



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 7 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTOPHER NJERU NGARI.....1ST ACCUSED

JAMLICK KITHU GITITI.....2ND ACCUSED

CHARLES NGARE MARTIN.....3RD ACCUSED

KELVIN MURIMI KIMANI.....4TH ACCUSED

JUDGMENT

A. THE CHARGES

1. The four accused persons herein face charges of murder. The particulars of the offence being that on 24.04.2013, at Mathai village, Siakago sub-location of Mbeere North District within Embu County, jointly with others not before court, murdered Alusio Njagi Nyaga.

B. PROSECUTION'S EVIDENCE

2. When they were arraigned in court they pleaded not guilty to the charges and a plea of not guilty entered against each of them. The matter thereafter proceeded to full hearing.

3. PW1 (John Bosco Machaki) testified that on the material day, he was coming from the quarry when one Jennifer Njeru Wambugu called him while crying and requested him to hurry up as there were people who were assaulting his brother and could kill him. That he arrived and met seven people and who were his village mates assaulting his brother (deceased herein) and they were armed with sticks which looked like folk jembe handles and who threatened to kill him if he interfered. He called the police who came and took the deceased and put him in the vehicle and at which time he was breathing though not talking.

4. That later he was called by his sister who told him that his brother had already passed on. He testified that the accused persons were part of those in the dock and that he knew them as they were his village-mates. In cross examination by Ms. Njeru for the 1st -3rd accused persons, he testified that he only saw the accused persons assaulting his brother and the four accused persons were armed with sticks and were jointly attacking the deceased and when he intervened they threatened to kill PW1. When cross examined by Mr. Ithiga the Learned Counsel for the 4th accused, he testified that the deceased was assaulted by seven (7) people and not by a mob and that he knew the 4th accused

5. PW2 (Peter Ngare Njiru) testified that on the material day, he was with the deceased in his (deceased's) house at around 8pm when he heard a knock on the door and someone ordered them to get out of the house. That when they got out, they found seven people (Ngare, Kariuki, Jamlick, Chris, Mwaniki, Njiru and Muchangi) and whom he knew as they were his neighbours and that he was able to identify them as there was moonlight and they were near him. They were armed with pangas and rungus and that he was hit on the head and the said people continued assaulting them as they demanded that they be given chicken and were later frog matched along the road. The police officers came and took them to the hospital. He identified the four accused persons and testified that he had known them for many years. In cross examination by both Mr. Momanyi for 1st to 3rd accused persons and further by Mr. Ithiga for the 4th accused person, he reiterated that the accused persons herein assaulted him and the deceased. He further testified that they had together stolen the chicken which they were eating on the material day. He also denied having been assaulted by a mob.

6. PW3 (Jennifer Njeri Wambogo) testified that she was at her home on the material day when she heard noise coming from the house of the

deceased and when he got there, he found 5-6 people and the deceased together with PW2 had their hands tied towards at the back. She testified that the 1st accused was attacking the deceased and it was not yet dark so she was able to identify him and further that the 1st accused chased her away when she asked him why he was beating the deceased. That she went home and called deceased's brother one Bosco (PW1) and informed him of what was happening. In cross examination by Mr. Momanyi, she testified that on the material day she found six (6) people and not a crowd and further that she did not see any person attacking the deceased other than 1st accused. In cross examination by the counsel for the 4th accused she testified that the deceased was being beaten by a mob.

7. PW4 (Peter Njuguna Ng'ang'a) testified that on the material day she was at home when she heard distress calls from the deceased's homestead and went to check what was going on. That when he reached there he found the deceased and one Peter being assaulted by mob and that he did not identify any person from the group. That the accused persons were amongst the group and though he did not know them by their names, he was able to identify their faces. That he stood about 15 metres from the scene. In cross examination by Mr. Momanyi for the 1st-3rd accused persons, he testified that it was getting dark when the incident took place and that he was able to identify the accused persons as they were near him and that the four accused persons were armed. He reiterated having seen the accused persons assault the deceased and one Peter. In cross examination by Mr. Ithiga for the 4th accused, he testified that he didn't know the 4th accused and further that he was not called for identification parade but was only told that the accused persons had been arrested and arraigned in the dock.

