



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 1 OF 2010**

**REPUBLIC**

**VERSUS**

**HANNAH NJERI MUNYOROKU**

**JUDGMENT**

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

Hannah Njeri Munyoroku was accused of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. The particulars are that on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2009 at Kingongo estate in Nyeri District within central province, jointly with another not before court murdered Wycliffe Ochieng Okwayo.

The accused pleaded not guilty to the charge.

The first prosecution witness was **Dr. Samuel Owino Ogang'a (PW1)**, a psychiatrist who examined the accused and established that she was mentally fit to stand trial. The second witness was Tuku Kutu (PW1) who worked as a night guard. It was his testimony that on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2009, he was on duty when the accused came out of her bar and started beating the deceased. A certain man, whom the witness described as the accused's friend, joined her in assaulting the deceased. He screamed for help and even attempted to restrain the accused and her friend from further assaulting the deceased but he was overpowered and even got his hand injured in the process.

Kutu new both the deceased and the accused. He described the deceased as a young man who used to sell khat and that the time of the assault, he was seated not far from where he was, chewing khat and drinking alcohol. He was even drunk. There was sufficient electricity light at the time of the attack.

The accused, according to Tuke, used a building or construction stone to hit the deceased; he identified it in court as the assault weapon. She hit the deceased on the head, chest legs and generally all over the body. He was seriously injured.

The police arrived after about half an hour. The deceased was still alive then. He showed them the stone which the accused used to hit the deceased. He described the accused as someone who was not only well-known to him and but that she was close to him too.

David Ndumia Kiragu (PW3) who lived in the neighbourhood, testified that on 28 December 2009 at about 2 AM, he heard a lady screaming saying in Kikuyu language, "I will kill". He came out of his house and found a crowd gathered around the road. There was a body lying on the ground, next to a certain lady, who turned out to be the accused. She picked a stone and hit the deceased on the head with it, at least three times. Kiragu rushed back to his house from where he called the police. He came back to the scene and found the deceased under a motor-vehicle which was then parked next to the accused's bar.

The accused and another man removed the deceased from where he was apparently hiding and brought him to the road. She, together with her accomplice kicked him. Shortly thereafter the police officers arrived. When they enquired who had assaulted the deceased, nobody responded. The accused later told them that the deceased had been assaulted by a mob. The police took the deceased away.

The witness testified that that was the first time he saw the accused. Like Tuke (PW2), he testified that there was electricity light at the scene. It was his testimony that the accused was so violent; he witnessed Tuke (PW2) trying to restrain her from assaulting the deceased.

Gabriel Ngunyi Chiuri (PW4) testified that he operated a shop at Kingongo. On 27 December 2009 at about 2. A.M. he received a call from

his brother-in-law who informed him that there was a robbery. When he ventured out, he found a watchman (PW2) quarrelling with two people. They accused the watchman of hiding criminals. The watchman in turn dared them to assault him. The two then left saying that they were going to finish the thief. They removed somebody hiding under a vehicle and took him to a footpath; he was bleeding profusely. Even then, the two still hit the deceased on the head thrice. The stone was a building stone. Of the two people, the accused hit the deceased with the stone. She told the deceased that she was going to kill him. He knew the accused operated a bar next to his shop. He also knew the deceased who was his regular customer.

Four months prior to the incident, the accused and the deceased had fought outside the accused's bar.

Stephen Matinda (PW5), a government analyst testified that on 14 January 2010, he received from corporal Mbogholi some items for analysis at the government laboratory in Nairobi. The items were a grey checked jacket and blood samples of the accused. He established that while the jacket was stained with blood, its origin could not be established. The accused's blood was established to be of group A.

The pathologist, Dr. Obiero Okoth (PW6) produced a post-mortem report on the post-mortem done on the deceased's body. He established that the body was of an African male aged 19. Amongst the injuries he noted was dry blood on the skull and bruises on his face; cuts wounds on the skull near the midline and the occipital region; and, cut wounds on the posterior and parietal regions. There were also bruises under the chin and contusions on the left part of the transverse column. Clotted blood was noted on the left side of the parietal region. Similar blood clots were on the surface of the brain. In his opinion, the deceased died of cardiopulmonary failure secondary to head injury with intercranial haemorrhage or brain oedema. The main injuries, according to him, were on the head and they were multiple of them; he opined that they were caused by a blunt object which must have been applied with a lot of force.

The prosecution closed its case with this particular witness because despite several adjournments they couldn't secure the attendance of the rest of the witnesses one of whom was the investigation officer.

