



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL CASE (MURDER) NO. 12 OF 2014**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**GEOFFREY WACHIRA MUTHONI.....1<sup>ST</sup> ACCUSED**

**HENRY MUNENE MUGURE.....2<sup>ND</sup> ACCUSED**

**SAMUEL MURIMI WANDIA.....3<sup>RD</sup> ACCUSED**

**JOSEPH NJAGI MURIITHI.....4<sup>TH</sup> ACCUSED**

**J U D G M E N T**

The four accused persons are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 9<sup>th</sup> September 2013 at Mahigaini village Tebere Location within Kirinyaga County the accused unlawfully murdered Titus Mwangi Muiruri. The charge is as per the information dated 11<sup>th</sup> December 2014 which consolidated murder cases **No.12/2014** and **No.22/2014**.

1. The accused denied the charge. The matter proceeded to full trial. The prosecution called twelve (12) witnesses who adduced evidence in effort to prove the charge against the accused person(s)

**Brief Facts:**

The facts of the case are that on 9<sup>th</sup> September 2013 a brother to the deceased by name Stanley Bao was sent by his mother to go and buy meat from a butchery at Mahigaini village. Later Stanley Bao called his mother through mobile phone and informed her that he had found the deceased being beaten by four men. PW1- Panas Mwaura Muiruri a brother of deceased overheard the conversation, Stanley Bao returned home. Later at about 8.40 pm, Jane Wairimu called the mother of the deceased and told her that the deceased was being beaten and that it was getting serious. The mother of deceased told PW1 to go and find out. PW1 went to a club called Kungu Maitu at Mahigaini village. At the back of the club he found the deceased being beaten by eight people. The four accused persons were among the people who were beating the deceased. The accused were armed with whips and other weapons. Henry Munene (2<sup>nd</sup> accused) Mithamo were burning the deceased using nylon papers which they were holding in their hands. Samuel Murithi Wandia (3<sup>rd</sup> accused) had a whip while Joseph Njagi (4<sup>th</sup> accused) had a bicycle locker and was using it to beat the deceased. On seeing PW2- the accused and the others who were beating the deceased retreated. The deceased lay on the ground naked and badly beaten. One of those who were beating the deceased alleged that there were two chicken which the deceased had sold to the owner of the club. The deceased informed him that he had brought two chicken from home and sold them to the owner of the bar then used the money to buy drinks. The PW1 tried to assist the deceased but he could not walk.

2. PW1 was joined by his brother Stanley and they tried to assist the deceased to walk. The clothes of the deceased had been thrown about five metres from where he lay.

PW1 called his uncle John Kiguru who had a motor bike. They took the deceased home. Later at 1.00 am the condition of the deceased became worse. PW1 looked for a vehicle to take the deceased to hospital. On the way they realized that the deceased had passed away. The matter was reported at Wangu'ru Police Station. The body of the deceased was escorted to Kibugi Funeral Home. Later a Post Mortem was conducted on the body by PW7 Dr. Ndirangu Karomo. He formed the opinion that the cause of death was severe head injury inflicted by a blunt object. The post mortem Form was produced as exhibit.

3. Evidence was adduced by PW10 Tabitha Wanjiru Murimi that on the material day the deceased had snatched her phone and ran away. She ran after him while screaming. Many people went and surrounded the deceased. She testified that the deceased was beaten. That when the deceased went home he was beaten by his father and it was alleged he had stolen chicken. The matter was reported to the police who

investigated the matter. The four accused were arrested and charged.

