



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

CRIMINAL CASE NO. 19 OF 2019

PETER WACHIRA KIMURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The accused, **Peter Wachira Kimuri** was charged with **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on **5th July 2019**, at **Bondeni Sub-Location** in **Trans Nzoia West Sub-County**, of **Trans-Nzoia County**, the accused murdered **Michael Kiuma Wachira** (the deceased). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called five (5) witnesses in its bid to establish the charge against the accused. After the prosecution had closed its case, the court being satisfied that a prima facie case had been established, put the accused on his defence. The Accused gave sworn testimony in his defence. He denied the allegation that he had assaulted the deceased causing him to sustain the fatal injury. He therefore urged the court to acquit him.

This court shall set out the facts of the case as put forward by the prosecution witnesses. Before doing so, it should be put on record that the hearing of the case commenced before Chemitei J before he was transferred to Nakuru. The learned Judge heard three (3) prosecution witnesses. The accused had no objection to this court taking over the proceedings from where Chemitei J had reached. This court heard the remainder of the prosecution witnesses before hearing the defence case.

PW1 Jane Muguru, was the wife of the deceased. She recalled that on 5th July 2019, the deceased left home and went to his place of work. The deceased was a mechanic. He was also a farmer. On the particular day, he went to look for animal feed for his sheep. At 1.00 pm, she took lunch to the deceased at his place of work. She said the deceased was seated with the accused. The accused and the deceased were friends. The accused was seated on the deceased as he was lying on the ground. PW1 pulled the accused away from the deceased. She saw the accused bite the deceased. After being separated, the accused left and said he would be back.

A short while later, PW1 saw a bodaboda rider by the name Jose come to the deceased's Mechanical Shade. The said Jose took the deceased to the accused's home. At the close of business, PW1 saw the deceased being brought back by another motorcycle rider and not Jose. He was injured. There were people at the scene. They advised her to give the deceased milk with glucose. The deceased could not swallow anything – he appeared disorientated. He urinated on himself. PW1 recalled that the deceased's condition was serious. She decided to get a boda boda to take the deceased to hospital. Other than saying that he had been injured and was not drunk, the deceased did not disclose the person that injured him. Before the deceased could be taken to hospital, he succumbed to his injuries and died.

When asked if the accused and the deceased had differed before the incident of the material day, PW1 testified that the deceased had borrowed the sum of Kshs 2,000/= from the accused. He had promised to pay but had not. This resulted in the accused making the decision to take one of the deceased's sheep to pay himself. She saw someone take the sheep but was not sure if the sheep had been taken to the accused. PW1 recalled that the deceased was assaulted about 3.00 pm. She recalled that one Joel was at the scene during the incident. She reiterated that the deceased did not mention the person who had assaulted him before his death. She saw injuries on the deceased's neck. His right hand had bite marks. She later recorded a statement with the police on which basis she was to testify before court.

PW3 Joel Nabibia told the court that he worked in a garage at Machinjoni. He also takes care of sheep. He used to work with the deceased. On the material day, he saw the accused strangle the deceased. The accused then hit the deceased on the neck. He then slapped him twice. He then assaulted PW3. The deceased fell down. The accused stepped on his back. The accused then kicked the deceased on his stomach. The deceased had been injured. First Aid was administered. He could not swallow the milk that he was being given. He fell down and he was taken to the house. He did not speak again. He succumbed to his injuries and died. PW3 recalled that the accused and the deceased had never differed before. Indeed, they used to be friends prior to the fateful incident.

PW3 reiterated that it was the accused who assaulted both the deceased and himself. In particular, he recalled that the accused stepped on the

deceased's stomach. He conceded that in his statement to the police, he had indicated that the accused and the deceased were fighting. He saw Jose take the deceased to the accused's house. He reiterated that the accused had not differed with PW1. He did not know why the accused and the deceased disagreed that it led to the fight on the material day.

PW4 Joseph Omwaka Ombululi was the deceased's customer at the garage. He also knew the accused because he had previously seen him at the deceased's garage. On 5th July 2019, he took his hedge-cutter to be repaired by the deceased. The deceased requested him to use the machine, after repairs, to trim his hedge. PW4 had no objection to the request. When he returned in the evening to collect the hedge cutter, he found the deceased in a foul mood. He told PW4 that he had been beaten by the accused. PW4 decided to promote reconciliation. He went to the accused's house with the deceased. When they reached there, the deceased peed on himself. PW4 realised that he was not feeling well. He took him to his home because he wanted the family to decide which hospital to take the deceased. After escorting the deceased back to his house, PW4 recalled that the deceased appeared drunk. He reiterated that it was his initiative that resulted in the deceased being taken home by a boda boda rider when he realized the deceased was not well healthwise. He confirmed that other than what the deceased told him, he did not witness the deceased being beaten by the accused.

Postmortem on the body of the deceased was conducted by **PW2 Dr. Alex Barasa** of Mt. Elgon hospital. Prior to the examination, the body of the deceased was identified by **PW4 Kabiu Wachira**, a brother of the deceased. This was on 9th July 2019. According to the doctor, the body of the deceased had multiple bruises on the chest and abdomen. On internal examination, there was haemotoma on the chest and lung cavity. There was massive internal bleeding which was caused by a ruptured spleen. He formed the opinion that the cause of death of the deceased was shock due to ruptured spleen caused by a blunt object. He reiterated that the blunt injury was caused to the chest of the deceased. He produced the postmortem report as prosecution's Exhibit No. 1.

The case was investigated by **PW5 PC. Paul Njuguna**. He recalled that on 5th July 2019, he was on standby duty at the Directorate of Criminal Investigations office at Kitale when he received a call that the deceased had died at Kitale Nursing home as a result of being assaulted. He proceeded to the scene with the Scenes of Crime officer. He found the relatives of the deceased at the scene. The Scene of Crime officer took photographs at the scene. He produced the photographs as prosecution exhibits No. 2 and a certificate as prosecution's exhibit No. 3 on behalf of the Scenes of Crime officer after the defence did not object to the production of the same. He proceeded to interview witnesses. His investigations revealed that the accused and the deceased had fought. The accused was not at the scene at the time of the deceased's death but later that night he was apprehended by the members of the public and taken to the police station. On interrogating the accused, he did not dispute that he had quarreled with the deceased. According to the witnesses, PW5 testified that the deceased and the accused had quarreled over a debt of a sheep. The accused was claiming that the deceased owed him. The aggressor was the accused. He went to seek out the deceased at his place of work. He reiterated that his investigations revealed that the accused and the deceased had fought over a debt. It was the accused who first attacked the deceased. After concluding his investigations, and having the accused mental status evaluated, he made the decision to charge the accused with the present offence.

After the close of the prosecution case, and upon evaluating the evidence adduced by the prosecution witnesses, this court formed the opinion that a prima facie case had been established to enable the accused to be put on his defence.

The accused gave sworn evidence in his defence. He testified that on 5th July 2019, he went to the house of the deceased at about 1.00 pm with a view to seeing him. After having a conversation with him, he left the place and went for lunch. He did not see the deceased again on that day. He denied the evidence that was adduced by the prosecution witnesses to the effect that he had assaulted the deceased. He wondered why no one else other than the two witnesses, who are relatives of the deceased, saw the alleged beating of the deceased yet it was alleged the incident took place by the roadside which is a public space.

The accused testified that the evidence of the prosecution witnesses was contradictory and clearly pointed to the fact that the witnesses were not truthful. He denied that he had ever disagreed with the deceased. He reiterated that the deceased owed him nothing. He was shocked to be charged with murder a crime that he was not aware of. He denied the claim by PW1 that he found him strangling the deceased. He testified that PW3 is the son of the deceased. He denied PW3's testimony that he had seen him beat the deceased. He reiterated that all the evidence by the prosecution witnesses alleging that he had assaulted the deceased were lies. He urged the court to dismiss the charge brought against him by the prosecution.

After the close of both the prosecution and defence respective cases, both chose not to file closing submission. In all criminal cases, it is the duty of the prosecution to establish the charge brought against the accused to the required standard of proof beyond any reasonable doubt. The burden of adducing evidence to support the charge is on the prosecution. This burden does not shift to the accused. The accused is under no obligation to prove his innocence, rather the onus is upon the prosecution to establish each element that establishes the charge of murder brought against the accused to the required standard of proof.

In the present case, the prosecution relied on eye witness account of two witnesses, PW1 the wife of the deceased and PW2. According to these two witnesses, the deceased and the accused were friends. In fact the deceased had borrowed the sum of Kshs 2,000/- from the accused the previous year. It was apparent from PW1's testimony that the deceased did not repay the debt resulting in a disagreement with the accused. On the material day of 5th July 2019, the accused went to the deceased's garage and demanded to be paid the said debt. It was clear from PW1's testimony that the deceased did not pay the amount. The accused decided to take one of the deceased sheep in settlement of the debt. It is this decision by the accused that seems to have been the trigger that resulted in a fight between the accused and the deceased. From PW1 and PW2's testimony, it was apparent that the accused had the upper hand in the fight. PW1 testified that he saw the accused sitting on the deceased while he was lying on the ground. He was strangling him. PW1 intervened and removed the accused from the top of the deceased. He testified that in the course of her intervention, she saw the accused bite the deceased's hand. On his part, PW2 testified that the accused kicked the deceased in the stomach area during the course of the fight.

After being separated, the accused went to his house. Meanwhile PW4 arrived at the scene to collect his hedge cutter which he had brought to be repaired by the deceased. He found the deceased in a foul mood. The deceased told him that he had been beaten by the accused. Since PW4 knew both the accused and the deceased, he tried to promote reconciliation. He went with the deceased to the accused's house. They found the accused but before the meeting started, the deceased peed on himself. PW4 realised that the deceased was not feeling well. He

made the decision to take the deceased back to his home with a bodaboda. According to PW1, on arrival at home, the deceased was doing poorly. He was disoriented. He was advised to administer first aid on him by giving him milk. The deceased could not swallow the milk. Shortly thereafter, he stopped talking and died. The police were informed. The body of the deceased was taken to the mortuary.

Postmortem on the body of the deceased determined that the deceased's cause of death was due to excessive bleeding as a result of a ruptured spleen.

This court's evaluation of the evidence leads it to the irresistible conclusion that it was indeed the accused that caused the death of the deceased. Why so? The testimony of PW1 and PW2 is that of eye witness account. They testified that on the material day, the accused went to the deceased's place of business with a view to demanding to be paid an outstanding debt of Kshs 2,000/-. When the deceased failed to pay the debt, the accused took one of the deceased's sheep. It was this decision by the accused that led to the fight. From PW1's and PW2's testimony, it was clear that the accused had the upper hand in the fight. He strangled and then kicked the deceased on his chest. PW2 described the place kicked as the stomach area. In addition to kicking and strangling the deceased, PW1's, PW3's and PW4's testimony placed him at the scene of crime. The accused's protestations to the contrary is discounted by the prosecution's cogent, consistent and credible evidence.

PW5's investigation revealed that indeed the accused and the deceased fought over a debt on the material day. The accused was the aggressor. The fatal injury to the spleen that the deceased sustained was consistent with the evidence of PW1 and PW2 that the accused sat on the deceased and kicked him in the chest area. This court therefore holds that it was the accused that committed the fatal blow on the deceased by kicking him in the chest area. The injury sustained by the deceased was a blunt force which is consistent with being kicked.

The issue that remains for determination is whether the prosecution established to the required standard of proof that the accused killed the deceased with malice aforethought. Malice aforethought is defined under **Section 206** of the **Penal Code** to include

“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”.

In the present case, the evidence clearly points to the fact that the deceased's death was a result of a fight between the accused and the deceased. The accused did not use any weapon. This court is of the considered opinion that the accused did not intend to kill the deceased or cause him grievous harm. Indeed PW4 testified that when he saw the deceased, his injuries did not appear serious. It was however clear that the accused was the aggressor. He was the one who provoked the fight. He had the upper hand. However, he had no intention to kill the deceased. There was no malice aforethought. This court therefore convicts the accused of the lesser but cognate offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. It is so ordered.

DATED AT KITALE THIS 9TH DAY OF DECEMBER, 2021

L. KIMARU

JUDGE