8. PW5 (Ann Weveti) testified that on the material day, she arrived home at around 6pm and she found people fighting and her son Alusio Njagi (deceased herein) being assaulted by some people who alleged that he had stolen a hen and that the 1st 2nd and 3rd accused persons were the ones assaulting him. That she pleaded with them to stop assaulting the deceased but they didn't stop. In cross examination by Mr. Momanyi, she testified that the accused persons ordered the deceased out of his house and that she saw the 1st - 3rd accused persons assaulting the deceased. In cross examination by Mr. Ithiga for the 4th accused, she testified that she did not see the 4th accused at the scene and further that she did not know him.

9. PW6 (Dr. Joseph Thuo) testified that he conducted mental assessment on the accused persons herein (on different dates) and wherein he found them mentally fit to plead. He produced the mental assessment reports for the accused persons as PExbt 1,2,3 and 4 respectively.

10. PW7 (Sergeant Johnson Muthiga) testified that he received a report that there was an incident of mob justice at Mathari village and when he arrived there together with PC Mwangi, they found two suspects who had been injured and he took the suspects to the hospital. In cross examination, he testified that there were so many people at the scene and since it was dark, he was not able to identify anyone.

11. PW8 (Cpl. Samson Kipsang) testified that he investigated the matter herein and arrested the accused persons after they were mentioned by the witnesses. That the crude weapons were never recovered.

12. PW 9 (Dr. Phyllis Muhonja) produced a postmortem report by Dr. Thuita. She testified that the doctor upon doing postmortem formed an opinion that the deceased died as a result of cardio-respiratory failure due to blunt injury due to head blunt trauma. In cross examination, she testified that the history was that the deceased was attacked by members of the public on suspicion that he had stolen chicken.

13. The prosecution proceeded to close its case and the accused persons were all found to have a case to answer and were put to their defense.

C. DEFENCE'S CASE

14. The 1st accused testified that on the material day (24.04.2013) he went to his shop in the morning and returned home between 5pm and 6pm when he was told that one of his cocks was missing and was given the name of Peter Ngari as the suspect. That he went to the home of the said Peter and wherein his sister-in-law told him that the said Peter had been seen together with the deceased carrying a cock and later left for the deceased' house. That he called his two neighbours (one Kariuki and Njiru) and went to the deceased's home and when they knocked the door and asked the deceased about the cock, he said that they had already cooked it and were eating the same.

15. That they went to Siakago Police station to report the matter in company of the 2nd accused, the two suspects and the deceased but while on the way, a crowd gathered and the police officers who were entering a nearby bar asked what was going on and after being explained to, they handcuffed the suspects and did beat them a bit asking them why they had stolen. The police arrested the suspects and requested DW1 and the others to go to the station the following day to record statements. That they were arrested the following day on the grounds that one of the suspects had died. He further testified that there was a land dispute between him and one Bosco and further between him and one Jane Rose Muthoni. In re-examination, he testified that he did not see the 4th accused at the scene.

16. The 2nd accused testified as DW2 and wherein he testified that on the material day, he heard noise from the house of the deceased and he went there and found the deceased and Ngari tied with clothes and that he saw the 1st accused and about six (6) other people there and after being told that they were suspected of stealing meat, he advised the people to take the suspects to the police. On their way to the police station and while near Maximum bar, they found a police officer whom they knew and the suspects were handcuffed by the said police officer who then took a whip and started beating the suspects and who were later joined by the crowd from the bar. He denied having taken part in the incident. In cross examination, he stated that one Peter Ngari testified that he saw them just because there was a grudge between them.

