



**Republic v Mwasya (Criminal Appeal 4 of 2017)
[2024] KEHC 14119 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 4 OF 2017**

RK LIMO, J

NOVEMBER 13, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

MUTHUI MWASYA ACCUSED

JUDGMENT

1. The accused person, Muthui Mwasya alias Kyalo has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the charge are that on 17/2/2017 at around 23hrs at Katilinga Market Katumbi Location Tseikuru within Kitui Country he murdered Mwandika Mati (the deceased).
3. The accused pleaded not guilty to the offence and the prosecution called a total of 8 witnesses. The prosecution's case is based on direct evidence while the accused person denies the charge and states that he was drunk at the time.
4. This is a summary of the testimonies and evidence tendered during trial by witnesses.
5. Benjamin Muinde Munene (PW1), testified that on 17/2/2017 at around 9:00pm the deceased and his brother Mwendwa were fighting near his hotel and tore some items they were carrying. He noted that both of them were drunk.
6. He testified that he witnessed the two fighting with the deceased hitting the accused with a stone on the head. He stated that the accused took a shirt off and tied it around his head to stop the bleeding and began hitting the deceased with his hands.
7. He testified that people gathered and tried stopping the accused and that one Chris Mwithui Musunda held the accused by the hand and led him away from the fight. He stated he together with the brother of deceased tried lifting the deceased from the ground but he could not stand. He stated they called



- the Assistant Chief who arrived and found the deceased vomiting. He stated a Member of County Assembly passed by and the Chief asked for assistance to ferry the deceased to the hospital which he did.
8. He clarified that the hotel where the accused and deceased fought was his and he witnessed everything.
 9. Charles Muthui Musunja (PW2) testified that he was at Katilinga Market on 17/2/2017 drinking alcohol. He stated that he later found the accused bleeding and on inquiring he told him that the deceased hit him with a stone. He stated that he took the accused to hospital and that the deceased was later taken to same hospital by the Assistant Chief. He stated that he did not witness the incident but had seen the accused earlier drunk.
 10. Robert Muasya Syengo (PW3) the Assistant Chief testified that he was at his home on 17/2/2017 when one Syengo Mwangangi called him and reported to him that there was an incident at Katilinga Market. He stated that he took a motorbike and headed there. He stated that on arrival he found the deceased lying down breathing heavily. He stated that his brother Mwendwa Matiku was trying to assist him. He stated that he went and reported to the Chief before taking the deceased to hospital for treatment and left him there while undergoing treatment.
 11. He stated that he later got reports that the deceased had succumbed.
 12. Joseph Syengo Mwangangi (PW4), a farmer at Katilinga Kahimbi location testified on 17.2.2017 he was at home at 10.30pm, when he got a telephone call from Musyoka Mwangangi, who told him that his brother-in-law had been assaulted by a person he did not know and that he was in serious condition. He rushed to the place.
 13. He stated that he reached and found the deceased and his brother, Kimotho. He told him that Mwandikwa, the deceased had been seriously assaulted saw the blood oozing from the mouth and got was overwhelmed. He stated that he went to the home of the sub chief and woke him up. That he found out later that he could not carry the deceased on the motor cycle of the sub-chief, and decided to call the Member of County Assembly to assist them with the motor vehicle. He state that the MCA went and assisted them to take the deceased to Tseikuru hospital.
 14. He stated that he was treated and referred to Mwingi Level 4 where he was admitted for 7 days and later succumbed on 26/2/2017. He further stated he found the accused at Tseikuru Hospital.
 15. Kimotho Mati (PW5) testified that on the material day he was at Chulungwa at Katilingi. He stated that he saw the accused tripping the deceased before hitting him and stepping on his head and chest. He stated that the streets were well lit by solar lights and he rushed to help the deceased.
 16. He stated that the Chief and the MCA later took the deceased to the police station before taking him to hospital. He confirmed that both the accused and deceased were drunk at the time.
 17. Sgt. Sylvester Toroitich (PW6) testified that he was based at Tseikuru at the material time and that on 17/2/2023 at 2310hrs he was woken up by police officer on duty and informed that someone injured had been taken to the station by MCA. He stated that he went to report office and found someone with a swollen head to the point that recognition was difficult.
 18. He stated that entered the report in the Occurrence Book as an assault as he was informed. He stated the Accused had earlier reported an assault case as well. That he escorted the badly injured deceased to Tseikuru Hospital where they found the accused queueing for treatment. He stated he arrested the Accused and the deceased was referred to Mwingi Tahidi Nursing Home because of the seriousness of the injuries sustained. That he was later informed that the deceased had passed on. He stated at first, he had preferred a charge of grievous harm against the accused, and he produced that Charge Sheet as Exhibit 1. That he later withdrew the Charge and on the advice of the Directorate of Criminal



Investigation proceeded to prefer a Murder Charge through the said office. He identified the Accused in Court.

