



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR NO. 11 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

MATHIAS MUTINDA MUNGUTI.....ACCUSED

JUDGMENT

1. **Mathias Mutinda Munguti** the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night of 30th/31st of March, 2018 at Kyumu village in Kilala location in Makueni sub-county within the Makueni county unlawfully murdered **Dominic Mwanja Matheka**.

2. The deceased was a workman of Pw2 **Silvester Kiinde Munguti**. Pw4 **Michael Kasina Nzalu** had a feast at his home in Kyumu village on the evening of 30th March 2018. The accused had assisted him in slaughtering a goat, after which he sent for alcohol and they started drinking and he again sent for more alcohol. Among those present were the accused, deceased, Meshack Kasee, (*his worker*) Musia and Muli.

3. At around 10:30 pm, there was shouting by those present and he decided that they go to the bar for their final drinks. He went to his house to get a jacket and when he returned, he found the accused boxing and kicking the deceased outside his gate. He pleaded with the accused to stop boxing the deceased since the latter was drunk and was lying down and was quiet. The accused inclined and stopped.

4. Also present was Muli Mutuku and his driver. He asked those present to take the deceased home which was done. They then went to the bar briefly and parted later. The next day he learnt of the deceased's death from the accused. He confirmed that while he took guinness the rest of his visitors took Kenya cane whisky.

5. In cross examination, he said he uses solar power in his house and there is no security light outside his house and gate. He also confirmed that Meshack Kasee had injuries and was bleeding but he only saw the injuries after leaving the club. Meshack Kasee is said to have left Pw4's employment soon thereafter and he did not testify. His statement was however availed to the court by the defence through their submissions.

6. Pw6 **George Muli Mutuku** was one of Pw4's guests on 30th March 2018 having been invited later at 11:00 pm. He went with a motorbike rider. At the gate he found the accused waking up the deceased while kicking and boxing him. He went and called Pw4 and informed him of what was happening. Together with the accused and another they carried the deceased to his house at his employer's home and they went to the club.

7. At the scene was Pw4's worker and the motor bike rider he had come with. His motorbike light was on during this time. He later learnt that the deceased had died the same night. Both Pw4 and Pw6 told the court that they never saw any physical injuries on the deceased.

8. Pw1 **Mwangangi Matheka** is a brother of the deceased. He received a report of this incident on 31st March 2018 at 8:30 am. He came to the home where the deceased was working and the accused took him to where the body was.

9. Pw2 **Silvester Kiinde Munguti** was the deceased's employer. He stated that the deceased left work on 30th March 2018 around 6:00 pm. There was a party in the neighborhood. He had heard people talk in the compound at 9:00 pm but he never went out to check. The next morning at 7:00 am when he woke up, his wife informed him he was calling the deceased but he was not responding. He informed the deceased's uncle and he went to school as he was on duty. He was later informed of the death and he went home after calling the chief.

10. Pw3 **Dr. Stephen Muli Musembi** produced the postmortem report (EXB1) on behalf of Dr. Loiposha. The findings of the postmortem were as follows:

- Bruises on left hand.
- Massive blood clot on right side of heart.
- Bruises on duodenum small and large intestines.

The cause of death was found to have been severe abdominal injury and blood clot in the heart due to blunt trauma.

11. Pw5 **No. 61118 PC Julius Kalunda** is the investigating officer. He received a report of the death from Pw2 on 31st March, 2018. That he had the previous night heard shouts of drunkards. He went to the scene accompanied by Corporal Komen and they found the deceased's body lying on the bed. He did not see any visible injury on the body which was taken to the mortuary. A postmortem was conducted on 5th April, 2018 and the doctor confirmed it was a murder case.

12. The witness then started serious investigations. That it was revealed to him that during the party at Pw4's house the accused and deceased had differed and the accused had boxed the deceased on his abdomen and he collapsed at Pw4's gate. He was then taken to his house which was nearby. Accused was arrested on 7th April, 2018.

