



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 25 of 1999

REPUBLICPROSECUTOR

- Versus -

SANI

FRANCIS MULWA

KITONYI

JOSHUA WAMBUA

SUA JOHN MUTIA.....ACCUSED

JUDGMENT

The three Accused persons, Francis Mulwa Sani, Joshua Wambua Kitonyi and Sua John Mutia, are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 19th day of March 1999 at about 1.00 p.m. at Ujamaa Village, Lunga Lunga Location of Kwale District within Coast Province the Accused persons jointly with others not before the court murdered Joshua Kaveta Mukova (the deceased).

The prosecution case is that Francis Mulwa Sani, the first Accused, lost his bicycle and suspected that the deceased had stolen it. He ganged up with the co-Accused persons and other people not before court to beat the deceased to tell them where he had hidden the bicycle. They started beating him on 18th March 1999 until he died the following day at about 1.00 p.m. They defied pleas from some prosecution witnesses to take the deceased to police.

On their part the Accused persons denied killing the deceased. After the case had been heard fully but before the final submissions were made one assessor, Pacifila Owino, failed to come to court. She was accordingly discharged and barred from further participation in this case. After summing up the case to the remaining two assessors they both opined that Accused 1 and 2 are guilty of manslaughter but Accused 3 is not guilty of any offence. Before I consider the opinion of the Assessors, I wish to summarise the evidence tendered by both the prosecution and the defence in this case.

CATHERINE MWIKALI KOMBO PW 1 owns a kiosk at Lunga Lunga market. On 18th March 1999 between 9.00 a.m. and 10.00 a.m. while in her kiosk she heard people talking outside. She got out and found a young man by the name Joshua handcuffed with four people. She knew all of them and gave their names as Francis Mulwa, Kiinde John, Silwa and Gatonye. Out of those it is only Accused 1 Francis Mulwa who is in court.

She said Accused one was beating the man whose hands were tied with a stick alleging that he had stolen a bicycle.

On the following day at about 10.00 a.m. she saw the same people at the border still beating the person who was tied asking him about the stolen bicycle. People gathered around and advised that he should be taken to the police station. He was carried on a bicycle and taken towards the police station. At about 2:00pm when the witness was going to Jua Kali she saw accused 1 and 2 seated on the side of the road with two other people. When she asked them why they had not taken that man to the police station they told her he was claiming to be sick. The man was lying down. When he was turned they realized he was dead. She went her way and left the two accused persons with two other people and the deceased there.

Cross examined by Mr. Munyao for Accused 1 she said that on 18th March 1999 she saw the deceased and the four people with a mob following. Only Accused 1 was beating the man with a stick but on the following day nobody was beating him and he had no injuries. In answer to questions put to her by Mr. Kenzi for Accused 2 she said that Accused 2 was not among the people she saw on 18th March 1999. On 19th March 1999 she saw Accused 2 standing on the side of the road doing nothing. At her request Accused 1 and 2 turned the man and tried to lift him but he could not stand. Cross examined by Miss Munyari for Accused 3 she said she did not see Accused 3 on 18th March 1999 and that even on 19th March 1999 she met him after passing the point where the deceased was with Accused 1 and 2. She is the one who informed Accused 3 of the deceased's death.

FLORENCE MUTUNGE PW 2 said the first, second and third Accused persons are her distant neighbours whom she knew as Francis, Lole and John respectively. On 19th March 1999 while going home from a river where she had gone to fetch water she heard someone cry from a depression near the path. She went there to find out what was happening. She found the three Accused persons and another man beating someone who was lying down. Shortly thereafter PW1 passed there and asked the Accused persons why they had not taken that person to the police station. They all including the Accused persons went away leaving that person lying down there.

He was not breathing.

On cross-examination by Mr. Munyao she denied seeing anyone beat the deceased and according to her the deceased was lying on his back and not on his stomach. On further cross-examination by Mr. Kenzi she said she saw Accused 2 at that place but she did not see them trying to lift the deceased and that PW1 may not have seen her. In answer to a question by Miss Munyari she said that Accused 3 was far off near the road trying to stop vehicles.

ROBERT MBITHUKA MUTUA PW 3 said that on 19th March 1999 at about 11.00 a.m. he received a report that there were people beating up another near Joseph Kibandi's hotel. He went there and found the three Accused persons all of whom he knew beating the deceased alleging that he had stolen Accused 1's bicycle. Accused 3 said that the deceased should take them to where he said the bicycle was but the witness advised them against that and asked them to take him to the police station. He went away and left them there.

