



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

STANLEY MURAGE.....1ST ACCUSED

JOEL MWANGI.....2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Omwancha advocate for the accused persons

JUDGMENT

On 11.4.2016, **Stanley Murage** and **Joel Mwangi** were jointly charged of murder contrary Section 203 and 204 of the Penal Code. The brief particulars of the charge were that on 14.3.2016 at Chakamba market – Tana-Delta Sub-County jointly they murdered **Peter Muiruri alias Bara**. Each of the accused being represented by Learned counsel **Mr. Omwancha** pleaded not guilty. The prosecution case was conducted by prosecution counsel **Mr. Mwangi** on behalf of the state.

According to the provisions of Section 203 of the Penal Code, the state must prove:

- (a). The death of Peter Muiruti*
- (b). That his death was caused unlawfully or through acts of omission against the Law.*
- (c). That such death was caused with malice aforethought.*
- (d). That the accused persons in executing the death had a common intention.*

At the conclusion of the prosecution case in which five (5) witnesses were called, the accused persons were found with a case to answer. The accused persons proceeded to state their defence under Section 306 (2) as read with Section 307 of the Criminal Procedure Code.

(a). The burden of proof in so far as the prosecution case is concerned is governed by Section 107 (1), 108 and 109 of the Evidence Act.

According to the first prosecution witness (**PW1**) he recalled that on 29.2.2016 on or about 3 pm, he was travelling to Mpeketoni, by boarding motor vehicle at Witu. That is when he saw a man being carried by touts and into the aforesaid motor vehicle. That time he learnt that the man was being escorted to the hospital. A short discussion which ensued with the man revealed that he had been assaulted by one **Murage** in company of other people. He also joined in to proceed to the hospital. On examination of the man at Mpeketoni hospital, he was referred to Kenyatta National Hospital where he died soon thereafter in the course of treatment. It followed that when police finalized with critical investigations, his body was released to the family to perform final rites.

Next was the evidence of (**PW2**) **Hiribae Hussein** a farmer at Chakamba village. In his testimony on 23.2.2016 while travelling to Witu in a motor cycle he saw a man lying down. As he got concerned to know what happened, he took a step of informing the police at Witu. According to (**PW2**), the accused persons were nearby going about their duties. On cross-examination by the defence counsel, (**PW2**) told the Court that he first saw the accused persons at that garage. He also confirmed that he did not know what had happened to the deceased.

Next was the evidence of (**PW3**) **Isaac Gakenga Nderitu** a resident of Witu. He also remembered this date on 23.2.2016 he was travelling

from his place of work to Chakamba riding a motor cycle. According to **(PW3)**, he saw some two people assault the deceased. On inquiry the reason of the assault, **(PW3)** testified that the assailants alleged that he had stolen a radio. The witness identified the two accused persons as the assailants inflicting bodily harm against the deceased. According to **(PW3)**, he saw the second accused come with a jerrycan of water which he poured upon the deceased who was lying down on the ground. It was **(PW3)** evidence that the following day he went to check on the deceased but the wife informed him that he never turned up from his daily chores. On further inquiry **(PW3)** told the Court that the deceased was found at the back of the house that is when they took the step to report the matter to the police. The request was made for him to be taken to the hospital at Witu and on examination he was referred to Kenyatta National Hospital. The testimony of **(PW3)** taken against the background of what transpired, told the Court that he witnessed accused persons beat the deceased.

Next was the evidence of **(PW4) No. 20017736 Sgt. Salimu Shambi** an administration police officer testified to the effect that on receipt of information on an assault incident he visited the said scene identified as 'garage'. According to **(PW4)**, on arrival he found the two accused persons and the deceased person. Further interrogation of the accused persons, **(PW4)** stated in Court that they alleged deceased had stolen their property. From what **(PW4)** observed he directed the deceased to be taken to the hospital. Thereafter he was to receive further information that the man he saw on 23.2.2016 at that garage had passed on while undergoing treatment at Kenyatta National Hospital. It followed that the accused persons had to be arrested in connection with the murder.