### **A Summary of the Evidence:**

PW1 Francis Mwaura Muiri adduced evidence that the deceased was his younger brother. He told the court that on the material day that is 9<sup>th</sup> September 2013, the deceased was sent to the butchery by his mother. It was between 730 and 8.00 pm. His mother received a call informing her that his brother Titus Mwangi Muiruri was being beaten by four men. After sometime his brother Stanley Bao went home and informed him about the beating of his brother Titus Mwangi. His brother Stanley Bao then said he wanted to go back to charge his phone in the same village at their grandmother's home. Later their aunt, Jane Wairimu called his mother informing her that the deceased was being beaten and it was getting serious. His mother told him to go to the club called Kungu Maitu at Mahigaini village. He found eight people beating the deceased at the back to the club. He testified that the four accused were among the people who were beating the deceased. The accused were armed with whips and other weapons. Geoffrey Wachira had a whip which had a nut on one end. Henry Munene and Mithamo were burning the deceased using nylon papers. Samuel Muiruri had a whip and Joseph Njagi had a bicycle locker which he was using as a weapon to beat the deceased. The accused and others were telling the deceased to remove what he had. The deceased was naked. PW1 testified that when the accused saw him they tried to cover their faces with scarfs and mavin. They also retreated to where there was no light. PW1 testified that the deceased was badly beaten and was bleeding from the legs. One of the people beating deceased told him there were chicken which had been sold to the club. PW1 enquired from Richard and he showed him two chicken. PW1 identified the chicken as theirs as it had a mask. PW1 enquired and deceased told him that he had sold the two chicken and used the money to buy drinks.

4. PW1 testified that his brother Stanley went to where he was and they tried to assist the deceased but the was unable to walk. They assisted him and took him home. The deceased could not sit down so he lay down. He requested that water be poured on his head. The deceased was taken to hospital but he did not make it to hospital as he died on the way. The matter was then reported at Wang'uru Police Station. PW1 testified that he knows the four accused as they grew up together in village and they are the ones who beat the deceased.

5. PW1 testified that after the incident the four accused ran away from the village for three to four (3-4) months. He testified that where the deceased was beaten there was electricity light and he was therefore able to see the accused clearly. PW1 further testified that their father did not beat the deceased.

6. The PW2- John Kiuru Mwaura is the uncle to PW1 and the deceased. His testimony was that he was called by PW1 and the deceased. His testimony was that he was called by PW1 who informed him that the deceased had been beaten and he wanted him to go and assist him to take the deceased home. He went and found that the deceased was in a very bad shape and looked for a motor vehicle to take him to hospital. He told the court that after the deceased was put in the vehicle he realized he had passed away. PW2 told the court that the father of the deceased did not beat him.

7. PW3 James Muiruri Karuoya testified that the deceased is his second born son. He told the court on the material night he was resting on the bed when he had a motor bike had come to the compound. He went outside and met his two sons Francis Mwaura (PW5) and Stanley Mbau and his brother -in- law John Kiguru Mwaura (PW2). A lady called Wanjiru was also present. The deceased was lying down outside the house. A lady called Wanjiru was also present. He told the court that the deceased picked her phone when it fell down and he ran away. Wanjiru told him that he called the village youth wo went and beat the deceased. PW3 told the court that the deceased appeared to have been beaten. He told the court that the deceased passed away as he was being taken to hospital. The police came at 5.00 am and carried the body.

8. PW4 Jane Wanja Karuoya testified that on 9<sup>th</sup> September 2013 she was informed that the deceased who was her nephew was being beaten at the plot of Njoga. She testified that she had gone to pick her phone from where she had taken it for charging. She was alerted by another woman that the deceased was being beaten. She went there and met many people. She met the brother of deceased and a woman called Wanjiru. PW4 asked Wanjiru what was happening. Wanjiru told her that the deceased had stolen her phone. PW4 asked the deceased whether he had stolen the phone. The deceased denied and said she had not seen the phone. She testified that some people started beating the deceased. She saw 2 & 4 accused among the people who were beating the deceased and telling him if he does not produce the phone they will teach him a lesson. She told the court that those beating the deceased were kicking him using their legs. The 4<sup>th</sup> accused said he suspected that the deceased had hidden the phone at Kungu Maitu Bar and they headed there. The phone was not recovered, she left. The next day she went to the home of deceased and she was informed that the deceased had died after the beatings.

9. PW5 is Zackary Ndungu Muchiri and he testified that on the material day at about 9.00 pm he was at home when he head screams. He went to the place and found many people saying the man was a thief. The 4<sup>th</sup> accused is the one he asked and he said the man was a thief. 4<sup>th</sup> accused told him a phone and chicken were stolen. PW5 testified that he told the 4<sup>th</sup> accused to take the deceased to the police. He told the court that 1<sup>st</sup>, 4<sup>th</sup> accused and many others were beating the deceased using whips. The brother of deceased came with a motor bike and carried the deceased. The next day he learnt that the deceased had died.

