



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL CASE (MURDER) NO. 3 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

ANTHONY WAMBUA WILLY..... ACCUSED

JUDGEMENT

1. The accused herein **ANTHONY WAMBUA WILLY** was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 6th Day of December, 2017 at Etukani Village, Kibau Sub-location in Mwala Sub-county within Machakos County jointly with others not before Court murdered **MATTHEW MUTUTA KYALO**.

2. The accused was represented by Mr Tamata whilst the State was represented by Mr Machogu and later by Mr. Mwongera.

3. 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 203 as read with section 204 of the Penal Code are:

i. That the deceased died.

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.

4. The prosecution called a total of ten (10) witnesses in support of its case. **Pw1** was **Mutua Mbuvi** who testified that on 6.12.2017 he was at a bar when he saw the deceased leaving with a beer bottle which resulted in an altercation with the bar maid. He told the court that he heard a noise in the back of the bar and upon checking he saw the deceased lying on the ground being attacked by the accused and other persons and later heard that the deceased died while undergoing treatment. On cross examination, he confirmed that the cause of the fight was about the deceased's move to walk away with a beer bottle without paying a deposit therefor and which the barmaid was opposed. He also stated that he could not tell how the fight started at the back of the bar. He maintained that he saw the accused and one Ndolo assaulting the deceased.

5. **Pw2** was **Stephen Muthyani Kavivya** who told the Court that on the material day he was at a local bar when he heard noise and on inquiry he learnt that there was an altercation between the barmaid and the deceased over non-payment of a deposit for a beer bottle by the deceased. He told the court that he saw the deceased holding accused's collar shirt and warning him not to interfere with his (deceased's) dispute with the barmaid. He also stated that a brother of accused advised the deceased to leave the accused alone but the deceased was adamant and who pulled accused's chair forcing him to fall down and which angered Alex Ndolo a brother to the accused and who assaulted the deceased. He finally stated that the deceased fell down and was later picked up by his relatives. On cross-examination, he stated that the deceased was then drunk was intent at assaulting the accused but the relatives of accused intervened and that the accused's relatives stopped beating the deceased as soon as he fell down. On re-examination, he confirmed that the deceased was drunk from the way he was behaving. He also confirmed that the deceased held accused's collar shirt as the accused had interfered with the deceased's dispute with the barmaid.

6. **Pw3** was **Peter Kaleli Mutisya** who testified that on the material day he was informed that the deceased had been found in bad shape and he rushed to the scene and took him to Mwala Hospital but passed on while undergoing treatment. On cross examination, he confirmed that he did not witness the incident.

7. **Pw4** was **Boniface Wambua Daudi** who testified that on the material day he went to the scene and found the deceased lying down and who could not talk. On cross examination, he confirmed that he did not see any injuries on the deceased as he assumed that the deceased was

drunk.

8. **Pw5** was **No.249481 APC George Wambua** who testified that he received a report from the accused herein that he had been attacked at a certain bar at Etukani village and that he referred him to hospital. He stated that later around midnight the deceased was brought to the police post while unconscious and he referred them to hospital. He added that he later learnt that the deceased died. On cross examination, he stated that he did not investigate the case.

9. **Pw6** was **Joseph Musau Mulwa** who testified that on 21.12.2017 he accompanied the father of the deceased to the mortuary where a post-mortem was carried out on the body of the deceased. On cross examination, he stated that the deceased died due to a blood clot in the head and that there were no other injuries apart from those on the head.

10. **Pw7** was **Boniface Mutua Matata** who testified that on 6.12.2017 after coming from the river to bathe he went to a local bar where he learnt from the barmaid one Mary that the deceased had created disturbances and had fought with one Wambua. He assisted to move the deceased from the back of the bar to the front from where his relatives took him to hospital. On cross examination, he stated that the deceased had been fighting. He also confirmed that he found the deceased lying on his back.

11. **Pw8** was **Dr Waithera Githendu** a pathologist at Machakos Level Five Hospital who testified on the post-mortem examination carried out on the deceased on 21.12.2017 who had died while undergoing treatment. According to the said doctor, the body had multiple chest injury and head injury as well as intracranial haemorrhage and she formed an opinion that the cause of death was increased pressure to the head due to head injury. She produced the post mortem report dated 21.12.2017 as an exhibit. On cross examination, she confirmed that there were no external injuries on the body. She also confirmed that the injury could be caused by a fall.