17. The 3rd accused testified as DW3 and gave unsworn evidence to the effect that on the material day he went home from his casual place of employment and one Bosco (PW1) went to his home at 9.30am on 25.04.2013 and told him that his brother had been killed and further requested him to give evidence against the 1st and 2nd accused. That when he declined this request, he was arrested. He denied having committed the offence.

18. Maritiru Mbaka testified as DW4 and wherein she testified that the 3rd accused was her son and further that sometimes in April 2013, PW1 (Bosco) approached her son to agree to testify in a case involving killing of his brother Alusio but advised the said Bosco to go and talk to the said son in person.

19. The 4th accused testified as DW5 and wherein he gave sworn evidence that on the material day he was at the miraa market in Siakago and was arrested on 24.06.2013 and charged with the offence herein. He denied having taken part in the same. In cross examination, he denied being at the scene on the day of the offence.

20. The defence proceeded to close its case.

D. SUBMISSION BY THE PARTIES

21. The accused persons proceeded to file their written submissions in support of their rival positions. On behalf of the 1st to 3rd accused persons, it was submitted that the prosecution did not discharge its burden of proof beyond any reasonable doubt in that it did not link the accused persons to the offence or demonstrate malice aforethought. Further that the evidence was to the effect that the deceased was attacked by mob and the accused persons were framed by the prosecution witnesses. Further that PW2 who was with the deceased and who was a victim of the mob justice did not identify any of the first three accused persons as he was the witness who had the best opportunity to see them. It was further submitted that the conditions were not conducive for identification of the accused as it was dark. As such there was doubt in the prosecution's case and which ought to be for the benefit of the accused persons.

22. The 4th accused person did not file any submissions.

23. The prosecution relied on the evidence on record.

E. ISSUES FOR DETERMINATION

24. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions filed by the accused persons herein. As I have already stated, the accused persons herein were charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code.

25. The offence of murder is defined under **Section 203 of the Penal Code** in the following terms; -

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

26. As such, for the prosecution to secure a conviction on the charge of murder, it has to prove, beyond reasonable doubt the ingredients of the offence of murder against an accused person. In *Anthony Ndegwa Ngari vs Republic [2014] eKLR*, the elements of the offence of murder were listed as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

27. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused persons herein murdered the deceased (see *Woolmington -vs- DPP (1935) AC 462*). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See *Miller -vs- Ministry of Pensions, [1947] 2All ER 372*). The question therefore is whether the above ingredients were proved to the required standards.

F. APPLICATION OF THE LAW AND DETERMINATION

28. As for the death of the deceased, the evidence by the prosecution was to the effect that after they were attacked by the accused persons herein, the deceased was taken to hospital and on the next day he passed on. PW9 produced a postmortem report by Dr. Thuita and wherein the cause of the death was noted to have been as a result of cardio-respiratory failure due to blunt injury due to head blunt trauma. It is my considered view therefore that the death of the deceased was indeed proved by the prosecution.

29. As to whether death was caused by unlawful acts, PW9 gave evidence that the deceased herein died as a result of cardio-respiratory failure due to blunt injury due to head blunt trauma. Under article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self defense or defense to property. (See *Guzambizi Wesonga -vs- Republic [1948] 15 EACA 63*) and also *Sharm Pal Singh [1962] EA 13*). The cause of the death of the deceased herein was definitely not excusable or authorized by law and thus the same was unlawful.

30. As to whether the accused persons herein committed the unlawful acts which caused the death of the deceased herein, PW1 testified that when he arrived at the scene after being called by Jennifer Njeru Wambugu, he met seven people and who were his village mates assaulting his brother (deceased herein) and they were armed with sticks which looked like folk jembe handles and who threatened to kill him if he interfered. In cross examination he testified that he only saw the accused persons assaulting his brother and the four accused persons were

armed with sticks and were jointly attacking the deceased and when he intervened they threatened to kill him. PW2 corroborated this evidence. He testified that he was with the deceased in his house when he heard a knock on the door and someone ordered them to get out of the house and that when they got out, there were people outside and whom he knew as they were his neighbour and that he was able to identify them as there was moonlight and they were near him.

