



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE (MURDER) NO. 35 OF 2016

BETWEEN

REPUBLICPROSECUTOR

AND

PATRICK MWILARIA.....ACCUSED

JUDGMENT

THE CHARGE

1) PATRICK MWILARIA (*Accused*) is charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that **On 20.06.2016 at Kindio area, Muthara Location, Tigania East Sub-County within Meru County murdered PATRICK KINYUA**

PROSECUTION CASE

1. On 20.6.2016 at 11.00 pm, PW1 Florence Kawira was sleeping when she was woken up by Patrick Kaumbura, her father in law Harriet who informed her that Patrick Kinyua, her husband had been injured by Patrick Mwilaria. She went to Harriet's home where Patrick was and she noticed he had an injury on the back of his ear. They escorted him home and in the night when his condition deteriorated took him to Muthara hospital while he died awaiting for Kinyua treatment. It was her evidence that Patrick did not say how and by whom he was injured.

2. PW2 Robert Kinoti and PW3 Christopher Karimuri stated that on the on 20.6.2016 at around 9.00 pm, they were chatting with Harriet and Patrick Kaumbura at Harriet's home when they saw Patrick Kinyua who was armed with a panga and was accompanied by dogs pursuing Accused. That sensing danger, they went away and the following morning learnt that Patrick Kinyua had died. PW4 Patrick Kaumbura followed Accused and Patrick into the farm where they had run and there found Kinyua who was lying down bleeding from the head. He reported the matter to Kinyua's parents who went to the scene and took him home.

3. A post mortem on Kinyua's body was conducted on 23.6.2016 at Meru TRH. The head had subscapular hematoma, left side of parietal bone was depressed with intracranial hematoma as a result of which the doctor formed an opinion that the cause of death was intracranial hemorrhage due to blunt force trauma as evidenced by the post mortem form PEXH. 1.

4. The investigating officer established that deceased threatened to cut Accused with a panga Accused hit him with a rungu in self defence.

DEFENCE CASE

5. The accused in his sworn statement stated that he ran away when deceased threatened to cut with a knife and did not know how he was injured.

6. Section 203 and 204 of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

murder.

204. Any person who is convicted of murder shall be sentenced to death.”

7. The offence of murder is complete when, “*malice aforethought*” is established if, pursuant to **section 206** of the **Penal Code** evidence proves 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.”

8. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under **section 202 Penal Code** which is punishable under **section 205 Penal Code** by a term of imprisonment extending up to life.

ANALYSIS AND FINDINGS

9. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

a. The death of the deceased

10. The postmortem form **PEXH. 1** reveals that the deceased died of intracranial hemorrhage due to blunt force trauma.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

11. None of the prosecution witnesses saw Accused hit the deceased. What they saw was deceased who was armed with a panga chasing Accused into a farm from where deceased was later found injured. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence.

12. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

13. In **Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

14. In the case of **Ernest Abanga Alias Onyango vs. R CR. NO. 32 of 1990 (UR)**, the Court of Appeal cited with approval the case of **Rafaeri Munya Alias Rafaeri Kibuka vs. Reginam (1953) 20 EACA 226**, where it was held that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”

15. The summing up of the defence by the Accused failed to give a reasonable explanation as to what happened to the deceased after deceased chased him out into the farm on the material night.

16. In the case of **Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782** the Court said thus:

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.

17. The logic of this reasoning is unavoidable, for the accused did not explain anything on the alleged offence as framed and prosecuted against him by the prosecution. In these circumstances of this case, I find that it can safely be inferred that Accused caused the injuries that resulted in deceased’s death.

c) Malice aforethought

18. Having found that the prosecution has proved *actus reus*, the issue for determination is whether malice aforethought can be inferred now that a single blow to deceased’s head caused his death.

19. In **Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR**, the Court of Appeal cited the case of **REX VS TUBERE S/O OCHEN (1945) 12 EACA 63** with approval where it was in stated as follows:

“If repeated blows inflicted the injury, then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

20. In this case, there is no evidence of repeated blows. This factor leads me to believe that the blow was an isolated one probably without any malice aforethought on the part of the Accused. In other words, it was likely that the Accused did not intend to kill the deceased but intended simply to defend himself against the aggressor who was armed with a panga.

21. Having considered all the evidence in this case, I am persuaded that malice aforethought has not been established.

22. As a result, Accused is found guilty of a lesser charge of manslaughter contrary to Section 202 (1) of the Penal Code as read with Section 205 of the Penal Code and is convicted accordingly.

DELIVERED AT MERU THIS 04TH DAY OF NOVEMBER ,2021

T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present

For the Accused persons - Mr. Wamache Advocate

For the State - Mr. Magoma