



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei – J

CRIMINAL (MURDER) CASE NO.7 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHINE MBATHA KIMONYI.....1ST ACCUSED

MICHAEL MUOKI MUSYOKA.....2ND ACCUSED

JUDGEMENT

1. The accused persons, **JOSEPHINE MBATHA KIMONYI** and **MICHAEL MUOKI MUSYOKA** were jointly charged with the offence of murder contrary to section 203 as read with section and 204 of the Penal Code. The particulars are that, on the 15th day of February, 2018, at Uamani Village, Muvuti location within Machakos County jointly murdered **KIMONYI MUMO**. They denied having committed the offence.

2. The prosecution called seven (7) witnesses in support of its case. Pw1 was **Rose Wanza Mumo** who testified that the deceased was her brother and that on 9th February, 2018 she received a call that there was a fight at the home of the deceased. She recounted that the deceased had differed with his wife. She told the court that she went to the deceased's house and found the deceased lying on his bed, face upwards, a mosquito net tied round his neck and blood oozing from the ears and nose. She told the court that the deceased was rushed to Machakos Level 5 Hospital and who upon regaining consciousness claimed that he had been beaten by his wife and her worker who was the 2nd accused. She testified that the deceased later passed on. On cross examination, she testified that she did not know when the 1st accused left her matrimonial home. She denied having refused the 1st accused use of the family land but however admitted that the 1st accused had been prevented from selling any portion of the land.

3. **James Maingi Mumo (Pw2)** testified that on 9th February, 2018, he received a call from Pw1 that there was a fight at the deceased's home. He told the court that he went to Machakos Level 5 Hospital where he found the deceased unconscious with injuries on the head and that after three days he learnt that the deceased had died. He told the court that he was present when the post mortem was being conducted on the deceased. He informed the court that the deceased did not live peacefully with his wife. On cross examination he denied causing chaos at the hospital and stated that he did not witness the fight at the deceased's home. He told the court that the deceased lodged reports with the area chief against the assault on him by the 1st accused who was his wife.

4. **James Mutuku Kisilu (Pw3)** testified that on 8th February, 2018 he was in the compound of the deceased and he heard him screaming. He told the court that he went to the scene where he found the 1st accused armed with a club and who was hitting the deceased who was then already on the ground. He told the court that the 2nd accused was also at the scene holding a torch. He stated that he learnt that on the following day, the deceased had not managed to wake up and he went to the deceased's home where he found the deceased on a bed with some head injury and swollen stomach. He testified that he escorted the deceased to Machakos General Hospital where he died on 15th February, 2018. On cross examination, he reiterated that he saw the 1st accused assaulting the deceased.

5. **Lydia Kaveke Kisulu (Pw4)** testified that on 9th February, 2018 she was informed that the deceased had not woken up and as a result she gained entry to the deceased's home via the roof where she found the deceased lying on a bed; he had head injuries but he was still breathing. She told the court that the deceased was rushed to hospital where he stayed for 6 days and on 16th February, 2018 she received a report that the deceased had died. She recounted how the 1st accused and the deceased used to fight a lot and that the 1st accused used to assault the deceased. On cross examination, she testified that she did not witness the accused persons assaulting the deceased. She stated that the 1st accused wanted to dispose of the family land.

6. Winfred Muendo (Pw5) testified that on 8th February, 2018 the deceased had a meal at her place and at the time he was outside the compound with the 1st accused. She testified that the deceased went to see the 2nd accused whom he accused of having an affair with his wife who is the 1st accused. She told the court that the 2nd accused came and claimed that the deceased had assaulted him and that he had gone to report to the police station but however at 2.00 am, the 2nd accused reported that the deceased could not be found. She told the court that she went to the home of the deceased and gained entry through the roof where the deceased was given porridge and was assisted to sit outside. She told the court that the deceased did not look like he had any problems. She testified that the deceased was taken to Machakos Level 5 Hospital where he was admitted for about a week before he died. On cross examination, she testified that the 1st accused and the deceased were in good terms. She testified that the deceased did not inform her that he had been assaulted by the accused. She told the court that the 1st accused used to take porridge and fruits to the deceased when he was in hospital and she used to visit him every day. She told the court that there was a land dispute; that the deceased did not implicate the 1st accused neither did she see any blood in the house of the deceased. She testified on re-examination that the relatives of the deceased wanted her to move out of the family land.

7. Dr. Waithera Githendu (Pw6) testified in respect of an autopsy that was carried out on the deceased which revealed that the deceased had skin injuries on the arm and the leg as well as soft tissue injuries; there was contusion on the scalp; he had internal bleeding to the brain causing increased pressure. He formed the opinion that the cause of death was internal brain injury due to blunt force trauma and that the injuries were caused by an external force. The post mortem report was tendered as an exhibit. On cross examination, she testified that the injuries could not have been caused by a fall.

