of the accused. P.W.7 said that he and P.W.5 went to request Josephine Ayuma (P.W.3) to take them to the house of the accused. The trio i.e. P.W.3, P.W.5 and P.W.7 went straight to the house of the accused which was not far from the pub. They found a huge crowd watching as the deceased was being beaten by the accused and two other men at the veranda and or corridor outside the accused's house. The trio were in agreement in their evidence that they found the deceased half naked. According to P.W.3 the deceased only had his underpants. According to P.W.5 and P.W.7, the deceased only had a trouser. The trio were also unanimous in their evidence that the deceased's hands were tied. An electric light emanating from a bulb assisted the trio to see what was going on in that veranda and or corridor. P.W.3, P.W.5 and P.W.7 in their evidence also agreed that the accused was seen using a whip to assault the deceased on the head. The trio further were in agreement that the deceased's body was

swollen and that blood was oozing from his mouth. P.W.3 said that she was branded a thief and chased away by the accused's brother when they saw him at the scene. P.W.3 said she saw a stone thrown at P.W.7 which landed on his head. P.W.3 went back to work but learnt of the death of her boyfriend the next day. P.W.7 said he and P.W.5 went to the house of Cyprian Wambugu when they were chased from the accused's house when they attempted to rescue the deceased. The duo later visited Nyali police station where they found the deceased and the accused had already been taken there. P.W.7 said he saw the accused whip the deceased twice on the head. P.W.7 was taken to Coast Provincial General Hospital where he was treated and discharged leaving behind the deceased who had been admitted. P.C. James Mwita (P.W.8) said he was instructed through the 999 Control Mombasa at 10.00 p.m. to proceed to rescue a person being assaulted in a house near cinemax. P.W.8 said he and a colleague by the name Wanyonyi took a taxi, proceeded to the scene where they found a crowd helplessly watching as the deceased was being assaulted. P.W.8, said he found the deceased half naked, with only a trouser while his hands were tied. P.W.8 also said he saw the accused while two other people joined the accused to assault the deceased. In fact P.W. 8 further said that he saw one of them lift the deceased and hit his head against a wall. P.W.8 stopped the assault, untied the deceased and took him with the accused in the same taxi to Nyali Police Station. At the police station the accused was given police bond while the deceased was rushed to Coast Provincial General Hospital where he was admitted but later died while undergoing treatment. P.W.8 said the two people who assaulted the deceased escaped with the whip which was in the possession of the accused. Dr. K.N. Mandalya (P.W.4) produced a post mortem report in respect of an autopsy he did on the deceased's body. In that report P.W.4 observed that the deceased's body had multiple cuts and bruises all over the body. P.W.4 also stated that there were swellings on the lips with bruises on the face. There was also haemorrhage below the skin of the skull. In the end, the doctor (P.W.4) formed the opinion that the deceased died as a result of intracranial haemorrhage due to head injury.

In his defence, Godfrey Ngotho, gave an unsworn statement. He said he went to rest at his house on 4/11/2004 and at about 1.00 p.m. he was woken up by his wife who informed him that somebody had entered their house and left with some items while he was resting. The accused said that he made inquiries from the adjacent kindergarten and confirmed that somebody had been seen walk away with two mobile phones. He discovered that his two mobiles were missing in the house. The accused said he went to book a report at Nyali Police Station. At 9.00 p.m. the accused said he was resting at the balcony of his house when he heard some people screaming. He claimed he rushed out and found people wearing Kanzus beating Patrick Waweru, deceased as a suspect for theft. The accused said he intervened to save the deceased. He called 999 Control to report to the police who in response arrived at about 10.00 p.m. The accused also claimed that people ran away when they saw the police leaving him and others to face the police. He said the police requested him to accompany them to assist them contact the deceased's family members. The accused further stated that he saw Josephine Ayuma (P.W.3) at the scene before she fled. At the police station, he said the deceased was referred to the Coast Provincial General Hospital while he was driven back home. He said when he went back to follow his complaint at the police station on 5/11/2004 he was arrested as a suspect. He denied all allegations made against him by witnesses.

At the end of the evidence counsel for the accused person and counsel for the prosecution made detailed submissions. Mr. Kenzi, learned advocate for accused urged this court to find that the prosecution had not established malice aforethought on the accused's part. The learned advocate was of the view that there was material contradiction in the evidence of P.W.3, P.W.5 and P.W.7. It is also the learned advocate's submission that there was no evidence to show that the accused hit the deceased on the head. The learned advocate further attacked the evidence of P.W.8 stating that the same was recorded after the accused had been charged. In a nutshell the defence is of the view that the prosecution's case was not proved beyond reasonable doubt.

