



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.53 OF 2001

DAVID WAWERU MURAGA ALIAS AGHA KHAN..... ACCUSED

VERSUS

PROSECUTOR REPUBLIC

JUDGEMENT

The Accused person in this case is charged with murder contrary to section 203 of the penal code. The particulars are that on the 16th day of November 1998 at Kibichoi village in Kiambu District of Central Province jointly with others not before court murdered Patrick Mbua Ng'ang'a. The accused denied the charge and Miss Thiong'o appeared for her. Mrs. Murungi appeared for the state. P.W.1 is the wife of the deceased person. When the deceased came home on 16th November 1998 at about 9 p.m. she noticed he had blood stained clothes and complained of having been hit on the head by an man whose name he gave as Waweru alias Agha Khan. She was able to recognize Waweru as the accused in this case. The deceased attended treatment in several hospitals and finally ended up in Kenyatta National Hospital where he died after being on treatment for 8 months. This was on 14th June 1999. Under cross-examination the witness testified that the deceased disclosed that he had been in the company of his niece when the incident happened. P.W.2 met the deceased on the day the fight took place.

The deceased came and requested to leave a bicycle at P.W.2's shop. According to P.W.2 the deceased had a cut on the head which was bleeding. Under cross-examination P.W.2 states that the deceased did not disclose to him who had hit him.

P.W.3 is a Doctor who examined the accused person as to his age and mental fitness. The accused had a scar on the head which he claimed to have sustained from the deceased person. The Accused was of sound mind.

P.W.4 identified the deceased for post mortem purposes. P.W.5 is a police officer from Kibichoi police post. He noticed the deceased's report in the O.B. on 17th November 1998 at 9.00 a.m. and was allocated the the report for purposes of investigations. He also met the deceased on the same day in the police station. The deceased had a bandage on his head. He interviewed him but the deceased could not make a statement as he was in a lot of pain.

P.W.5 arrested the accused person when he was brought to the station over some other minor offence. He charged him with this offence. Under cross-examination P.W.5 states that he had been looking for the accused prior to his arrest so that he could arrest him and charge him with murder but the accused had eluded him. On further cross-examination the witness disclosed that the deceased gave the name of the accused person as the person who hit him on his head. P.W.6 is the niece of the deceased who was in his company when the incident leading to the death of the deceased happened. Her evidence is that she and the deceased were together but the deceased was riding a bicycle slowly. P.W.6 was walking beside the

bicycle. Upon meeting a group of people the deceased rung the bicycle bell and the people gave him way. The accused who was in the group was however offended and abused the deceased by telling him to get off his bicycle which was bought for him (deceased) by his mother (deceased's). P.W.6 identified the man who abused her uncle as the accused in this case because she knew him. The deceased did not bother with the accused although he abused him and he continued walking. According to P.W.6 and after a short distance she saw the accused following them.

The accused then pulled the deceased from the bicycle and the deceased fell down. The accused then took a stone and hit the deceased with it on the head. P.W.6 says that the accused hit the deceased with the stone several times hitting on the head. The accused then removed some metal bar like object from his pocket and hit the deceased with it. According to P.W.6 the accused claimed to have been looking for the deceased for a long time with a view to killing him and that the accused had got this chance to do so. The accused then run away leaving the deceased seriously injured on the head. P.W.6 helped the deceased push the bicycle to the trading center as the deceased went to Kigumo to report the matter to the police. P.W. 6 reported the incident to her mother there after. P.W.6 has testified that the deceased did not recover from the injuries and died later. Under cross-examination P.W.6 reiterates that she is not mistaken about the accused's identity and that the accused hit the deceased with a stone on the head.

P.W.7 is the Doctor who did a post mortem on the body of the deceased person.

He found a laceration on the deceased skull, a small laceration on the left abdomen near the chest which was healing.