Next was also the evidence of **APC. Elias Abdubi** who confirmed to the Court that he arrested the accused persons on an allegation of committing the crime of murder against the deceased. To further support the narrative of murder, a postmortem examination report dated 23.3.2015 was produced as an exhibit. The postmortem conducted on the body of the deceased showed that he had suffered injuries to the head to the left leg, left upper limbs. The pathologist concluded from his examination that the deceased died due to hypostasis pneumonia, consistent with blunt head injuries. With that evidence case for the state was closed.

Defence case

According to the 1st accused, he denied killing the deceased. To the best of his recollection, the deceased when call he encountered the deceased on 23.2.2016 he complained of hunger. That is how he managed to call the 2nd accused to assist in availing some food for the benefit of the deceased. Further, it was the 1st accused testimony that the deceased stayed on until the following day when he decided that a report should be made to the police. According to the 1st accused under instructions from the police, they made arrangements to take the deceased to the hospital. He was only to receive information that the deceased passed on while undergoing treatment.

In so far as the 2nd accused is concerned, he also denied the charge. He told the Court that on 23.2.2016, he saw the deceased lying on the ground. It was at that juncture in consultation with the 1st accused the deceased was taken to the house of the 1st accused. The accused person also added that he left the deceased at the compound of the 1st accused only later to be followed up as a suspect of the alleged death. He denied any participation directly or indirectly with the crime as alleged by the prosecution witnesses.

Then there was also the evidence of their witnesses **(DW3) Simon** who testified that he was made aware of the incident by the 1st accused as the chairman of the area residents. **(DW3)** testified that he left for the scene. It is at that scene **(DW3)** testified the deceased lay on the ground apparently intoxicated. According to **(DW3)**, it was decided that the 1st accused accommodates the deceased and subsequently have him escorted to the hospital.

(DW4) John Anyona also a resident of Chakamba told the Court that he was informed of the presence of the deceased at the home of the 1st accused. In his testimony, **(DW4)** observed that the deceased was intoxicated with liquor and unconscious. That on further consultation, they all agreed that he was to be given some food and also be escorted to the hospital for treatment.

Having considered the two trajectories, it is now the duty of this Court to make a finding on this incident in which the accused persons are facing the allegations of killing the deceased.

Determination

For the offence of murder to be proved beyond reasonable doubt, it is incumbent upon the prosecution to prove the elements cited elsewhere in this Judgment.

The words in the case of **Miller v Minister of Pensions {11942} ALL ER** on the standard of proof vested with the state appear to impose a mandatory duty on the state to prosecute the case with this obligation in mind. In view of that right proposition, the burden of proof never shifts to the accused persons.

In my care good sense and the provisions of Article 50 (2) (a) of the Constitution on the right to presumption of innocence until the contrary is proved is non-negotiable. Any failure by the prosecution to prove the elements of the offence renders the criminal proceedings against an accused person fatally defective. So, there is the Law, stated with a degree of lucidity that requires no elaboration. I must now consider the direct and indirect evidence upon which the accused persons were charged of the offence of killing the deceased.

Against the evidence of the prosecution witnesses and the defence version there is no dispute that the deceased **Peter Muiruri** is dead. The second line of inquiry is how did he die? For the prosecution to sustain the offence of murder contrary to Section 203 of the Penal Code against an accused person, it is of necessity for the facts proven establish the cause of death. It is trite that proof of death and proximate cause of it is at the heart of the essential element of the charge as premised in the specified Section of the Penal Code.

As reflective of the various decisions over the years proof of death cause of it is usually through medical evidence, with a residual clause that it may also be proved through other means based on circumstantial evidence. See the principles in **Nyamwenga v R {1990-1994}**, **Ndiba v R {1981} KLR 103**, **R v Cheya & another {1973} EA 500**, **Benson Ngunyi Nundu v R CACRA 171 of 1984**, **Kishanto Ole Sololo v R**

(Nakuru CACRA No. 70 of 1995). In this case causation issues flow from the provisions of Section 213 of the Penal Code. The Section underpins the principle that the death need not be caused by the immediate act of the accused person. The Section goes on to state that the accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances:

(a). He inflicts bodily injury on another person and as a consequence of that injury, the injured person undergoes a surgery or treatment which causes his death.