13. In cross examination he said intention had not been revealed in this case. He admitted having recorded Meshack's statement. Meshack was Pw4's worker. He even went to Meshack's home and found him with a blood stained shirt. He did not pursue that since Meshack had not been implicated as having fought with the deceased. He said he could not send the clothes for analysis since the source of the blood was known.

14. The accused elected to give a sworn statement of defence. He stated that on 30th March, 2018 at 6:00 pm he was home when he was called by Pw4, who wanted him to slaughter a goat for him which he did. He arrived at Pw4's home at 6:30 pm. At 7:00 pm, Pw4's wife sent the deceased and Kasee for four guinness, one whisky, three Kenya cane (spirit) from the shop.

15. They returned at 8:00 pm and the deceased took bottles of Kenya cane undiluted. After dinner, the deceased was again sent for more alcohol by Pw4. He then took one bottle of the spirit, his tobacco and left for his house. Half an hour later, Muli who came with a boda boda informed them that the deceased was lying at the gate.

16. They left for where the deceased was as Pw4, Muli (Pw6) and his rider went to the bar. They took the deceased to his house. The next morning Dw1 called him and told him she had gone to wake up the deceased to get milk but found him dead. He went and confirmed the death and thereafter informed Pw4. A report was made to the police and the body was taken. On 6th Kasee reported that it is him who had beaten the deceased and he was arrested alongside Pw4, who paid money and was released.

17. In cross examination, he admitted having known the deceased as his brother's employee. He denied taking Karubu (alcohol) though it was there. He said the deceased took spirits and tobacco and he was so drunk that night. He denied any misunderstanding nor fight between him and the deceased.

18. His mother **Josephine Mueni Munguti** who testified as Dw1, said the deceased informed her on 30th March, 2018 evening that he was going to a feast. The same night at 3:00 am she heard people talking and Kasee was abusive with very bad language. She peeped and saw four people and then went to sleep. The next morning, she went to wake up the deceased to go for milk but there was no response. She sent for Kasee who came and they went to the deceased's house.

19. On the way, Kasee informed her that the deceased had been taking undiluted alcohol. The same Kasee had fresh blood on his face and shirt. When she confirmed the death she informed Sylvester's wife who in turn informed her husband who is her son. She said that when she saw Mrs. Kasina's (Pw4) wife she was sweeping blood from Kasee's house.

20. Mrs. Owenga for the prosecution submitted that the evidence by its witnesses had indeed established that the accused had inflicted the injuries that resulted in the deceased's death. That this was confirmed by the evidence of Pw4 and Pw6. For clarification, the deceased's mother never testified in this case as submitted by Mrs. Owenga. It was her contention that the prosecution had proved malice aforethought against the accused person.

21. Mr. Hassan for the accused submitted that from the evidence on record one Musya who was Pw4's worker left job soon after the death of the deceased and the police never tried to get him. He wondered why Meshack Mutiso Makau never testified yet he had recorded a statement. The said statement was annexed to his submissions for the court to see it. It is his submission that Meshack's statement contradicted the evidence of the prosecution witnesses.

22. He cited the case of **R –vs- Nicholas Onyango Nyolo (2014) eKLR** in establishing what the prosecution is expected to prove in a murder trial. He wondered where Meshack and Kasee were as they never testified. Counsel submitted that the prosecution case should fail as it had failed to satisfy the ingredients of the charge of murder.

23. This is now the case before this court for determination.

24. Murder is defined under section 203 of the Penal Code as follows:

Murder

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

25. From the above definition three essential ingredients must be proved by the prosecution for a charge of murder to stand. These are: -

- i. The fact and cause of death of the deceased.
- ii. That the death of the deceased was due to the unlawful act of omission or commission of the accused person (*actus reus*).
- iii. That the act of omission or commission by the accused was motivated by malice aforethought (*Mens rea*)

See the case of Republic –vs- Andrew Mileche Omwenga (2009) Eklr.

26. Guided by the above definition and caselaw, I now embark on evaluation of the evidence before this court.

i. The fact and cause of death of the deceased.