On opening the skull of the head there was a bar hole (a hole made into the skull to drain something). He noticed signs of previous bruises. The bar hole was healing. He noticed signs of subdural haematoma on the brain. He was of the opinion that the cause of death was head injury with brain haemorrhage on the left parental lobe of the brain. The injury was caused by a blunt object. P.W.8 took a statement under inquiry from the accused person. The defence did not challenge the said statement and the same was admitted as evidence. I have noted the contents of the statement in which the accused admits that he fought with the deceased. He blames the deceased for having failed to apologise to him when he hit him with a bicycle. He says that the deceased threatened to beat him a matter which the accused refused to accept. The deceased took a stone and hit the accused with it on the head. It was this same stone which the accused disarmed the deceased of and hit him with it on the head.

The accused made an unsworn defence statement and called no witnesses. He admits having met with the deceased who hit him with a bicycle. When the accused inquired as to why the deceased had hit him the deceased stated that the accused too had eyes to see. This generated into a quarrel. Some ladies intervened and the quarrel ended. In the defence statement the accused avoids to admit that he hit the deceased person at all. He however admits that the deceased was hit when they collided with the bicycle. The accused thus denies having caused the death of the deceased.

I have considered the evidence of the prosecution witnesses carefully. As concerns whether the deceased was dead or not and what caused his death, I have no doubt in my mind that evidence adduced by the prosecution witnesses is enough to prove this point.

P.W.1 saw the deceased with some injury on the fateful day. He named the accused as the person who inflicted this injury on him. P.W.3 attended a post mortem on the deceased. P.W.4 saw the deceased with the head injury. P.W.1 and p.w.4 received the deceased's complaint that it was the accused who injured him. P.W.6's evidence as to how the fight between the deceased and the accused took place is corroborated by the accused's own admission in his statement under inquiry.

The Doctor (P.W.7) saw injuries on the deceased that were consistent with the injuries which P.W.1, P.W.4 and P.W.6 saw on the deceased. The accused also admits in his statement that the deceased was injured on the head. I do not accept the accused's denial in his defence that he did not hit the accused on the head and that if anything the accused was injured out of the collision with the bicycle. The accused's defence statement in an unsworn statement would appear to be a complete denial of the contents of his

statement under inquiry. I am more inclined to believe the contents of the statement under inquiry as opposed to the contents of the accused's statement in defence. Evidence was adduced by P.W.6 tending to show that the accused had the intention to kill the deceased which intention was manifested earlier. I am unable to find any evidence to support P.W.6's evidence on this issue.

From P.W.6's evidence coupled with the evidence of the accused as contained in that statement under inquiry there is nothing to suggest that the accused person did not act in the heat of passion the head of person in fighting the deceased person. There is nothing to suggest that the accused had planned at any one time to kill the deceased. It would appear that the accused was provoked into fighting with the deceased person when the deceased failed to apologize to him after hitting him with the bicycle. I am therefore unable to find any evidence whatsoever to support the presence of any malice afore thought in the conduct of the accused person. Although I find as a fact that the deceased died as a result of the unlawful act of the accused person; I do not find that malice afore thought has been proved in the conduct of the person.

I find that the accused was provoked by the deceased person in the way that the deceased acted and that the accused hit the deceased in retaliation for what the deceased had done to the accused person. I have noted that the deceased died within the statutory limitation provided under S. 215 (1) of the Criminal Procedure Code for the act to amount to killing of the deceased.

In acquitting the accused of murder I at the same time substitute the lesser offence of manslaughter against the accused person and find him guilty on the same. I therefore convict the accused person of the lesser charge of manslaughter. I note that the three assessors are in agreement with me in so far as the manslaughter charge is concerned. Order accordingly.

R.M. MUTITU

JUDGE

Delivered dated and signed in open court in the presence of the Accused, Miss Thiong'o for the accused and in the presence of Mr. Murungi for the state and the three Assessors.

R.M. MUTITU

JUDGE

10/6/2002