(b). He inflicts injury on another which would not have caused death of the injured persons, if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of timing.

(c). He by actual or threatened violence causes such other persons to perform an act which causes the death of such person, such an act being a means of avoiding such violence, which in the circumstances appear natural to the persons whose death is so caused.

(d). He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death.

On this element the prosecution led evidence stands that the deceased was assaulted and thereafter taken to the hospital where he passed on while undergoing treatment. From the record, the first encounter was with **(PW1)** when the deceased told him that he had been beaten by the 1st accused wife and some other person.

The second corroborative evidence came from **(PW2)** who on the material day of 23.2.2016 saw the deceased fall down as the accused persons went by their chores unperturbed. Apart from the testimonies of **(PW1)** and **(PW2)**, it was also the assertion by **(PW3)** that on 23.2.2016 he saw the accused persons assault the deceased on suspicion that he had stolen a radio. The postmortem examination report produced in Court as **Exhibit 1** showed that the deceased suffered inflicted injuries to the upper, hinder limbs and the head.

In the final analysis, the pathologist opined that the cause of death being sepsis Due hypostasis pneumonia, consistent with blunt injuries. The specifics of the death therefore is an act or an omission that the accused persons had assaulted the deceased whose consequence is death. There is a strong connecting proximate cause between the injuries and the resultant death. To borrow a leaf from the principles in **R v Kipkering Arap Koskei {1949} EACA 135**, the inculpatory facts of the death are incapable of any explanation other than that of the injuries suffered by the deceased.

In the instant case, the facts of the case and the evidence adduced satisfies the best under the provisions of Section 213 of the Penal Code. The dominant cause of death of the deceased was found to be the injuries suffered. The beating of the deceased was an independent factor. This is in burden with the dicta in **Rex v Okule s/o Kahect {1941} 8 EACA 78**, the Court stated legal position being that:

“a person who inflicts injury on a person who is already in a weak state, whether by reason or illness or a previous assault by another is guilty of murder if death results from such injury, supervening upon the weakness of the victim, even though, the last injury would not by itself have killed a healthy person.”

It is therefore my finding that the direct and circumstantial evidence against the accused persons satisfies the standard of proof required by Law. That the death of the deceased was through unlawful acts of assault.

It is also the duty by the prosecution to show that at the time the act or omission was committed, the accused persons were motivated by malice aforethought. Section 206 of the Penal Code sets down what constitutes malice aforethought

“as an intention to cause the death of or to do grievous harm to any person, whether that person's 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....”

An intent to commit a felony. As indicated in the cases of **R v Tubere s/o Ochen {1945} 12 EACA 63**, **Mugao v R {1972} EA 543**, **Ernest Asami Bwire Abanga alias Onyango v R Nairobi CACRA No. 32 of 1990**, **Mums Aluoch v R CACRA No. 47 of 1996**. Intention to kill is normally construed to manifest in the circumstances of each particular case taking into account the weapon used, the manner in which it is used, the gravity of the injuries inflicted, the parts of the body targeted, the fact of the brutal killing, the conduct of the accused before, during and after the incident.

In the case at bar, the key witnesses **(PW1)**, **(PW2)** and **(PW3)** told the Court that the deceased death stems from the injuries inflicted by the accused persons. In the first instance **(PW1)** evidence hinged on the dying declaration of the deceased in terms of Section 33 (1) (2) and (3) of the Evidence Act. That evidence is well corroborated with the testimonies of **(PW2)** and **(PW3)** respectively. The evidence therefore satisfies test in **Migezo v Uganda {1965} EA 71**, **Okethi Okale & others v R {1965} EA 555**. So the evidence of the three witnesses all allude to the *actus reus* and the wrongful acts of the accused persons before, during and after the commission of the offence. The Court also considers that it is not clear whether the accused persons were armed with any dangerous weapons or any other manipulated to inflict the injuries. The entire spectrum of evidence by the prosecution consistent on this element. It is no doubt that the postmortem examination revealed the presence of injuries with an opinion that the deceased of the predominant factor of the serious bodily harm. The trigger of pneumonia was not the primary cause but collateral to the injuries suffered prior to any existing condition of disease. In the sum up of the total evidence against the accused persons it is not in dispute that the deceased was known to the accused persons.