27. The evidence by Pw1 (brother to the deceased), Pw2 (deceased’s employer), Pw5, Pw6, accused and Dw1 clearly attests to the fact of death of the deceased. Pw3 produced the postmortem (EXB1) which indicates the cause of death as:

“Thrombemboli and severe abdominal trauma secondary to blunt trauma.”

ii. Did the accused cause the deceased’s death by his omission and /or commission?

28. Pw2 who was the deceased’s employer testified that the deceased left work on 30th March 2018 at around 6:00 pm. He was also aware of a party in the neighborhood. Dw1 who is the mother to Pw2 and accused also confirmed that on 30th March 2018 the deceased had told her he was going for a feast. Besides these two, Pw4 also confirmed that he is the neighbor who had a party or a feast at his home for his family. He had invited the accused to slaughter for him a goat. He said the deceased who was the accused’s friend was also present at the feast.

29. This feast was not just about goat eating. From the evidence of Pw4, Pw6 and the accused, there was alcohol in plenty and they partook of these drinks, in the form of guinness, spirits and traditional liquor. According to Pw4 they organized to go to the nearest club/bar to refresh after they had eaten and drained the alcohol at his home.

30. It was while on his way from the house and at his gate that he found the accused boxing the deceased who lay on the ground drunk. The deceased was not saying anything. There were several people present including Pw6 (**George Muli Matheka**) and his driver Musya and Kasee *alias* Meshack. Pw4 pleaded with the accused to stop beating the deceased and he inclined.

31. In cross examination he said there was no security light at his gate or house. He confirmed that the beating was outside his gate. He also added that he saw one Meshack with injuries after they left the club.

32. Pw6 **George Muli Matheka** joined the feasting team abit late. It is his evidence that he came to Pw4’s home slightly after 11:00 pm on 30th March, 2018. He came carried by a motorbike rider and his lights were on. At the gate he found the accused boxing and kicking the deceased as he woke him up. He went and reported to Pw4 their host. Later Pw6, accused and another carried the deceased to his house at his employer’s home. They left him there and proceeded to the club. The next morning, he learnt that the deceased had been found dead.

33. In his defence, the accused admits having been at the feast and partaking of the food and drinks. He said the deceased took dry hot drinks (*alcohol*) without diluting with water. He then left for his house but they were called by Pw6 thirty (30) minutes later and informed that the deceased was lying at Pw4’s gate. They went there and as some left for the bar, him and others took the deceased to his house. The next morning his mother (Dw1) informed him that the deceased was not responding to her calls.

34. One thing that is clear from this evidence is that there were several people at Pw4’s home during the feast which ran into the night. There was also heavy drinking of alcohol. Pw4 and Pw6 who testified were among those present. Their evidence is that they saw the accused kicking and boxing the deceased as he lay down unable to speak at Pw4’s gate. Pw4 said he had no security lights at his gate. It is not denied that Pw6 came there on a motorbike and his rider remained there. Even the accused in his defence confirmed that Pw6 had come there on a motor bike.

35. Pw6 confirmed that it is the lights from the motorbike that enabled them to see what the accused was doing to the deceased. That has not been challenged.

36. Mr. Hassan in his written submissions raised an issue of crucial witnesses not having been called to testify. He further annexed the written statement of Pw4’s workman called Meshack Mutiso Makau who was loosely referred to as Kasee. Mr. Hassan must have been served with this statement by the prosecution at the stage of **“disclosure of its case”** to the defence. Meshack was not called as a witness by the prosecution.

37. In its response to the defence’s final submissions the prosecution has not mentioned anything on this issue which I find to be unfortunate. Silence to me means that the statement by Meshack originated from the prosecution.

38. Section 143 of the Evidence Act provides”

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

39. In the case of **Bukenya and Others –vs- Uganda (1972) E.A 549** the Court held thus:

“(1) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(2) That the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

40. In the case of **Kihara –vs- R (1986) KLR 473** the Court of Appeal stated this about witnesses: -

“The prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in court. It would have been pointless to call witnesses who did not know what had happened between the Appellant and deceased.”