10. PW6 Stanley Mbau Kamoya testified that he identified the body of the deceased to the doctor who performed the post mortem.

11. PW7 Doctor Ndirangu Karomo testified that he performed the postmortem on the body of the deceased and formed the opinion that cause of death was severe head injury caused with a blunt object.

12. PW8 Stanley Mbau Muiruri testified that he witnessed the four accused beating the deceased on allegation that he had stolen a mobile phone.

13. PW9 Benson Njenga Njoroge testified that he met the deceased on 9<sup>th</sup> September 2013 and the next day he heard that he was beaten to death. He testified that he did not witness the beatings.

14. PW10 Tabitha Wanjiru Murimi testified that on 9<sup>th</sup> September 2013 the deceased snatched her phone and ran away. She chased him while screaming. Many people came after him and surrounded him including his uncle Kiguru and his brother Francis. She testified that the deceased was not beaten and that he was drunk and was hauling abuses. The deceased was taken home and when his father asked him about the phone, the deceased started abusing him. The father of deceased started beating him and stepping on him, lifting him up and dropping him on the ground. Francis told her he would pay the phone. She left. The next day she heard that the deceased had passed away. She told the court that she did not see any of the accused anywhere.

PW11- Doctor Joseph Thuo testified that he examined the accused persons on 30<sup>th</sup> April 2014 and confirmed that they were fit to stand trial.

15. The 1<sup>st</sup> accused gave his defence and stated that he did not know how the deceased met his death and he was not there.

16. The second accused (DW2) testified that he was not there when the deceased was beaten. He told the court that they had no grudges with the deceased.

17. The 3<sup>rd</sup> accused testified that he did not beat the deceased with his co-accused.

18. The 4<sup>th</sup> accused (DW4) testified that on the material day he heard screams and went to find out. He met Wanjiru, Kiguru and Mwaura. He said he heard screams from many people, at the shopping centre. His relatives said he had stolen a chicken. He left and went home. He said he did not know about the death. He testified that he did not bet the deceased.

19. DW5 Peter Muturi Mwangi was called as a defence witness. He told the court he heard screams from the home of deceased. He said he was not at the town and that the deceased was not killed at the town. He said he did not know who killed the deceased.

20. DW6 testified that he heard screams but did not see anybody being lynched on being beaten.

21. DW7 Ester Wanjiru Waruguru testified that she heard noise and went to find out. There was an allegation that the deceased had stolen chicken and a phone. The four left. He did not witness anybody beating the deceased.

22. The defence closed its case and the counsel stated that he wished to file submissions. He however did not file any submissions.

### **23. Analysis and determination:**

I have considered all the evidence adduced by the prosecution and the defence. I find that there is no dispute that the deceased died. The issue for determination is whether the accused are the ones who unlawfully caused the death of the deceased.

24. The accused are charged with murder contrary to **Section 203 as read with Section 204** of the **Penal Code**. There are two key ingredients in a charge of murder which are required to be proved. These are the *actus reus* and *mens rea*. The *actus reus* is the unlawful act which leads to the cause of death of the deceased while *mens rea* is the malice aforethought. These two must be established in order for the charge of murder to be proved to the required standard. The court of Appeal in the case of ***Anthony Ndegwa Ngari-v- Republic (2014) eKLR***, stated that the three elements of the offence which must be established to prove a charge of murder are:-

- (a) The death of deceased occurred
- (b) The accused committed the unlawful act which caused the death of the deceased.
- (c) That the accused had malice aforethought.