12. **Pw9** was **No. 47941 Pc Alfred Kivvaso Rupia** who testified that on 8.12.2017 he received a report that the deceased had been involved in a fight while at a local drinking joint. After booking the report, he visited the scene and established that the fight was due to non-payment of deposit for a beer bottle by the deceased and which degenerated into a scuffle wherein the deceased had held the collar shirt of the accused and that other patrons joined in the fray and overpowered the deceased. He also confirmed that the accused had also booked a report of having been assaulted. On cross examination, he confirmed that upon interrogating the barmaid, she confirmed that she had seen the deceased hitting his head on the counter rails. He also confirmed that the deceased had started the fight. On re-examination, he confirmed that the cause of the squabble was about the deposit for a bottle of beer the deceased intended to go away with and that the deceased had wanted to beat the barmaid when the accused and other patrons intervened.

13. **Pw10** was **Mary Mbeke** who testified that on 6.12.2017 she was at work at the scene as a barmaid and she served beer whereupon the deceased left with the beer bottle that she sought to find out if he had paid deposit for it. She testified that the deceased followed her to the counter and started hitting it on the counter when the accused informed him to leave and later the accused went to the back of the bar as he did not want any problems whereupon the deceased followed him there but she did not know what happened at the back of the bar. It was her testimony that she heard that the deceased was taken to hospital and the accused arrested. On cross examination, she stated that the deceased used his head to hit the counter rails. She also confirmed that the accused did not touch the deceased and excused himself by going to the rear of the bar. She also stated that she did not know how the deceased met his death.

14. At the close of the prosecution's case, this court established that a prima facie case had been established against the accused. The accused was duly placed on his defence. He opted to give sworn testimony and called one witness in support of his defence.

15. **Antony Wambua Willy (Dw1)** testified that on the material date he visited Etukani Village Bar for a drink. He stated that later the barmaid came in the company of the deceased and that the two were arguing. Apparently, the dispute was about the conduct of the deceased in insisting to take away a beer bottle without paying a deposit. The deceased who was then drunk pursued the barmaid who took refuge behind the counter while the deceased banged the grill using his head three times. The deceased later smashed the beer bottle into pieces spilling the beer contents. The accused testified that he tried to intervene but the deceased caught hold of him and threw him outside. He went on to state that he managed to rise up and went back to his seat only for the deceased to get hold of his leg and pushed him to the ground. He stated that two relatives who were present in the bar came to his assistance then went home. He further stated that his two relatives are the ones who struggled with the deceased and that the deceased had fallen onto tiles on the floor injuring his head. He stated that he learnt that the deceased passed on while undergoing treatment. He stated that he did not touch the deceased as alleged since it is the two young men who are at large that should be responsible. He stated that the deceased was a troublesome person and who was an expert in martial arts. He stated that he was not involved in the alleged murder and sought to rely on the statement recorded by the barmaid as an exhibit. On cross-examination, he stated that the deceased and the barmaid had a disagreement over a beer bottle. He also confirmed that he was seated near the counter and witnessed the altercation between the deceased and the barmaid.

16. **Charles Mulwa (Dw2)** testified that on the material date he was at Etukani Village Bar and witnessed a struggle involving three people namely John Kelly, Alex Ndolo and Anthony Wambua. He stated that John Kelly and Alex Ndolo were persuading the deceased to leave the accused alone. He confirmed that the deceased threw the three men outside as he was performing acrobatic manoeuvres. He stated that the deceased unfortunately slipped due to the slippery floor and injured the back of his head. He stated that the deceased did not manage to wake up and stated that the deceased was attacked by John Kelly and Alex Ndolo but not the accused. On cross-examination, he stated that the accused was assaulted by the deceased. He also stated that the deceased had been drinking earlier in the day. On re-examination, he confirmed that the deceased was the aggressive one who caused trouble at the bar.