At about 3.00 p.m. while at the site where he was building a pit latrine Accused 1 and 2 went there and told him that the deceased had died. He went with them and reported the matter to Lunga Lunga police station. Leaving the Accused persons at the police station as advised by the OCS the witness went and lit a fire at the scene to scare of the hyenas. On cross-examination this witness said when he first saw the deceased with the Accused persons there was also a mob. The deceased was still alive at that time. That is the last time he saw him alive. Later he went to scene as directed by the Accused persons at the police station and found the body of the deceased lying on its stomach. He further stated that he was not sure if Accused 3 was also concerned with the matter. He came to see him with police at 3.00 a.m. on 20th March 1999 when a vehicle went to fetch the body.

ERASTUS PETER MWALUKU PW 4 was also at Umoja Trading Centre on 19th March 1999 when the three Accused persons went there with the deceased with a mob following. He asked the deceased why he

was being beaten and he told him that it was alleged he had stolen a bicycle. He admitted he had stolen the bicycle and hidden it in a thicket on one Kalowe's farm but he had been beaten by many people until he was confused. He said those people had arrested him at 6.00 a.m., the previous day. The three Accused persons left with him. At about 3.00 p.m. PW1 informed him that the deceased had died.

On cross-examination this witness said that when he saw the three Accused persons with the deceased on 19th March 1999 they all including the deceased looked tired. The deceased was not handcuffed and there was no quarrelling. He said he did not know what caused the deceased's death as the deceased did not say who had beaten him.

JOSEPH KAMIDO KIBALI PW 5 is the owner of the tea kiosk or hotel at Umoja Trading Centre where PW3 said he went to on receiving information that there was someone being beaten. He said that on 19th March 1999 at about 12.00 noon Accused 1 and three other people whom he knew by appearance only went to his hotel. Two of the others were Accused 2 and 3. Save for the fourth man who was said to have stolen Accused 1's bicycle the Accused persons had sticks. The alleged thief drunk milk and the Accused persons took tea. PW3 went there and advised the Accused to take the man to police but they did not. They went back to where they had come. At about 2.00 p.m. Accused 1 and 2 went back and said the man they were with had died. They went with a village elder one Muriithi to report the matter to police. On cross-examination he said the Accused and the deceased had been his customers. He said when he saw the deceased he appeared to have been beaten as he was bleeding from the forehead and his shirt had bloodstains. He further stated that they had come from the direction of the border and while at the hotel the three appeared to be guarding the deceased.

IP JAMES ORORA TIMA PW 6 said that on 19th March 1999 at about 7.20 p.m. he was called from his house to go to the station to attend to a murder report. He went there and found Accused 1 and 2 with the village elder PW3 who had made the report. While still at the police station PW3 told them that there was another suspect and Accused 1 pointed out to them the home of the suspect. With PC Nyaaga and another police officer this witness went and arrested Accused 3 at his house. From there they proceeded to the scene where they found the deceased's body lying on the stomach near a water pond. After drawing a sketch of the place they moved the body of the deceased to Msambweni District Hospital mortuary and came back and commenced investigations.

Some other suspects were arrested but they were released after interrogation.

On cross-examination he said that they found the deceased's body in the bush with nobody guarding it. That was at about 9.00 p.m. It was swollen. He further stated he had known both the suspects now Accused 1 and Accused 2 before. He said that night he went with Accused 1 whose bicycle it was alleged had been stolen and after arresting Accused 3 the two directed them to the scene. He said he cannot remember the position they found the body. It had no visible injuries but it was swollen.

PC YUVINALIS NYAANGA PW 7 was on duty at Lunga Lunga police station in the evening of 19th March 1999 when a village elder from Gondi village, Joseph Muriithi with his assistant Kibandi, went to the station with two suspects now Accused 1 and 2. The elders reported that at about 12.00 noon of that day the two suspects had assaulted someone who had later died. He rearrested them. He booked the report and informed PW6. Together with PW6 and PC Wangombe in the company of the village elder and Accused 1 they went to the scene via Accused 3's home. After arresting Accused 3 they all proceeded to the scene arriving there at about midnight. As it was dark they used torches. They confirmed that the deceased had died. His body was swollen. PW6 drew a sketch plan of the place after which they moved the body to Msambweni District Hospital mortuary.

On cross-examination the witness said Accused 1 and 3 together with the village elder directed them to the scene where they found the body lying on its side. It was swollen all over. They did not see any weapons at the scene that night.

Dr. MWAURA DAUDI PW 8 was the last witness called by the prosecution. He produced a medical report prepared by his colleague Dr. Ngwatu who is now at Meru District Hospital whose handwriting

and signature he is familiar with. He said according to the report the post-mortem had been conducted by Dr. Ngwatu on 29th March 1999 in the presence of a police officer and two relatives, Mukova Kaveva and Charles Mukova. The body had swollen lips with the right hand side ribs broken. On opening the body he found a massive collection of blood in the abdomen.

The internal organs had started decomposing. In the opinion of Dr. Ngwatu the cause of death was internal haemorrhage.

