



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram D. K. Kemei – J

CRIMINAL (MURDER) CASE NO.9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WAMBUA KIMEU.....ACCUSED

JUDGEMENT

1. The accused herein **WAMBUA KIMEU** was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 9th day of September, 2014 at Ngaatini village, Mbaani sub- location in Mwala sub-County within Machakos County he murdered **MBITHI MULI**.

2. The accused was represented by Mr Muthama while the prosecution was represented by Mr Machogu and later Miss Njeru.

3. A total of six (6) witnesses were called by the prosecution. **Pw1** was **Alex Mweu Mbithi** who confirmed that the deceased was his father and that on the material date at around 9.00pm he was heading home after leaving the market in the company of Bernard Kiilu Mullei and Maingi Ndole when they saw the accused herein assaulting the deceased. He stated that he tried to intervene by requesting to stop beating him whereupon the accused viciously slapped him. He added that he called his brother to rush to the scene as the deceased was then bleeding profusely and unable to talk. He further stated that the deceased was rushed to Machakos level five hospital where he was admitted for one week before being transferred to Kenyatta National Hospital and who later passed on. He added that the accused had in the past violently robbed the deceased and hence the two had some differences over the same. On cross examination he maintained that he witnessed the incident and that the accused did slap him.

4. **Bernard Kiilu Mulei (Pw2)** testified that he was heading home from Maii market in the company of Alex Mweu and Maingi Lole and on reaching the gate to accused's home, we found the accused having assaulted the deceased who was then lying on the floor and bleeding profusely. He stated that Alex Mweu demanded from the accused as to why he had assaulted the deceased to which the accused responded that he had found the deceased applying witchcraft paraphernalia near his(accused's) home. He stated that the deceased was rushed to hospital and died afterwards. On cross-examinations, he testified that the incident took place at a gate to the accused's home. He also confirmed that they found the accused standing over the injured deceased. He admitted that they did not find the accused assaulting the deceased. On being re-examined, he stated that they found the accused holding the deceased' leg who was by then lying on the ground. He also stated that the accused left holding the deceased and told them that he had found the deceased applying witchcraft at his gate.

5. **Peter Muthini Muli (Pw3)** testified that the deceased was his elder brother and that he witnessed the post-mortem examination conducted on the body of the deceased on 30th September, 2014. He identified the Post-mortem report form.

6. **Job Muli Mbithi (Pw4)** testified that the deceased was his father and that he received a distress call from his younger brother Alex Kimeu that their father had been injured. He rushed to the scene and found the deceased lying down on the ground bleeding profusely. He also confirmed that he found the accused in the scene who later jumped over their family fence. He rushed the deceased to hospital and later filed a report to the police at Masii Police Station. He also confirmed being present during the post-mortem on the body of the deceased. On cross-examination, he confirmed that he did not witness the incident.

7. **No. 54919 Pc David Mbugwa (Pw5)** testified that on the ninth of September, 2014, he received instructions from the OCS to proceed and arrest the assailant. He proceeded to Masii town and managed to arrest the accused whom he escorted to the Police Station. The accused was later charged with a holding charge of assault vide Machakos CM CR. NO. 1473 of 2014. Upon the death of the deceased, the holding charge was withdrawn and the present charge of murder was preferred. He stated that he learned that the deceased was trying to bewitch the accused at the time of the incident. On cross-examination, he stated that he established from the accused that the deceased had entered his compound and a toilet without permission. He also stated that he could not tell if the fight took place inside or outside the compound of the

accused.

8. **Dr Grace Midigo (Pw6)** testified that she participated in the post-mortem on the body of the deceased while in the company of her superior Dr Emily Rogena. The examinations revealed that the head had a mild frontal skull-bruise while the internal examinations revealed subdued cranial haemorrhage and mild flattened gyri (due to brain pressure). She stated that they found the opinion the cause of death was head injury and that the weapon must have been a blunt object. She produced the post-mortem report as an exhibit.

9. The court upon analysing the evidence, established that the prosecution had established a prima facie case against the accused. The accused was thus placed on his defence. The accused opted to tender a sworn testimony and did not call any other witness.

10. **Wambua Kimeu (Dw1)** testified that on the material date he had come from performing a certain casual job and he decided to pass by the market to buy household food items. On his way home, he found somebody lying on the road. He tried to inquire as to what had happened. Other people arrived. As he stood by, some of the people positively identified the victim as their relative. He tried to apply first aid and then a motorcycle was called and who rushed him to hospital. The accused further stated that the victim had an injury on the head and he tried to administer first aid. He stated that he later went to his home and was surprised to be arrested three days later on allegations that he had assaulted the deceased. He maintained that he did not assault the deceased as alleged and that he only found him at the scene and applied first aid. On cross-examination, he admitted that he found somebody lying down unconscious near their gate and that the said person had been injured. He also confirmed that the relatives of the deceased found him standing near their family gate. He also confirmed that Pw1 and Pw2 found him at the scene and that he was the only one at the scene at that time. He also confirmed that he did not have any problem with the deceased or his family members. He denied any knowledge about witchcraft allegations attributed to the deceased. He also admitted that he was the first one to notice the deceased at the scene.

11. Learned counsels filed final written submissions. Vide submissions dated 16.2.2021 Miss Njeru for the prosecution submitted that the cause of the deceased's death was not by natural causes but had been unlawfully caused. She also submitted that the accused was found at the scene assaulting the deceased at their gate by the first witnesses who arrived at the scene. It was counsel's submission that the evidence by the prosecution was overwhelming against the accused and that the defence testimony did not displace that of the prosecution. Learned counsel urged the court to find the accused guilty of the offence of murder as charged and to convict him accordingly.

12. Mr Muthama learned counsel for the accused vide his submissions dated 16.6.2020 and filed on 18.2.2021 first submitted that the witnesses called by the prosecution did not witness the incident and as such the evidence if any is circumstantial in nature. It was contended by counsel that the circumstantial evidence does not form a chain that is so complete that it only infers the guilt of the accused when all the evidence of the prosecution is taken as a whole. It was also submitted that the accused had no motive to kill the deceased as no such motive was proved by the prosecution since the accused confirmed that he had no ill will against the deceased. Learned counsel urged the court to find that the prosecution did not prove its case beyond reasonable doubt and proceed to acquit the accused of the charges. Reliance was placed in the following cases- **Sawe V Republic (2003) eKLR, Teper V.R (1925) AC 489, r, v, Kipkering Arap Koske & Another (1949) 16 EACA 135, Simoni Musoke V. R (1958) EA 715, Erick Odhiambo Okumu V. R (2015) EKLR, Libambula V. R (2003) KLR 683.**

13. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard of proof. It is trite that the burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all instances save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. (See *Miller V Minister of Pensions (1947) ALL ER 372.*) In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

14. If there is a strong doubt as to the guilt of the accused, it should be resolved in his favour. Hence, an accused must not be convicted because he has put up a weak defence but rather that the prosecution's case strongly incriminates him and that there is no other hypothesis than the fact that the accused person committed the alleged crime. See **Woolmington V DPP (1935) AC 462.**

15. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 2014 of the Penal Code are as follows:

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

16. The post mortem report on the examination of the body of the deceased was duly produced as no objection was raised by the defence. Dr Grace Midigo (Pw6) who conducted the post mortem in company of her superior Dr Emily Rogena confirmed that there was a mild frontal skull bruise on the external part of the head and that the internal examination revealed a subdued cranial haemorrhage and mild flattened gyri (due to brain pressure). She formed the opinion that the cause of death was head injury and that the weapon used was a blunt object. To that extent the first ingredient of the offence has been proved.

17. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic V Boniface Isawa Makodi (2016) EKLR* that referred to the case of *Guzambizi Wesonga V Republic*

(1948) 15 EACA 65 where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

18. The deceased herein was found to have died from head injury inflicted by a blunt object. There is therefore certainty as to the cause of death. Given the nature of injuries suffered by the deceased that resulted in his death as indicated in the post-mortem report it can safely be concluded that death was the desired outcome of whoever the assailant was.

19. The evidence of Alex Mweu Mbithi (Pw1) and Bernard Kiilu Mulei (Pw2) was that upon arrival at the scene they found the accused assaulting the deceased who was already on the ground bleeding profusely. The two confronted the accused as to why he had assaulted the deceased and who informed them that he had found the deceased applying witchcraft paraphernalia in his compound. The accused in his defence maintained that he arrived at his gate and found the deceased lying down already injured and that he tried to administer first aid. He also denied the allegations of witchcraft attributed to the deceased.

20. From the evidence of the two prosecution witnesses it is clear that the accused was placed at the scene of crime. Indeed, the accused himself confirmed in his evidence that he was alone with the deceased before the two witnesses arrived. The accused also confirmed that he had no differences with the two witnesses or the deceased.

21. As the accused admitted being the first one at the scene to notice the deceased, the spotlight regarding the circumstances the deceased sustained injuries must ordinarily be placed at the doorstep of the accused. This is so because the first two prosecution witnesses confirmed in their testimonies that they found the accused assaulting the deceased. That evidence was not shaken by the defence. The prosecution was under duty to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable. From the evidence of Pw1 and Pw2 that they found the accused assaulting the deceased, the next issue for determination is whether they said assault was with malice aforethought. The evidence of those two witnesses is that they confronted the accused and demanded to know why he was assaulting the deceased whereupon the accused claimed that he had found the deceased applying witchcraft paraphernalia in his compound. Even though the accused in his evidence gave a wide berth to the witchcraft allegations, I am convinced that the reason why the deceased was attacked had to do with the said witchcraft allegations. I find this was the factor giving rise to the malice aforethought. Suffice to add here that Pw1 had stated that the accused had earlier been involved in a robbery incident against the deceased earlier on and this coupled with the witchcraft allegations attributed to the deceased provided the requisite malice aforethought in this offence. Hence, the accused's claim that he found the deceased already injured and attempted to administer first aid is not convincing. The issue of motive was dealt with by the Court of Appeal in the case of **Libambula v Republic [2003] KLR 683**, when it held as follows:

“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of person. See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime”.

22. Learned counsel for the defence has submitted that the prosecution did not establish any motive on the part of the accused who had no ill will against the deceased and went on to add that the accused did not have any dispute or any bad blood with the deceased. The counsel has suggested that the case revolves around circumstantial evidence which has not been proved against his client. However, the fact that the accused was assaulting the deceased left no doubt that he was involved in the death of the deceased. The earlier allegations of robbery against the accused where the deceased was the victim as well as the allegations of witchcraft attributed to the deceased perfectly established the motive (Malice aforethought) for the attack.

23. Even if circumstantial evidence was to be considered as suggested by Defence Counsel, there are no co-existing circumstances which could weaken or destroy the inference of the guilt of the accused as there is no escape from a conclusion that the crime was committed by the accused and nobody else. In the case of **R v Kipkering Arap Koske & Another [1949] 16 EACA 135**, the Court of Appeal for Eastern Africa held as follows:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of is guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

Further, in the case of **Teper V. R. [1952] AC 489** the Court held as follows:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

24. From the above authorities, the evidence of the two key prosecution witnesses (Pw1 and Pw2) that they found the accused assaulting the deceased left no doubt that there are no co-existing circumstances which could weaken or destroy the inference of the guilt of the accused since he was placed at the scene of crime. The accused's claim that he found the deceased already injured is not plausible as he was found red handed busy attacking the deceased. That evidence was not dislodged by the Defence. The accused confirmed that he had no differences with the deceased as well as his relatives and therefore the element of a frame up does not arise at all. The accused must have been angered by the actions of the deceased who was then applying witchcraft paraphernalia and thereby viciously attacked him. I find the accused had had the requisite malice aforethought since from the injuries inflicted it can be discerned that the assailant intended to achieve desired result namely death of the deceased. Even if the deceased might have been attacked by other persons as suggested by the accused,

the fact that he was found attacking the deceased and claiming that the deceased had applied witchcraft paraphernalia in his compound, then he was placed at the scene of crime and must therefore be held responsible for the crime. The actions of the accused in attacking the deceased were not warranted since the alleged planting of witchcraft paraphernalia in his compound could be reported to the authorities for action. The killing of the deceased was therefore not justified in the circumstances.

25. In the result, it is my finding that the prosecution has proved the charge of murder against the accused herein **Wambua Kimeu** beyond reasonable doubt. I find him guilty of the offence of murder and he is accordingly convicted therefor.

It is so ordered.

Dated and delivered at **Machakos** this **13th** day of **May, 2021**.

D. K. KEMEI

JUDGE