And in **Keter –vs R (2007) I.E.A. 135** the same court held:

“The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

41. It is therefore clear from the law and case law that the prosecution has the liberty to call the number of witnesses it deems fit to prove its case. However, for justice to be seen to be done the prosecution has the duty to avail all crucial evidence whether it is inconsistent to enable the court arrive at a just decision.

42. I have had the opportunity of reading the detailed witness statement of Meshack Mutiso Makau dated 6/4/2018 at 13:00 hours, which was annexed to the defence’s written submissions. This statement clearly indicates the role the accused, Pw4, Pw6 and the bodaboda rider played in the whole saga.

43. Meshack clearly states that it is the accused (MUTINDA) who beat up the deceased by pounding his chest six (6) times. Pw4, Pw6, accused and the boda boda rider then dragged the deceased slowly, towards his employer’s gate. This same Meshack has clearly explained how he received an injury which was the source of the blood on his shirt. It had nothing to do with the deceased.

44. Whatever Meshack would have said if called as a witness would just be a repetition of the evidence of Pw4 and Pw6. I do not therefore find anything new that Meshack’s evidence would have added to the case before this court. Secondly the court was informed that Meshack left Pw4’s employment a month after this incident and he may have not been traceable for bonding.

45. In his defence the accused admits having been at the feast and also partook of the food and drinks. From his evidence, he seems to suggest that the deceased died as a result of taking dry alcohol which he never mixed with water. That the deceased left Pw4’s home at 10:00 pm for his house. Thirty (30) minutes later, Pw6 came with a bodaboda and informed them that the deceased was lying at the gate.

46. That they left and while some left for the bar, him and others took the deceased to his house. That it’s his mother (Dw1) who informed him that the deceased was not responding to her calls. Dw1’s evidence seemed to suggest that one Meshack alias Kasee who had blood on his shirt may have been involved in the killing. She said she had on 31st March 2018 morning seen Mrs. Pw4 sweeping blood from Kasee’s house.

47. Dw1 is the accused’s mother and mother to Pw2 who was the deceased’s employer. It is her evidence that she went to call Kasee at Pw4’s home where she found Mrs. Pw4 whom she asked to call Kasee for her. Kasee came and they left for her home. She therefore never went to Kasee’s house. At what point then did she see Mrs. Pw4 sweeping blood from Kasee’s house? Had that been true she could have reported it to the authorities which she did not. Her statement is therefore not supported by any evidence.

48. It may be true that the deceased took dry alcohol which was not mixed with water. Had that been the cause of death the post mortem conducted on the deceased’s body would have revealed that. The postmortem report (EXB1) confirmed that the deceased died of internal injuries (severe abdominal injury and blood clot in the heart) due to blunt trauma. These injuries are and consistent with the evidence of kicks caused by the beatings he received from the accused and maybe others others during their feasting and drinking at Pw4’s home, as stated by pw4 and Pw6.

(iii) Was malice aforethought proved?

49. Malice aforethought is defined under section 206 of the Penal Code as :

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 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.**

It is the duty of the prosecution to prove one or more of the above circumstances for malice aforethought to be established. See **Nzuki –vs- R (1993) KLR 171.**

50. The circumstances revealed herein show that Pw4 had prepared a feast at his home. The accused had been invited to go and assist in slaughtering a goat which he did. Thereafter, there was food and free drinking of alcohol. The evidence reveals that the people present were drunk and considering the time the feast ended they were indeed drunk. This unfortunate incident occurred when the accused and others plus the deceased not charged were in a drunken state.

51. They even carried the deceased to his house. They may not have been aware of the injury they had caused him. There is no evidence of there having been bad blood between the deceased and accused prior to this. I therefore find the element of malice aforethought or intention to kill not proved, but manslaughter has been established.

52. In this case I reduce the murder charge to manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused on the reduced charge.

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong’udi

Judge