31. In cross examination, he testified that he was able to see the four accused persons herein assault the deceased. The evidence by PW3 was also to the effect that she was able to identify the accused persons herein assaulting the deceased. PW4 also testified that he was able to identify the four accused persons herein from the group which was assaulting the deceased. In cross examination, he testified that he was able to identify the four accused persons as they were close to him though it was getting dark. PW5 also testified that she was able to identify the accused persons attack the deceased. However, she testified that she could not identify the 4th accused neither did she see him. It is clear from this evidence that the accused persons herein are the ones who indeed committed the unlawful act which caused the death of the deceased. The evidence by the prosecution was sufficient in that respect.

32. When the accused persons were put to their defense, none of them tendered substantive evidence to controvert this consistent evidence. In their defence, DW1 and DW2 testified that the deceased was attacked by police as they were being questioned. DW3 on the other hand testified that PW1 framed him when he refused to testify in the case. DW5 on the other hand testified that he was not at the scene. I find this evidence being an afterthought and which cannot hold water.

33. In their submissions, the 1st- 3rd accused persons raised an issue as to the conditions having not been favourable for identification. They submitted that the prosecution witnesses were their village mates and were just fixing them. In my view, the witnesses identified the accused persons properly. It was not a mere coincidence that PW1-PW5 all testified that they were able to identify the accused persons herein.

34. The defence of alibi raised by the 4th accused herein cannot stand too. As a general rule, the burden of proving the falsity of the defence of alibi rests on the prosecution. (See **Victor Mwendwa Mulinge –v- R. [2014] eKLR**). However, the Court of Appeal in **Erick Otieno Meda –vs- Republic [2019] eKLR** while discussing the defense of alibi laid down rules to be applied in considering the defense of alibi and the Learned Judges of Appeal held as thus; -

“23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)*)

35. In the instant case, the said defence was not raised during the prosecution’s case herein so as the prosecution could tender evidence to disprove the same. Further, the same was never corroborated by any other evidence. As such the same cannot stand.

36. In my considered view, the prosecution tendered sufficient evidence and proved beyond any reasonable doubt that the accused persons caused the death of the deceased by their unlawful act.

37. As to whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder. **Section 206 of the Penal Code** defines it as follows;

206. 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.

38. The Court of Appeal in **Bonaya Tutu Ipu & Another –vs- Republic [2015] eKLR** stated as follows on the prove of malice

aforethought; -

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX -Vs- TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

39. In the instant case, the evidence by PW1, PW2, PW3, PW4 and PW5 is to the effect that the accused persons were armed with sticks which they used to assault the deceased. The evidence by PW9 was to the effect that upon conducting the post-mortem, there were multiple bruises on both legs, the left leg had a deep cut, the left side of the neck had bruises, a cut on the forehead, cut on the back side on the head and the bruises. It is my view that the weapons used and the extent of the injuries suffered by the deceased clearly shows that the accused persons had intention to cause death or grievous bodily harm to the deceased. I find that malice aforethought was proved, the same being the intention to cause grievous bodily harm.

40. It is trite that where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a proper consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. (See **section 21, Penal Code**). In **Rex –vs- Mikaeri Kyeyune & 4 Others 8 EACA 84** the Court observed that: -

“Any person identified as having taken part in the beating must be regarded as linked by a common intention.”

(See **Daniel Nzioka Mbuthi & another –vs- Republic (supra)**).

41. The accused persons having committed the offence together, it can only be said that they had a common intention to cause death to the deceased herein.

42. Taking into account all the above, I find that the prosecution tendered sufficient evidence to prove the offence of murder against the accused persons herein.

43. I hereby convict them for the offence of murder as charged.

44. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JULY, 2021

L. NJUGUNA

JUDGE

.....for the Accuseds

.....for the State