25. The burden is on the prosecution to prove criminal liability which is established by the two ingredients namely *actus reus* and *mens rea*. In the case of ***Woolmington -v- DPP (1935) A.C 462 at 481*** while addressing the issue of legal burden of proof, it was stated:-

***“ Through out the web of English criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoners guilty subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”***

26. The accused person are charged with murder, **Section 203** of the **Penal Code** provides:-

***“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

I will proceed to consider whether the prosecution discharged the burden of proof elements of the charge. To start with:-

#### **a) Death of the deceased:**

The death of the deceased is not in dispute. All the accused admitted that they learnt of the death of the deceased the day after the incident. The death of the deceased was confirmed by PW7. Doctor Ndirangu Karomo who testified that he performed the post mortem on the body

of the deceased and formed the opinion that the deceased died as a result of severe head injury inflicted by a blunt object. He produced the postmortem form as exhibit 1. He also testified that he issued a death certificate No. 0155168. The doctor further observed that the body had bruises on the thighs and the buttocks which he described as whip marks. The death of the deceased was proved to the required standards.

**b) Whether the accused committed unlawful act which caused the death of the deceased (actus reus)**

The prosecution case is that the four accused were involved in beating the deceased to death. The accused person(s) denied that they beat the deceased. This was a mere denial as the prosecution tendered credible evidence from various witnesses who witnessed the accused beating the deceased. The witnesses who adduced evidence knew the accused before and there was no possibility for mistaken identity. The witnesses had no grudges with the accused and gave their testimonies based on what they witnessed that day. The witnesses who told the court that they witnessed the accused beating the deceased are PW1 Francis Mwaure Muiruri who found the accused and others not before court beating the deceased. His testimony was that 1<sup>st</sup> and 3<sup>rd</sup> accused were armed with whips, 4<sup>th</sup> accused had a bicycle locker which he used as a weapon and 2<sup>nd</sup> accused was burning him with nylon papers. The other witness is PW4 Jane Wanja Karuoya gave graphic details on how the deceased met his death at the hands of the four accused. She enquired and Tabitha Wanjiru Murimi told her that the deceased had snatched her phone. She asked the deceased but he denied that he stole the phone. The evidence of PW4 shows that the motive of the beating was the allegation that he had stolen the phone. It is important to note that there was no eye witness to the allegation of theft of the phone and that it was never recovered from the deceased despite the fact that he was arrested soon after the allegation. Furthermore PW10 told PW8 that he suspected the deceased as he had passed where she was. There was also evidence by PW10 who testified that he met the deceased in the hotel where PW11 was taking soup. The deceased went there then left. PW10 left the PW11 there and she had not alleged that her phone was stolen.

27. Turning again to the testimony of PW4 she told the court that the 4<sup>th</sup> accused said he suspected the phone was hidden at Kungu Maitu and led the deceased there. The phone was not recovered. The 4<sup>th</sup> accused told PW4 to leave and led the deceased behind the shops. It is here that PW1 found the 4<sup>th</sup> accused and others beating the deceased. There is also the testimony of PW5 who witnessed the accused pleading with them to stop and take him to the Police Station. PW3 James Muiruri Karuoya who is the father of the deceased testified that Wanjiru (PW11) took the deceased home when he was badly injured. Wanjiru told him that the deceased had stolen his phone and she called the village youth who maintain security in the area and they beat him. There are other witnesses like PW5, PW8 who witnessed the beatings. I find that the prosecution has adduced credible evidence which is well corroborated to prove that the accused were involved in beating the deceased to death.

28. I have considered the evidence by PW10 Tabitha Wanjiru. I find that her testimony is not credible. There is overwhelming and well corroborated evidence that the deceased was beaten by the four accused before he was taken home by his brother and his uncle when he was in bad shape. It is not possible that his father would have added more beatings on the deceased in the state that he was in. PW1 in cross-examination told the court that his father did not beat the deceased. He told the court that the deceased was very weak and PW10 was saying that she was drunk. PW3 told the court that he did not beat the deceased. I find that the testimony of PW10 is not credible. It was a veiled attempt to cover up the accused after she caused them to beat the deceased to death on a false allegation that he had stolen her phone. Evidence was adduced that she made the false allegation then called the youth and 4<sup>th</sup> accused who said he was going to teach the deceased a lesson. PW10 had alleged that she was threatened which turned out to be false. I find that the testimony by PW10 does not cast doubt on the prosecution case on the manner in which the death of the deceased was caused.