8. Pius Ngila (Pw7) testified that he was assigned to investigate the instant case and he noted from the OB that the deceased had been assaulted. He told court that he received information that the deceased had been admitted to hospital and died while undergoing treatment. He told the court that it was alleged that the 1st accused assaulted the deceased and who was arrested; that he went to the scene where the deceased's bedroom had vomit and blood. He told the court that the deceased's houseboy who was alleged to have been involved had disappeared to Kimutwa but was however apprehended by members of the public; he told the court that investigations implicated the accused persons. On cross examination, he testified that it was not true that the deceased fell off the hospital bed. He admitted that the accused persons had lodged a report that they had been attacked and chased by the deceased but that the report was not genuine.

9. The prosecution then closed its case. A prima facie case was later established to have been made and that both accused were placed on their offence. They opted to tender sworn testimonies and called one witness in support of their case.

10. Josephine Mbatha Kimonyi (Dw.1) is the 1st accused person herein. Her case is that on that material day 15th February, 2018 she was on duty and later left for home at around 6pm. The deceased (her husband) arrived home at around 9pm from town and demanded for supper. The deceased claimed that he will not spend the night home as he needed to go to his brother's place. She tried to dissuade him from going but he insisted and at about 1.00 am she heard the 2nd accused calling out and on inquiring what was the problem, he requested that she opened the door and on doing so he noticed his hand was bleeding and he claimed that the deceased had stormed into his room by breaking the door and was armed with a panga and during the struggle he sustained injuries on his thumb.

11. She testified that the 2nd accused noted he would lodge a report on his assault by the deceased and on enquiring about the whereabouts of the deceased, the 2nd accused told her that he had already left. She went back to the house picked a leso and proceeded to notify her daughter in law to take care of the house. Together with the 2nd accused person they went in search for the deceased. They went to Machakos police station to enquire about the whereabouts of the deceased, the 2nd accused was interrogated about the incident and she was advised to escort him to hospital.

12. She testified that the police also advised her to take back with them the panga and to bring it back the following day. They went in search of the deceased within the area but did not find him. The taxi took them back home half way and they walked the rest of the way. She advised the 2nd accused to go to sleep as she made arrangements to go look for the deceased. She later requested the 2nd accused and her daughter in law (Pw5) to assist her to search for the deceased within the compound and she later stumbled upon him in their bedroom but he refused to open the door and directed her to sleep elsewhere.

13. She further testified that she woke up the next day at 5.00am, made some porridge and requested Pw5 to accompany her to the deceased's room which was still locked from the inside. She knocked on the door demanding to know why he refused to open but the deceased only enquired if she made his porridge which he requested that she leaves in the kitchen. She left for work at around 6.30 am as she was a nursery school teacher and at about 9.00 am she inquired from Pw5 whether the deceased had come out of his room only to be told that a large group of people led by Pw1 had stormed into the compound and one of them gained access to the room via the roof and forcefully removed the deceased and fed him the porridge. Pw5 further informed her that they took the deceased to hospital and she feared going there with them as she didn't want to be attacked. She testified that the deceased died from his lung issues as he had been diagnosed with TB.

14. On cross-examination she testified that the deceased died while undergoing treatment and it was not true that the 2nd accused person assaulted the deceased. She further clarified that she was not having any secret affair with the 2nd accused and that the 2nd accused was only employed as a labourer that year in January.

15. Michael Muoki Musyoka (Dw.2) is the 2nd accused person herein. He testified that he worked at the home of the 1st accused as a labourer. He had worked for 2 years. He testified that it was around 1.00 am when his door was forcefully opened and saw somebody armed with a panga aiming at him. He testified that as he tried to defend himself and take the panga away from the deceased he sustained injuries. He immediately informed the 1st accused of the altercation and that he wanted to go and make a report at the police station. After searching for the deceased with no success, the 1st accused person advised him to go to bed as he had work to do the next day. The next day while working he was accosted by a large crowd with weapons and he ran for his life to his home where he stayed until his arrest and one-week remand at Machakos police station. On cross examination, he testified that he worked at the home of the deceased for 2 years and did not witness any squabbles between the 1st accused and the deceased. He did not have any treatment notes to show he sustained injuries and there was no witness to his attack by the deceased.

16. Learned counsels for the parties relied on the filed written submissions submitted during the case to answer hearing. Mr. Nthiwa for the 1st and 2nd accused persons submitted that the prosecution evidence is doubtful and contradictory and placed reliance on the case of **Kavoo Kimonyi v R (2018) eKLR** and prayed that the court finds that the prosecution's case was not proven and thus the accused ought to be acquitted.