19. On cross-examination, PW 6 stated that the deceased was so badly injured that he was unable to talk and he could not interrogate him.
20. Dr. Curtis Alice (PW7) gave his evidence and informed the Court that he was a medical doctor based at Mwingi Level 4 Hospital. He testified on behalf of his colleague, Dr. Josephine Muthoni who is no longer in Kitui County having relocated to the United States. Prior to that, the two had worked together for 2 years and PW 7 stated that he knew her handwriting well.

The doctor produced a post-mortem report prepared by his colleague as Exhibit 2 and the findings were that the body was unclothed and he wore a beaded necklace. The findings were bruises on both the right and left forearms and that there were healing abrasions in the right side of the chest with scab and another healing laceration on the angle of his left eye. The findings in the respiratory system were that there were pleural adhesions that were fibrous and there were multiple lung contusions. As a result of the examinations, the doctor opined that the cause of death was an acute lung injury compatible with blunt chest trauma.

21. Corporal Joseph Kyalo Mitia (PW 8), gave evidence as well and stated that he took over the case from Corporal Bernard Gichuhi, who was transferred to Narok where he later passed on.
22. He stated that upon taking over the case, he proceeded to avail the remaining witnesses before this Court. He presented the Directorate of Criminal Investigation's report as Prosecution Exhibit 3, and he also produced the statement of the Investigation Officer as per Section 33 of the [Evidence Act](#) as Exhibit 4.
23. When placed on his defence, the accused gave evidence on oath and stated that on 17/2/2017 he was at his place of business before later going for a drink at a local bar where they drunk with friends until 11.50pm. He stated that he closed his pool business and went home but on his way he met the deceased with his brother Martin quarrelling. He stated that he inquired from them why they were quarrelling and that as he did so he was hit with a stone on his head which started bleeding as a result. He admitted that the incident happened outside Benjamin Muinde's (PW1) hotel which was well lit by solar lights.
24. He stated that he took a shirt and tied it on his head to stop the bleeding and screamed but no one came to his rescue. He added that his cousin Chris Muthui (PW 2) came and helped him to close his business premises. He stated that his uncle Kitheka Mwendwa arranged for transport for him to be taken to hospital and that before they left the scene Mwendwa, the brother to the deceased apologized to him and that he did not know what the issue with the deceased was.
25. The Accused stated that he was taken home by his cousin and uncle aforementioned to hospital in Tseikuru. He stated that they reported the matter at Tseikuru Police Station before going for treatment. He was stitched on the cut on his head and was given intravenous fluids and that as he was waiting for drugs, the police came and arrested him.
26. DW 1 produced his treatment notes as Defence Exhibit 1 from Tseikuru sub-district hospital dated 18/2/2017 and was also issued with a P3 Form of even date which he produced as Defence Exhibit 2. He said that he was arrested on 18/2/2017 at the Hospital and escorted to Tseikuru Police Station, where he recalled that the deceased arrived at Tseikuru Police Station, as they were going to hospital for treatment. He noted that he was the first to report but wondered why the Deceased was not arrested.



27. He denied hitting the deceased claiming that he was unable to commit the offence as he had been hit on the head. He claimed that PW5 was the one who hit the deceased and denied that he reported an assault case to cover up the murder.

28. Defence Written Submissions

Mr. J.M Muinde for the accused person submits the evidence of PW1 and PW2 were full of contradictions as to what really transpired. It is his contention that there is evidence that the deceased was fighting with his brother because PW 1 testified as such which raises the question as to whether those injuries are what caused the death of the deceased.

29. Regarding the ingredients of murder, the defence counsel submits that even though the death of deceased has been established to have occurred, it is not clear whether the deceased died as a result of the injuries inflicted by his brother or the accused. He submits that the prosecution failed to move their case on that account.

30. Defence Counsel also submits that the prosecution did not establish that the death was caused with malice aforethought since no motive was established at all.