17. Learned counsels filed final submissions. Vide submissions dated 2nd February, 2021 Mr Mwongera submitted that the prosecution had proved all the ingredients of the offence of murder against the accused beyond reasonable doubt. Counsel submitted that the accused was placed at the scene of crime and that the incident took place in broad daylight and witnessed by Pw1 and 2 as well as the barmaid (Pw10). Learned counsel urged the court to convict the accused for the offence of murder.

18. Mr Tamata for the defence vide submissions dated 1st February, 2021 submitted that the prosecution did not prove the ingredients of the charge of murder beyond reasonable doubt. Learned counsel urged the court to consider the conduct of the deceased as narrated by the

witnesses namely that he was then drunk and unruly and had even banged his head on the counter rails and later fought some bar patrons and had slipped and fell down on a slippery floor. Counsel further urged the court to find that there were doubts as to the manner in which the deceased sustained the injuries and as such the benefit of such doubt should be given to the accused by being acquitted of the charge. Reliance was placed in the cases of **Roba Galma Wario Vs Republic [2015] eKLR**, **Republic Vs Mohammed Dadi Kokane & 7 Others [2014] EKLR**, **Woolmington Vs DPP [1935] A.C 482**, **Republic Vs Daniel Musyoka, Paul Musya and Walter Otieno Ojwan (Mombasa High Court No. 42 of 2009)**. I have given due consideration to the evidence on record and the submissions of learned counsels for the parties. The issue for determination is whether the prosecution proved its case to the required threshold. The burden to prove all ingredients of the offence of murder falls upon the prosecution in all instances save for a few statutory offences. The standard of proof is one of beyond reasonable doubt. This threshold 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. (**Miller Vs Minister of Pensions [1947] ALL. E.R 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 to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weaknesses of the defence raised by the accused.

19. The prosecution must prove all ingredients of the offence of murder in order to sustain a conviction thereof. As per the ingredients provided for under section 203 as read with section 204 of the Penal Code, the prosecution must prove beyond reasonable doubt that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused.

20. The post mortem report on the examination of the body of the deceased as tendered by PW8 has neither been objected to nor controverted. Dr Waitheera Githendu formed the opinion that the cause of death was increased pressure to the head due to head injury. The said doctor further opined that there was blunt force trauma which did not manifest itself externally but internally. This ingredient was duly proved by the prosecution.

21. 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 Vs Boniface Isawa Makodi [2016] eKLR** 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.”

22. The deceased herein was found to have died from pressure to the head due to head injury. The evidence adduced herein is that the deceased had been drinking at Etukani village bar when a fight ensued between him and some patrons and the injuries sustained led to his death. The barmaid also added another twist to the effect that the deceased had earlier banged his head on the bar counter rails before engaging in a fight with some patrons. At this stage, I find it safe to presume that the death was unlawful.

23. As regards the ingredient of malice aforethought, the same connotes an intention to cause death of a person. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

24. It is noted that the witnesses for the prosecution appear to have given somehow contradictory evidence regarding the manner in which the deceased met his death. However, there is certainty as to what caused the death. Given the nature of the injuries suffered by the deceased that resulted in his death as indicated in the post mortem report, it can safely be inferred that death was the desired outcome of whoever the assailant was.

25. The next issue for consideration relates to the accused's participation in the alleged crime that led to the death of the deceased. The key prosecution witnesses were PW1 and 2 who gave their different versions of the incident. Whereas Pw1 stated that he saw the accused in company of his relatives assaulting the deceased, Pw2 stated that it was the deceased who had actually attacked the accused for interfering with the deceased's quarrel with the barmaid over a beer bottle that the deceased wanted to carry home without paying a deposit therefor. Pw2 stated that the deceased was drunk as he had started drinking from 3pm to 5pm and that he saw him grabbing the deceased by the collar and pulling his chair forcing the accused to fall down and which prompted accused's relatives to come to his rescue and managed to overpower the deceased. Again, the barmaid (Pw10) gave her own version of events when she stated that she had confronted the deceased over his failure to pay deposit therefor before taking it away when the deceased hit the counter rails with his head and which caught the attention of the accused who requested the deceased to leave. She confirmed that the accused did not touch the deceased at all as he excused himself and moved to the rear of the bar as he didn't want any problems. The barmaid's witness statement was produced by the defence as D.exhibit1. The investigating officer (Pw9) visited the scene and established that the deceased had been drunk at the time and had scuffled with the accused whereupon accused's relatives intervened and overpowered the deceased. He also established that the accused had lodged a report of having been assaulted and also established from the barmaid (Pw10) that the deceased had hit his head on the counter rails following an altercation with the barmaid. The investigating officer also established that it was the deceased who had started the fight. It transpired from the evidence of PW1, 2, 9 and 10 that the deceased was a rough, provocative fellow who was always quick to pick up a fight with anybody as it was established that he was a martial arts expert. The evidence of the accused and his witness is that the deceased who was already drunk sought to fight the accused and two others and engaged in his martial arts manoeuvres but slipped and accidentally fell on a slippery floor injuring the back of his head.