The accused opted to give sworn testimony when she was put on her defence. It was her evidence that she was a bar attendant at Kingongo and on 27 December 2009, she closed the bar at about 11 PM. She asked Tuke (PW2) to escort her. Tuke was with the deceased and both were chewing khat and drinking alcohol. The deceased, according to her evidence, threw a jiko of fire at her. She screamed; members of the public responded and came to her rescue. They beat the deceased. They ran away when the police arrived. She admitted that the deceased was seriously injured and although he could talk, he couldn't stand. The deceased told the police that "I will not repeat again". The police took away the body and asked the accused to report to Nyeri police station the following day. She went to the police at 8 AM. She also wanted a P3 form from the police. Her report was recorded as OB No. 24/28/12/2009. She then proceeded to work but she was arrested at 8.00 PM on the same day on allegations that she had assaulted the deceased. She was arrested by the officer in charge of the station and other plain clothes officers. She denied that there was any stone at the scene and neither did anybody hit the deceased with a stone. She denied ever hitting the deceased.

She admitted that Tuke (PW2) had been accused of harboring criminals and this was after the police had left. She did not see the deceased hide under the vehicle. She testified that she had differences with Chiuri (PW4) because he used to disconnect power from her bar.

At cross-examination, she admitted that she had known Tuke (PW2) for a long time and that the two of them never had any differences. She did not know Chiuri (PW4) as much but she was aware that he used to supply her bar with electricity. She also admitted that Tuke (PW2) witnessed what happened and also that he and the deceased had been chewing khat together. Her report to the police was recorded at 12 PM but was arrested at 8 PM. Before then she had not gone to the hospital.

Police constable Newton Mwangi (DW2) testified upon the accused's application for witness summons for him to come and produce the abstract of the occurrence book of 28 December 2009 at Nyeri police station. He confirmed that indeed the accused made report and was entered in the occurrence book of that day as OB No. 24 at 11.40 AM. The report was of assault. The accused had reported that on 27 December 2009 at around 11.30 AM, the deceased had thrown a burning jiko at her and that two of her fingers on the left hand had been burnt. She was referred to the hospital for treatment and she was to return and record a statement. However, the accused did not come back and she never attended any hospital.

Section 203 of the Penal Code under which the accused was charged reads as follows:

### **203. Murder**

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

The section primarily defines the offence of murder. Prior to the Supreme Court's decision in **Francis Kariokor Muruatetu & Another versus Republic (2017) eKLR, section 204** of the **Penal Code** prescribed the penalty for the offence of murder but it has since been invalidated to the extent that it prescribed death as a mandatory sentence.

Going back to section 203, a case of murder is established when first, death of a person is proved; secondly, that the death was caused by the act or omission of another person; thirdly, that the act or omission was unlawful, and; finally, that the other person was motivated by malice aforethought or had the criminal intent of causing death.

The first component of the offence was established by the evidence of the pathologist, Dr. Obiero Okoth (PW6) who produced a report of the post-mortem on the body of one Wycliffe Ochieng Owayo at the Nyeri Provincial General Hospital; the report, among other things, certified the death of the deceased. The deceased, according to the report died on 28 December, 2009 while undergoing treatment. This evidence was neither disputed nor controverted.

The second component was also established beyond peradventure; the deceased died as a result of an unlawful act of another person. The

evidence of Tuke (PW2) Kiragu (PW3) (PW4) and the pathologist (PW6) was crucial in this regard. Apart from the pathologist who saw the deceased after his death, the rest of these witnesses were eye witnesses; they saw the deceased being assaulted. Tuke (PW2) who was not far from the deceased at the time of the incident, said he saw the accused come out of a bar and assault the deceased. She was joined by another man in attacking the deceased. The deceased, according to his evidence, was hit several times with a stone, which was exhibited in evidence. Kiragu (PW3) gave a similar account of events, that the accused hit the deceased with a stone and perhaps alarmed by what he was seeing he called the police. Similarly, Ngunyi (PW4) saw the accused and another man hit the deceased with a stone after they pulled him from under a vehicle said to have been parked in front of the accused's bar.

Their evidence as to cause of the fatal injuries which the deceased sustained was corroborated by the pathologist (PW6) who confirmed that indeed the deceased had sustained injuries on the various parts of his body and, in fact, he died of heart failure secondary to head injury and brain haemorrhage. They were caused by a blunt object which, according to his evidence, was applied with a lot of force. The nature of those injuries would suggest that they were not self-inflicted.

The point is, the injuries were not of the deceased's own making and also that they were not lawful. It was never suggested, and in fact there was no proof, that the act of assault was provoked or was in self defence. In these circumstances, the conclusion that the fatal injuries were as a result of an unlawful act of another person or persons would be a safe conclusion.

The same witnesses, save for the pathologist, would also answer the question whether the person who perpetrated the acts that resulted in the deceased's death was the accused. All of them were consistent that it was the accused and another person who subjected the deceased to the savagery attack. They were particular that the accused employed what they described as 'a building stone' as the assault weapon.

The evidence suggests that the attack took place at 2.00 A. M on 28 December 2009 and therefore the immediate question that would arise is whether circumstances were favourable for a positive identification. All the witnesses were consistent that there was electricity light sufficient enough for them to pick out each other and, for present purposes, the deceased's assailants.