That was the evidence adduced by the prosecution against the accused persons in this case. After finding that the Accused persons had a case to answer Accused 1 and 2 chose to give unsworn statements while Accused 3 testified on oath. None called any witnesses.

In his unsworn statement Accused 1 denied knowledge of the murder. He said he neither knew the deceased nor the co-accused persons. On 19th March 1999 he said he was at his home the whole day looking after their cattle. At about 7.30 p.m. the Assistant Chief and Administration Police went to his home and told him that he was required by the Chief. Instead of taking him to the Chief they took him to the police station where he was placed in cells. The following day the OCS told him that he had murdered someone near the border but he denied. He was later charged with murder. He denied going to the scene with PW 6. He said PW4 bore a grudge against him. In 1996 PW4 had stolen a cow from their home and Accused reported the matter to police. That witness swore to revenge. He denied owning a bicycle or the same having been stolen. Accused 2 also made an unsworn statement. He denied knowing leave alone killing the deceased and stated that the prosecution evidence against him was all false. He said that on 19th March 1999 at about 5.00 p.m. the Assistant Chief went to his home and told him he was required by the Chief.

As the chief was not in he took him to police and he was placed in cells. The following day he was taken to the OCS's office where he found his village chairman, Sam Mkapa and three other people.

The OCS asked him if he knew of the murder of someone at the border but he denied and he was taken back to cells.

As already stated Accused 3 gave sworn testimony. He also did not only deny killing the deceased but also denied knowing him or any of the co-accused persons. He denied having been arrested by PW6 and or PW7. He said he was arrested on 20th March 1999 at about 4.00 p.m. for illegally burning charcoal and taken to police. On 22nd March 1999 he was taken to the OCS's office and asked to say what he knew about the murder at the border. He denied knowledge of it and was beaten and returned to cells. At that time PW1 was in the OCS's office and that she denied knowing him. He said that PW2's testimony that he saw him at Gondi on 19th March 1999 was all false. He was not there.

On cross-examination by the state counsel he denied that he was arrested on 19th March 1999 and insisted that he was arrested on 20th March 1999. He strongly disputed the evidence of PW4 and stated that that witness got to know his name in court when he came to testify. He further denied participating in killing the deceased or offering himself to police.

At the end of the defence evidence counsel made short submissions. Mr. Monda the state counsel submitted that the prosecution had proved the charge of murder against all the accused persons.

He said that the prosecution witnesses were consistent. The witnesses especially PW1 and PW4 said that on 19th March 1999 they saw the Accused persons with the deceased. PW4 advised the Accused to take the deceased to police but instead they allegedly took him to the place where he said he had hidden the stolen bicycle. Later that day Accused 1 and 2 returned and said that the deceased had died. They later assisted in the arrest of Accused 3 and they all took police to the scene. He further submitted that the deceased did not die of natural causes. Dr. Mwaura PW 8 gave the cause of death as internal haemorrhage. The deceased was last seen alive with the three accused persons. Accused 1 and 2 later presented themselves at Lunga Lunga police station.

Though the prosecution case is based on circumstantial evidence he said it had met the standard set in the case of **Kipkereng Arap Koske – Vs – Republic** and that the Accused persons should therefore be found guilty as charged.

Mr. Munyao for Accused 1 said the prosecution had failed to prove the two elements of murder against his client. Nobody saw Accused 1 kill the deceased. The evidence on record, he said, pointed to the scenario of the deceased having been killed by a mob. Deceased told PW4 that. He said no murder weapon was found with Accused 1 to link him to the murder of the deceased. He further submitted that Accused 1 denied owning a bicycle which was alleged to have been stolen and that PW4 testified against him out of a grudge he bore against him. He concluded that the motive for the murder having not been proved the case against his client cannot be sustained.

Mr. Kenzi for Accused 2 also submitted that the case against his client has not proved as required. He said there were several contradictions in the prosecution case. He said PW1 contradicted PW2 while the evidence of PW3, 4 and 5 contradicted each other. It is only PW5 who said he saw Accused persons carrying sticks at Umoja Trading Centre. The other two did not say anything of the sort. He said there was no direct evidence of anyone seeing Accused 2 beat the deceased and he should be acquitted.

For Accused 3 Miss Munyari submitted that there is no evidence at all against him. Nobody said he saw him beat the deceased and that the bicycle allegedly stolen did not belong to Accused 3.

She further submitted that PW1 said she saw Accused 3 in the crowd but he was not beating the deceased while PW2 said he saw him near the road. Accused 3 was arrested for burning charcoal and not for murder. She called for his acquittal.