26. For the accused person to be convicted for the present offence, the prosecution must prove the ingredients of the offence in section 203 of the Penal Code which is to the effect as follows:

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

From the evidence of Pw1, 2, 9 and 10, it emerges that there is some doubt that the accused herein caused the death of the deceased with

malice aforethought. It is clear from the evidence that the deceased first squabbled with the barmaid over his intention to carry a beer bottle without paying a deposit for it and that the altercation led to the deceased hitting his head on the counter rails which attracted the accused herein who was enjoying his drink and who requested the deceased to leave the barmaid alone only for the deceased to attack the accused and which attracted other patrons who included relatives of the accused. It also transpired that the deceased was a martial arts expert who unleashed his prowess at the time and coupled with too much drink he accidentally slipped and fell onto the ground. It is instructive that the deceased had also hit his head on the bar counter rails prior to the scuffle all of which contributed to his death. Under those circumstances, there is some doubt as to whether the deceased died out of his injuries sustained while hitting his head on the counter rails or due to him falling down on the slippery ground. The evidence clearly shows that upon the deceased attacking the accused, the accused's relatives who are reported to be at large came to his rescue and managed to overpower the deceased. The barmaid (Pw10) seems to have absolved the accused from any blame in the unfortunate incident. The issue of malice aforethought on the part of the accused is therefore quite remote. The evidence presented by the prosecution in my view falls short of the standard of proof required in this matter. In the English case of Woolmington Vs DPP [1935]A.C 481 Lord Viscount Sankey stated the legal burden of proof in criminal case as follows:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle is part of the common law of England and no attempt to whittle it down can be entertained.”

27. Looking at the entire evidence, it is my considered view that the defence has cast doubt upon that of the prosecution. The evidence of Pw1 and 2 has been dislodged by that of Pw9 and 10 and which has gone ahead to bolster the defence evidence regarding the involvement of the accused herein in the alleged crime. It is clear that the head injury suffered by the deceased had been brought about by his hitting himself on the counter rails and subsequently falling on a slippery floor. The role of the accused's relatives in the incident has not been taken keenly by the prosecution as it has not seen the need to pursue them despite claiming that they are still at large. The investigating officer confirmed that the accused had indeed lodged an assault report but is silent on whether the said complaint was investigated. It seems the police were only after any person who might have come into contact with the deceased for purposes of prosecution. I find that the case was not thoroughly investigated as it would appear to me that the prosecution is out to have the accused punished for the sins of his relatives. The accused's presence at the scene was not a ground for prosecution since it was the deceased who had first attacked him before his relatives intervened. I am persuaded to give the accused the benefit of doubt. It will be a travesty of justice to convict the accused on insufficient evidence availed by the prosecution. I agree with the sentiments of my brother Justice Mrima in Joo Vs Republic [2015] eKLR when he held thus:

“It is not lost to this court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled, proof beyond reasonable doubt hence this case cannot be an exception. This court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

28. In the result, it is my finding that the evidence adduced by the prosecution has not met the threshold of proof. I find the prosecution has not proved the charge of murder against the accused herein beyond any reasonable doubt. Consequently, I find the accused Anthony Wambua Willy not guilty of the charge of murder and is hereby acquitted therefor. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 12th day of May, 2021.

D. K. Kemei

Judge