Tuke (PW2) recognised the accused as the main culprit. She was a person well-known to him and to put it in his words, the two of them were close. The accused herself testified that indeed she had known Tuke for a long time and that she had even asked him to escort her that night; it was not, however, clear from her evidence where she was to be escorted to. Similarly, Chiuri (PW4) testified that he knew the accused before since she operated a bar next to his shop; his too was a case of recognition.

Kiragu's (PW3's) evidence of identification of the accused was more a dock identification because it was his evidence that he saw the accused for the first time on the morning of 28 December 2009 when she assaulted the accused; I would have been quite cautious in relying on his evidence of identification if he was the only witness or, as is normally put, he was the single identification witness. But his evidence in this respect was, to a greater degree, only corroborative of Tuke's and Ngunyi's evidence. The evidence of this latter two witnesses would still be enough to prove positive identification even without Kiragu's evidence.

It is worth of note that the accused did not deny seeing these witnesses; her evidence denying their accounts of what transpired is, however, doubtful and I am not prepared to find that it has raised any doubt that what these witnesses said was true. Although, for instance, she denied that the deceased was hit with any stone, and that that she did not do it in any event, the pathologist's description of the weapon employed in the assault was consistent the stone with which the deceased was hit. According to the pathologist, the injuries were caused by a blunt object and that the force behind it was much. The stone which the witnesses saw and identified in court must have been 'the blunt object' that was applied with a lot of force on the deceased. in a word, the accused's testimony was contrary to facts.

I am therefore satisfied that despite the accused's defence, the evidence of Tuke (PW2), (PW3) Chiuri (PW4) and the pathologist (PW6) was neither shaken nor displaced.

It follows that I am equally persuaded that it has been proved beyond reasonable doubt that the accused did inflict the fatal blows on the accused and besides kicking him, she hit him with a stone several times on the head and other parts of the body.

The final question for determination is that of malice aforethought. This is the mental element of murder and it is either express or implied. It is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm (**see DPP v Smith [1961] AC 290**).

It has also been held to be constructive if it is proved that the accused person killed in furtherance of a felony ( for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm (**see Raphael Mbuvi Kimasi versus Republic (2014) eKLR; Isaak Kimanathi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007 (unreported)**).

The concept has a statutory underpinning in section 206 of the **Penal Code**; this section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

#### **206. Malice aforethought**

***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.*

Going back to the evidence of the second, third and fourth prosecution witness, they were consistent in their testimony that the accused hit the deceased several times with a building stone on his head. I have held that their evidence in this regard was not controverted.

The accused's side of the story was that as she closed her bar at 11.30 P.M., she asked Tuke (PW2) to 'escort' her. Without any provocation, so she testified, the deceased picked a jiko and threw it at her. But Tuke never suggested that the accused asked him to escort her; as a matter of fact, he gave a totally different version of events. In particular, he said that it was the accused who, without any provocation started assaulting the deceased. His evidence on the manner she assaulted the deceased was, as noted, corroborated by the testimony of third and fourth prosecution witnesses.

To cap it all, the pathologist gave a graphic description of the injuries which was in every respect consistent with the sort of assault that these witnesses described. If may recap his evidence, he testified that the accused sustained bruises on the lower limbs and on the chin; he also sustained bruises on the left side of his face. There was contusion on the parietal region; on the left side of the transverse colon. Again, there were cuts on the skull. The deceased's brain was damaged to the extent that there was intercranial haemorrhage.

The nature and the extent of the injuries would suggest either of the two things; that the accused intended to cause the death of the accused or wanted cause him grievous harm. The injuries, by themselves, also demonstrate that the accused was aware that her actions would probably cause the death of the deceased or cause him grievous harm but she was indifferent or reckless whether death or grievous harm would result. It is also possible that the accused was simply out to commit some felony. Whatever the case, I am satisfied that it has been established beyond all reasonable doubt that the accused had the necessary malice to murder the deceased.

There was no evidence, as suggested by the accused, that some unruly mob, and not herself together with another person, fatally assaulted the deceased. There was also no evidence that the accused was provoked in any way. Her testimony that the deceased threw a jiko at her to the extent that she was injured was not supported by any evidence.

An extract of the occurrence book at Nyeri police station showed that she made a report of assault on 28 December 2009 at 11.40 AM. The deceased had died about two hours earlier. It is possible that the accused may have heard of a wind of what had transpired and therefore she may have made the report simply to pre-empt the inevitable charges against her or to prepare for a defence in the event she was charged. I say so because despite the fact that she was given a P3 form by the police and referred to hospital for treatment, she never went to hospital; rather she proceeded to work from where she was arrested at 8 PM in the night. There was no evidence that she was injured as alleged and neither was there any evidence that she was attended to in any hospital.

I am satisfied that the accused's defence is not enough to displace the overwhelming prosecution evidence against her; in other words, the accused's defence does not create any reasonable doubt in my mind that she murdered the deceased. In the ultimate I find and hold that she is guilty of murder as charged and she is convicted accordingly.

**Dated signed and delivered on this 9<sup>th</sup> day of April 2020**

Ngaah Jairus

**JUDGE**