31. The Defence therefore submits that the accused ought not to have been charged with murder and urged this Court to acquit the accused person for lack of sufficient evidence.

32. Analysis and Determination

This court has set out in summary the evidence tendered by the prosecution and the defence put up by the defence.

33. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Section 203 and 204 provide that:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.....Any person convicted of murder shall be sentenced to death.”

34. For a charge of murder to be sustained, the following ingredients must be established and proved beyond reasonable doubt by the prosecution who always bear the burden of proof. The elements are;

- i. The fact of death and its cause.
- ii. That the death was caused by unlawful acts or omission of the accused.
- iii. That the accused had malice aforethought.

35. (i) The fact and cause of death

The actual death and the cause of death are evident from the findings of the post-mortem from that was produced as Prosecution Exhibit 2 by PW 7. The doctor’s conclusion was that the cause of death was an acute lung injury compatible with blunt chest trauma.

36. (ii) Actus Reus or that the accused caused the death of deceased.

The question arising is who caused the injuries from which the deceased later succumbed. The evidence tendered by the prosecution as well as the accused shows that both the deceased and accused were at Katilinga Market on 17/2/2017 when a quarrel and a fight broke out. It is also clear that the incident occurred outside the hotel of PW1 who gave an account of what transpired.



37. According to the testimonies of PW1 and PW5, accused person, was hit by a stone on the head. PW1 and PW 5 stated that they saw the accused assaulting the deceased clearly because of the solar lights. It was confirmed that both the accused and deceased were drunk at the time of the incident. The Accused did not deny being present at the scene on the date of the incident, but denied assaulting the accused.
38. This court has considered the defence put forward and the accused in his defence squarely placed himself at the scene of crime. He concedes that the incident occurred outside the hotel of PW1 and that the place is well lit by solar lights. Sgt. Sylvester Toroitich (PW6) described the appearance of the deceased when he was taken there by an MCA and the Chief. The head of deceased was so swollen to the extent that he could not be recognized. PW5 stated that he saw the accused hitting the deceased with his hands and stepping on his head and chest. Dr. Curtis Alice (PW7) in his evidence stated that the deceased death was caused by blunt chest trauma. The medical evidence was consistent with the sort of injuries PW5 stated he saw the accused inflicting on the deceased. The accused attempt to lay blame on PW5 is an attempt to deflect guilt or culpability to the offence while the deceased may have been quarrelling with his brother (PW5), it is the accused who was seen inflicting injuries to him.
39. This court finds that based on the evidence tendered the element of actus reus has been established and proved against the accused beyond reasonable doubt.

40. (iii) Malice aforethought/means rea

This element did not come out clearly in the prosecution's case what is apparent is that the accused also suffered an injury to his head and that could explain why he might have opted to revenge. It also apparent that he was the first to hit with a stone before turning on the deceased.

41. Malice aforethought is defined under Section 206 of the Penal Code. Under Section 206 it 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
 - c. An intention to commit a felony.”

42. This court has carefully considered the evidence tendered and what is coming out clearly is that both the accused and deceased were drunk at the time. Intoxication can be a defence to criminal charge if established.

43. Section 13 of the Penal Code provides that:

- “ 13. Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
 - (1)
 - (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -
 - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or



- (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intent on, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

44. This court finds that the element of means rea is not clearly proved in light of the intoxication of both the accused and deceased. In the absence of the element of means rea, the charge of murder cannot stand but where there's overwhelming evidence that the accused committed the act that cause death then an accused will be found guilty of a lesser charge of manslaughter.

45. The Court of Appeal in the case of Patrick Kihara Njoroge v Republic [2002] eKLR found as follows:

"We have carefully re-evaluated the evidence adduced before the trial court and making our own independent assessment of the same we come to the conclusion that this was a case in which the appellant and the deceased were involved in a drunkards brawl and, as often happens in many such incidents, the deceased lost his life at the hand of the appellant. There was overwhelming evidence to the effect that the appellant stabbed the deceased with a knife.... Having regard to the foregoing, we are not able to say that the appellant was so drunk that he was incapable of forming any guilty intention. However, since the charge of murder was reduced to manslaughter, we think that it would not be appropriate to interfere with the learned Judge's findings."

46. In light of the evidence tendered and the above decision this court finds that the accused is not guilty of murder but he is found guilty of manslaughter and he is hereby convicted of manslaughter accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF NOVEMBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