On the basis of this evidence are the three Accused persons or any of them guilty of the murder of the deceased as charged or are Accused 1 and 2 guilty of the lesser offence of manslaughter and Accused 3 not guilty of any offence at all as opined by the assessors? To be able to answer these questions we need to analyse this evidence and examine the provisions of the law creating the offences of murder and manslaughter. I will start with the analysis of the evidence. Catherine Mwikali Kombo PW1 said only Accused 1 beat the deceased on 18th March 1999. According to her Accused 2 and 3 were not among the people she saw with the deceased on 18th March 1999. She saw Accused 2 on the road on 19th March 1999 doing nothing and met Accused 3 after she had passed the point where she found the deceased lying down. PW2 contradicted herself. In examination in chief she said on 19th March 1999 she saw someone, apparently not any of the Accused persons, beating the deceased. In cross-examination, however, she denied seeing anyone beat the deceased. She said she saw Accused 2 standing as a spectator near the deceased and Accused 3 far away near a road trying to stop vehicles. It is only Robert Mbithuka Mutua, PW3, who said he saw the three Accused persons beating the deceased on the 19th. In cross-examination, however, he said that Accused 3 did not appear to be concerned with the matter. The deceased himself is said to have told PW4 that he had indeed stolen the bicycle but he had been beaten silly by many people and had forgotten where on one Kalowe's farm he had hidden it.

All the three Accused persons were seen by PW1, 2, 3 and 4 with the deceased on 18th and 19th March 1999. Though they denied killing the deceased Accused 1 and 2 were seen by PW3 beating up the deceased on 19th March 1999. That witness advised them to stop beating the deceased and instead to take him to police. At about 3.00 p.m. on the same day Accused 1 and 2 went back to PW3 and told him that the deceased had died. With him they went and reported the matter to Lunga Lunga Police station. In the circumstances, I reject the unsworn statements of Accused 1 and 2 that they were arrested from their respective homes on allegations that they were required by the area chief and find that, with others not before court, the two beat up the deceased to death. As regards Accused 3 there is no sufficient evidence to connect him with the killing of the deceased and I accordingly acquit him.

Are Accused 2 and 3 guilty of murder or manslaughter of the deceased? Section 203 of the Penal Code states that:-

“Any person who of malice aforethought causes the death of another person by an unlawful

act or omission is guilty of murder.”

Section 204 of the Penal Code which is referred to in the information only deals with sentence. It provides that anyone convicted of the offence of murder shall be sentenced to death. Section 203 of the Penal Code makes it clear, as anyone who has been to a law school knows, that murder is not a strict offence. Both mens rea and actus reus the two elements of the offence of murder must be proved against any accused person before me or she is found guilty of the offence.

The section refers to mens rea as malice aforethought. Section 206 of the Penal Code defines malice aforethought in the following terms:-

“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 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 the same 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.”

From the evidence on record there is nothing to show that Accused 1 and 2 had any intention of killing the deceased. Even though they beat him for two days I do not think they intended to cause him grievous harm either.

The 17th Edition of Black’s Law Dictionary defines “grievous harm” as

“Serious physical impairment of the human body.”

My understanding of Section 231 of the Penal Code which enumerates the acts intended to cause grievous harm is that the weapon or substance used must be dangerous or offensive. These include a spear, sword, knife or any kind of projectile weapon or explosive, noxious or corrosive substances. In this case witnesses talked of the accused beating the deceased with sticks. Having broken his ribs as is clear from the postmortem report I suppose they also kicked him. In the circumstances I do not think Accused 1 and 2 intended to cause grievous harm to the deceased.

I therefore agree with the assessors and find that mens rea or malice aforethought as defined by section 206 of the Penal Code has been proved against Accused 1 and 2. Consequently, I find them not guilty of the murder of the deceased. Are they guilty of manslaughter?

Section 202(1) of the Penal Code which creates the offence of manslaughter states that:

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”

Subsection (2) of that section defines what an unlawful omission is. We are not, in this case, concerned with an unlawful omission. We are concerned with the act of beating of the deceased by the two Accused persons.

As I have already found Accused 1 and 2 beat up the deceased for two days. The witnesses and in

particular PW3 and the deceased himself said they were beating him to go and show them where he had hidden Accused 1's bicycle. I have no doubt in my mind that that act of beating up the deceased was an unlawful one. Nobody has a right of beating another person even if that other person has committed an offence. If they knew or suspected him of having stolen Accused 1's bicycle, they should have taken him to police. They should not have beaten him at all. The postmortem report shows that the deceased's body had swollen lips and broken ribs and gives the cause of death as cardio pulmonary arrest due to internal haemorrhage. I find that it is Accused 1's and 2's an unlawful act of beating the deceased that caused his death. And having found that they did not intend to kill or cause grievous harm to the deceased I find them guilty of manslaughter and convict them accordingly.

DATED and delivered this 13th day of September 2005.

D. K. MARAGA

JUDGE