On behalf of the prosecution, Miss Mwaniki, learned State Counsel beseeched this court to find that the state has established their case beyond reasonable doubt. The learned State Counsel pointed out that there were strong evidence that the accused inflicted grievous injuries on the deceased which manifest malice aforethought on the accused's part. The learned state counsel also urged this court to take note of the fact that the accused told lies which should be taken as corroborative evidence.

I have taken into account the evidence and the submissions made by both learned counsels. Murder is defined as the causing of death of a person by another person by an unlawful act or omission with malice aforethought. It is obvious from the above definition that in order to convict for murder two elements must be proved namely: *actus reus* and *mens rea*. What is the position in this case? The evidence of Josephine Ayuma (P.W.3), Anthony Gachoki (P.W.5), Charles Wambugu Muthige (P.W.7) and P.C. James Mwita (P.W.8) place the accused at the scene of crime. The accused in his unsworn statement of defence attempted to distance himself but the testimonies of P.W.3, P.W.5, P.W.7 and P.W.8 are so overwhelming that I can only infer that the accused told a lie when he claimed he was not at the scene of crime. I believe on the testimonies of P.W.3, P.W.5, P.W.7 and P.W.8 because there was no evidence that the quartet had a grudge against the accused. Having found that the accused was at the scene of crime, it is now necessary to see whether he actually participated in assaulting the deceased. There is also overwhelming evidence that the accused was seen by P.W.3, P.W.5, P.W.7 and P.W.8 assaulting the deceased using a whip. All these witnesses were unanimous that they saw the accused whip the deceased with the assistance of an electric light emanating from a bulb. The accused sat on a log on a position higher than where the deceased sat. P.W.8 saw one of the accused's accomplices hitting the deceased's head against the wall. I am convinced by the evidence that the accused actively participated in assaulting the deceased. His defence of blaming people who wore kanzus cannot hold water. I am of the view that his evidence is a make up story to cover-up his role in assaulting the deceased. In a nutshell I am convinced that three accused told lies in his defence. In the case of **Ernest Asami Bwire Abanga alias Onyango vs= Republic CR. Appeal No. 32 of 1990 (U.R)** the court of Appeal expressed itself as follows:

“But its basic holdings namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence.”

Having concluded the aspect of *actus reus* let me now examine the evidence in respect of *mens rea*. The evidence of P.W.3, indicates that the accused had visited Corner Pub in search of the deceased over his lost mobile phones. The accused was overheard mentioning the name of the deceased to the Manager of P.W.3. There was also evidence that the deceased accompanied two people who had been sent by the accused to pick him.

In his evidence in defence, the accused confirmed that his two mobile phones were stolen from his house that day. He also confirmed that the deceased was a person known to him. DR. K.N. Mandalya (P.W.4) produced in evidence the post mortem report which gave in detail the kind of injuries the deceased suffered. It is the opinion of P.W.4 that the deceased died as a result of intracranial haemorrhage due to head injury. The evidence of P.W.3, P.W.5, P.W.7 and P.W.8 clearly show that the accused and two other people jointly participated in assaulting the deceased. P.W.8 said that the other assailants escaped with the whip which the accused used to beat the deceased. These people have never been arrested up to date. I find that the accused and the others who fled had a common intention to assault the deceased. Consequently it does not matter who inflicted the fatal blow on the deceased. The injury on the head was grievous. The deceased's head was hit against the wall and as a result the deceased bled through the mouth. Can it be said that Malice aforethought can be inferred from these injuries? The Court of Appeal in **Morris Aluoch vs= Republic Cr. Appeal 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 late. In the case of REX vs= TUBERE S/O OCHEN (1945) 12 E.A.C.A. 63 the assault was of a serious nature causing severe injuries from which the victim died shortly afterwards.”

In this case the deceased was assaulted as from 10.00 p.m. or thereabouts on 4/11/2004. He died while undergoing treatment at about 4.00 a.m. on 5/11/2004 just about 6 hours from the time of assault. Under Section 206 of the Penal Code Malice aforethought can be inferred where interalia there is proof that the accused had an intention to cause the death of or to do grievous harm to any person. I find the accused

and his accomplices to have intended to cause grievous harm to Patrick Waweru Gachoki, deceased. In the end I find that the accused had malice aforethought. I find him guilty and convict Godfrey Ngotho Mutiso for the offence of murder and sentence him to suffer death in the manner authorized by law.

Dated and delivered at Mombasa this 29th day of February 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Monda h/b for Miss Mwaniki for state.

Kenzi for the accused.