17. The state in response submitted that the accused persons were involved in the death of the deceased as per the evidence of Pw3; that there was malice proven vide the use of a club and that the accused were identified by Pw3. It was submitted that as per the evidence of Pw6, the cause of death was established. The court was urged to find the two accused persons guilty of the offence of murder.

18. I have considered the evidence presented by the prosecution as well as the defence. I have also considered the submissions by learned counsels. The offence of murder is defined by section 203 of the **penal code** as:

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

Section 206 of the Penal Code provides as follows:

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.**

19. The burden of proof rests squarely upon the shoulders of the prosecution. The three ingredients of the offence of murder which they must establish beyond reasonable doubt under section 203 as read with section 206 of the Penal Code are as follows: -

- a. proof of the fact that and the cause of death of the deceased.**
- b. That the cause of deceased's death was as a result of the direct consequences of the accused's unlawful act or omission which is the actus reus of the offence.**
- c. Proof that the unlawful act or omission was committed with malice aforethought.**

20. As regards the first ingredient of the offence, it is noted that the same has been established by the prosecution. **Dr. Waithera Githendu** who testified as **Pw6** stated that she conducted an autopsy on the deceased which revealed that the deceased had skin injuries on the arm and the leg as well as soft tissue injuries; there was contusion on the scalp; he had internal bleeding to the brain causing increased pressure. She formed the opinion that the cause of death was internal brain injury due to blunt force trauma and that the injuries were caused by an external force. The post mortem report was tendered as an exhibit. On cross examination, she testified that the injuries could not have been caused by a fall. Pw2 identified the body of the deceased before the autopsy was conducted.

21. As regards the second ingredient, the evidence of Pw3 placed both accused persons at the scene of crime. That there was malice proven vide the use of a club and that the accused were identified by Pw3. As per the evidence of Pw6, the cause of death was established. Both accused persons in their defence testimonies confirmed that the accused sustained injuries and was rushed to hospital. It transpired that the accused persons had harboured ill will against the deceased prior to his death and that both had a concerted effort in inflicting injuries upon the deceased. Both accused were thus placed at the scene of crime.

22. As regards the third ingredient and hence 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 the case of **Republic –Vs- Boniface Isawa Makiod [2016] eKLR** that referred to the case of **Gusambizi Wesonga –Vs- 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 of property.”

23. The deceased herein was found to have died from internal brain injury due to blunt force trauma and that the injuries were caused by an external force. The 2nd accused in his evidence noted that he only disarmed the deceased but from the evidence of Pw3 he witnessed the accused persons beating the deceased below a mango tree in his homestead and on trying to intervene the 1st accused person took a club and advanced towards him.

24. 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.**

25. 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-

- a. The intention to cause death.**
- b. The intention to cause grievous bodily harm.**
- c. 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.”**

26. 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.**

27. The intention to cause death or grievous harm constitutes proof 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**.

28. Applying the above principles to the present case, I find that the malice aforethought was proved. The accused persons wanted to cause bodily harm. They beat the deceased with the club according to Pw3 and on his intervention the 2nd accused took a club and advanced towards him. I find that the manner of beating and the weapon used coincide with the post mortem report that clearly stated that the cause of death was as a result of blunt force trauma to the head. 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. The defence evidence did not shake that of the prosecution which was quite overwhelming against the accused persons. It transpired that the two accused persons worked in concert to conceal the fact that they had injured the deceased. It was quite surprising for the 1st accused to leave for her work place the following morning when she knew that the deceased who was her husband had been injured. It is instructive that the two did not bother to take the deceased to hospital yet they knew that he had been injured. It also transpired that the deceased and 1st accused had had a strained relationship stemming from allegations that the 2nd accused herein was having an affair with the 1st accused. Again, the alibi presented by the accused persons did not shake off the overwhelming evidence of the prosecution and which squarely placed both accused at the scene of crime. It transpired from the defence evidence that the two accused persons alleged that the deceased had attacked the 2nd accused and thus went to report to the police and then embarked on searching for the deceased when in fact no such evidence of a police visit or an occurrence report was available as the same was rejected by the investigating officer Pius Ngila (Pw7). The action by the deceased in confronting the accused persons over a secret love affair between them must have been the genesis that led to the two planning to eliminate him. Again, the conduct of the 2nd accused in running away to hide in his village raised doubts about his claim that he was a victim of assault by the deceased and hence his claim is not believable. I am satisfied that the defence evidence has not shaken that of the prosecution which is overwhelming against both accused. The accused persons seem to have found the deceased a nuisance and a bother to their secret love affair. It transpired that the deceased used to be mistreated and neglected as no food was being given to him and had to take meals at his brother's house as confirmed by Pw1. The attempt by the 1st accused to suggest that the deceased was suffering from

TB is not convincing since the pathologist clearly confirmed that the cause of death was internal injury to the brain due to blunt force trauma. I find both accused herein guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and are accordingly convicted.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE