



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 58 OF 2018

BETWEEN

REPUBLIC..... PROSECUTOR

AND

DUNCAN MUNENE..... ACCUSED

JUDGMENT

1.DUNCAN MUNENE (*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 21.05.2018 at Kirindua sub-location in Igembe North Sub-County within Meru County murdered John Kobia

PROSECUTION CASE

2.On the night of 14.07.2017, the deceased was attacked and injured. **Kobia**'s son PW1 Timothy Mutwiri Kobia said that he heard screams at about 09.00pm and he flashed his torch to see his mother, Agnes Kajuju and Accused standing next to the **Kobia** who was lying near the gate. That he called out the deceased and he responded that he had been attacked by Munene. In cross-examination, he conceded that before the material date, **Kobia** frequently fainted. Rosemary Karamana claimed to have been informed by one Makena that **Kobia** had been attacked and injured by Accused. PW3 Mary Kobia, **Kobia**'s wife stated that at about 09.00 pm on the material date, she heard deceased shout he was being killed by Munene. That she rushed to the gate and found **Kobia** lying down and that she also saw Accused running away from the scene. That at the scene, she found Rose, Makena and Accused and **Kobia** said he had been assaulted by Munene and Makena. PW4 Agnes Kajuju, PW5 Stanley Kirema and PW6 Johana M'Imbere similarly stated that **Kobia** said he was assaulted by Munene. Victor Musui used his vehicle to take **Kobia** to hospital where he was treated as an outpatient. He later received information that **Kobia** had died. Accused was subsequently arrested and charged.

DEFENCE CASE

3.The accused gave a sworn statement in which he denied assaulting Kobia as a result of which he died.

ANALYSIS AND FINDINGS

4.I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that Accused persons committed the murder and that they were actuated by malice. (See **Anthony Ndegwa Ngari v Republic [2014] eKLR**).

(a)The death of the deceased

5.The death of the deceased has been confirmed by all the prosecution witnesses and by a postmortem form produced as **PEXH. 1** dated 29.05.2019 which shows that deceased suffered 8 cm long wound on frontal aspect of scalp extending to the face, depressed left frontal bone fracture, left frontal swollen brain and had died of cardiopulmonary arrest due to severe blunt head injury with epidural and subdural hematoma on frontal parietal with depressed skull fracture.

(b)Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased

6.None of the prosecution witnesses saw Accused persons or anyone else attack the Kobia. Evidence that Munene was at the scene is also

scanty. Whereas PW3 who arrived at the scene said that Munene had escaped and PW1 and PW4 who arrived subsequently stated they found Munene at the scene casting doubt on whether Munene or was not at the scene.

7. Other than the foregoing evidence, the prosecution relies upon is a dying declaration by deceased to PW1, 3, 4, 5 and PW6. There is evidence that Kobia and Accused were neighbours and therefore well known to each other.

8. The Court of Appeal in considering the admissibility of a dying declaration stated in the case of **Pius Jasunga s/o Akumu vs. Republic (1954) 21 EACA 333** that:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another, (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

9. The same court in the case of **Choge V. Republic 1985 KLR 1**, held as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

10. The evidence on record reveals that Accused was well known to the Deceased. The Deceased could therefore not be mistaken as to his identity.

11. I am satisfied that the statement made by the deceased to PW1, 3, 4, 5 and PW6 qualifies as a dying declaration. Kobia had suffered serious injuries to his head. Death was imminent and that was well established by the fact that even though action was taken almost immediately to deliver the deceased to hospital, he subsequently succumbed to the injuries 10 months later. I have warned myself of the dangers of relying solely on a dying declaration but am satisfied that the danger is mitigated by the fact that the deceased told not to one person but 5 different people that it was the Accused that assaulted him.

12. Accused's defence that he only heard Kobia speaking at a distance and did not attack him is put in doubt considering that the case of the prosecution against him is overwhelming.

Malice aforethought

13. Malice aforethought has been defined in a number of cases. In **Nzuki v Republic [1993] KLR 171**, the Court of Appeal reiterated the provisions of section 206 of the Penal Code that “*malice aforethought*” is established if, 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.”

14. In this case, medical evidence reveals that Kobia suffered repeated blows that caused him depressed skull fracture among other injuries that led to his death and this leads to the presumption that Accused knew or ought to have known that his action would probably cause the death or grievous harm to Kobia. (See **Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR**).

15. I am therefore satisfied that malice aforethought has been established in terms of Section 206 (a) and (b) of the Penal Code.

16. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused persons are found **GUILTY** of the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code and he is convicted accordingly.

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For the Accused - Ms. Wambulwa Advocate

For the State - Ms. Mwaniki