Once, this incident occurred, the accused conduct was that of sympathy to what had befallen the deceased. They became involved in making arrangements for hospitalization and initial accommodation accompanied with meeting the deceased basic needs. It may well be that the accused persons wanted to punish the deceased for the theft of the radio, but as pointed out in the prosecution case, the force used was excessive and unnecessary.

In the circumstances of the case thus, it is the duty to establish that the accused persons in committing the murder they formed the necessary malice aforethought to prosecute an unlawful purpose.

In the instant case, the three important witnesses for the prosecution (**PW1**), (**PW2**) and (**PW3**) failed to satisfy the threshold as stipulated under Section 206 of the Penal Code. I observe that the unlawful acts which resulted in the death of the deceased was in furtherance of an intention to cause the death of the deceased.

In my view the elements of the offence fits within the ambit of Section 202 as read with 205 of the Penal Code on proof manslaughter beyond reasonable doubt. This trial also raises the issue of identification. It has been stated by the superior Courts in many decisions i.e. **Maitunyi v R {1986} KLR**, **Abdula Bin Wendo v R {1953} 20 EACA 166**, **Roria v R {1967} EA 583**, **Walunga v R {1989} KLR 424**, identification of an accused person at the scene of the crime is an important connecting factor on culpability.

The Court's duty is to weigh with greatest care and inquire into the circumstances that made it possible for the accused persons to be identified and squarely placed at the scene.

The Court in dealing with this issue on identification is satisfied with the evidence of (**PW1**), (**PW2**) and (**PW3**). Finally, the accused persons do not dispute that force of evidence of the accused being in control with the deceased. The only point of departure with the prosecution case is in this aspect of inflicting harm which eventually caused the death of the deceased. So that if this Court was to reconstruct the sequence of events, the picture one gets is that of the accused persons being at the center of the event episode.

With that I am satisfied that the prosecution has put forward strong direct and circumstantial evidence which constitutionally proves that the accused persons committed the manslaughter contrary to Section 202 as read with 205 of the Penal Code. Accordingly, I find each one of them guilty of that lesser charge with a corresponding order on conviction for that offence.

Verdict on Sentence

The two convicts **Stanley Murage** and **Joel Mwangi** were found guilty and convicted for the offence of murder contrary to Section 203 of the Penal Code. As a result of that it's now my singular duty to pass an appropriate sentence under Section 204 of the Penal Code.

In my considered view, the Supreme Court case of **Francis Muruatetu v R {2017} eKLR** has properly summarized the important considerations, trial Courts have to take into account when sentencing convicts in joined culpable for the offence of murder.

In summary, the Court outlined the age of the offender convict, the personal antecedents and other compelling circumstances, whether the convict is a first offender, regard to the time already spent in custody, the gravity of the offence, the aspect of remorse and likelihood of rehabilitation, etc. Addressing the Court **Stanley Murage** invited the Court to note that he is a first offender and the main breadwinner for the family. Hence a lenient sentence would be most appropriate. Further, the Court received report from the probation officers indicate of the good character of both convicts. Having said, in the instant case, I factor in aggravating factors and mitigation offered by the convict.

Indeed, the circumstances of the offence are defined in the Judgment of this Court. **The Court in R v Pose & Another {1997} 2 MLR 95** stated as follows:

“Firstly, that the sentence passes for a particular offence must compare with sentences imposed on offences more or less the same. Secondly, the Court has to look at the instance of the offence before it and decide whether it is such that deserves heavy punishment. The Court has also to look at the circumstances in which the offence was committed. The sentence passed must be just to the offender. The Court must consider the personal circumstances of the offender. The Court has also to consider the effect of the crime on the victim.”

In the instant case, considering the relevant factors my view is the convicts must be given a custodial sentence of twenty (20) years as they cannot be described as the worst of murders, effective from date of Judgment. The convicts have a right of appeal within fourteen (14) days, I so order.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 6TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1.