29. I have considered the defence tendered by the accused. I find that the defence is not plausible. The accused were seen beating the deceased by people who knew them very well. There was no possibility of mistaken identity. DW6 testified that he heard screams and found the deceased and there were many people. It is not possible for an allegation of theft to be made against a person and the public don't take any action. The defence has advanced a narrative that the deceased was a thief and fell short of saying that he deserved to die. There can never be a justification of a mob justice no matter what crime a person has committed. Due process of the law must be followed at all time to prevent deaths of innocent victim implicated purely based on suspicion.

DW5 despite saying that he is the village secretary yet he did not volunteer any information to the police. The evidence by PW10, DW5 and 6 is a make up story which I find is not true.

30. The 1<sup>st</sup> accused said he was at Mahigaini on the material day but did not beat the deceased. The defence is a mere denial. He admitted that he went to the scene and witnesses confirmed that he was beating the deceased. It is also clear that after the death of deceased he left the area in huff and returned in April 2014 when he was spotted. He was then arrested. I reject his defence.

31. DW2 also confirmed that he was at Mahigaini. He denied that he was involved. Like 1<sup>st</sup> accused, there is evidence that he is one of those who were beating the deceased. He disappeared from the area when the news of the death of deceased was made public. He resurfaced in April and was arrested. The 2<sup>nd</sup> accused said he had no grudges with the deceased. He could not be falsely implicated. I reject his defence.

32. The defence of 3<sup>rd</sup> accused is a mere denial. He was seen by witnesses beating the deceased like his co-accused, he left the area only to be arrested later in April. I find that the defence is a mere denial.

33. The 4<sup>th</sup> accused denied the charge. I find that his defence is a mere denial. He was seen by the PW4 and even talked to her telling the deceased he would teach him a lesson. He also disappeared from area and resurfaced in September.

I find that the defence of the accused persons is not credible. I reject the defence. I find that the prosecution has proved that the accused are the ones who beat the deceased and inflicted fatal injuries. The motive of the beating was due to the allegation by PW10 that the deceased had stolen a phone. The action by the accused to beat the deceased was unlawful. They took the law into their own hands. The phone was never recovered from the deceased despite being stripped naked. The beating was pointless.

34. **(c) Whether the accused had malice aforethought**

Malice aforethought is one of the elements which has to be proved in order for the offence of murder to be established. Under **Section 206** of the **Penal Code**, Malice aforethought is the intention to kill or to cause grievous harm. The section provides:

*“ 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 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 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.*

The Court of Appeal in the case of *Nzuki -v- Republic (1993) KLR* stated:-

*“ Malice aforethought is a term of art and emphasized that:-*

*Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions-*

*(i) The intention to cause death*

*(ii) The intention to cause grievous bodily harm.*

*(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.”*

35. Malice aforethought can be inferred from the circumstances of the case. In *Republic -v- Tubere S/O Ochen (1945) E.A C.A 63*, the court stated that malice aforethought can be inferred from the following factors:-

(a) The nature of the weapon used.

(b) The part of the body targeted

(c) The manner of killing or in which the weapon was used.

(d) The conduct of the accused, before, during and after the attack.

The intention to cause death or grievous harm constitutes prove of malice aforethought. Malice aforethought can also be inferred from the manner of killing, see *Ernest busier Abanga -v- Republic (1990) Criminal Appeal No.32/90.*

36. Applying the above principles to the present case, I find that the malice aforethought was proved. The accused person wanted to teach the deceased a lesson on allegation of stealing a mobile phone. The four beat deceased and stripped him naked. They even told a woman to move away as they beat the deceased. They had the intention to cause death of the deceased or grievous harm. I find that the manner of beating shows that they wanted to administer mob **“justice”** and lynch the deceased as they had started burning him with nylon papers after beating him senseless for several hours. The prosecution has proved malice aforethought beyond any reasonable doubts. The prosecution has sufficiently established all the elements of the charge of murder. The guilt of the accused has been proved beyond any reasonable doubts. I therefore find the accused persons guilty as charged and I convict them under **Section 322(2) of the Criminal Procedure Code.**

**Dated, signed and delivered at Chuka this 8<sup>th</sup> day of April 2021.**

**L. W. GITARI**

**JUDGE**

**8/4/2021**

Judgment read out virtually.

**L.W GITARI**

**JUDGE**