



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 29 OF 2017**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**PATRICK KIMANTHI MUJIRI.....ACCUSED**

**JUDGMENT**

1. The accused **PATRICK KIMANTHI MUJIRI** was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of which were that on the **6<sup>th</sup> June 2017** at Tea Room in Nairobi within Nairobi County, jointly with another not before the court murdered **KELVIN KINYUA**.

2. He pleaded not guilty to the said charges and on 13/6/2018 his trial commenced before me, where the prosecution called and examined a total of six witnesses. When put on his defence, the accused gave a sworn statement of defence without calling any witness.

3. **PW1 ONESMUS MWITI MUTHEE**'s evidence was that on 6/6/2017 he was at his *miraa shop* up to 3.00 am when he sold off his stock. He was with one Kenneth Mwiti Naftaly when they closed the shop and commenced their journey home. Upon reaching Terminal A 2 next to Tea Room, they saw two people chasing one person who happened to be their friend the deceased. He later identified those following him as Mutua and "Kim" the accused. They saw the deceased fall down before being hit with a log by Mutua and kicks by the accused. The deceased then managed to escape and ran away, while they proceeded to their house.

4. It was his evidence that the deceased was later on brought to the house by a Good Samaritan whom he did not know. They placed the deceased on bed. Shortly thereafter a lady called Caro came to the house and asked the deceased if he had money so as to take him to Umoja and he said that he had money in his pocket which turned out to be Ksh.200/=, which did not impress the said Caro who immediately left the house. He decided to look for a taxi so as to take the deceased to hospital only to be informed that he had died, it was his evidence that he knew the accused.

5. In cross examination he stated that he had chewed *miraa* up to 3.00 am on the material day and that there was bright street light which enabled him to see the accused. He later on went to the police and reported the death of the deceased. He stated that the deceased mentioned the name of the accused and Mutua *alias* Mose as those who had assaulted him.

6. **PW2 MICHAEL THURANIRA LODIANI** was called by PW1 who reported to him the death of the deceased who was his brother, as having been killed by known people. He then gave the information to **JULIUS LODIANI** their father, who asked him to come to Nairobi. He later attend the post-mortem examination of the deceased whose body he identified together with PW3. It was his evidence that PW1 knew those who had assaulted the deceased and gave him their names as "Kim" and Mutua *alias* Mose.

7. **PW4 DR. SILVESTER MAINGI** performed post-mortem mortem examination on the body of the deceased at the City Mortuary and observed the following injuries:-

- Scalp bruising on the right frontal, right temporal and left prenatal area.
- Swollen brain with subtentorial hematoma.
- Global surachnoid hemorrhage, as a result of the examination, he formed the opinion that the cause of death was raised intracranial pressure due to subarachnoid hemorrhage as a result of blunt force trauma to the head. In cross examination he stated that he could not tell whether the deceased had been beaten by looking at the body and that there were three (3) injury points.

8. **PW5 KENNETH MWITI NAFTALY** stated that he was with PW1 at his *miraa shop* along Tom Mboya Street and while going home

they saw two people chasing the deceased. Through the use of the street light, he was able to identify the deceased whom he knew as the person being chased. He saw the deceased fall down in a pool of water. The deceased was later on brought to the house of PW1 by a good Samaritan. He then told them to close the door since 'Mose' and 'Kim' wanted to kill him. They thereafter decided to take him to the hospital but died on the way. It was his evidence that he knew 'Mose' but had not seen the accused before.

9. In cross examination, he stated that whereas he had been taking *miraa* from 4.00 pm, the effect on him was very low. He was able to recognize the deceased when he rose up after falling down. He saw the accused kicking the deceased, while 'Mose' was beating him with a rod. The area was well lit.

10. **PW6 PC JAPHETH MULUMO** received information on the death of the deceased and proceeded to his house where the body was. He was told that the deceased had fought with two people the previous night. He then took the body to the city mortuary and later on attended to post-mortem examination. The names of those the deceased had fought with were given as Mutua 'Mose' and the accused 'Kim'. On 26<sup>th</sup> day of June 2017 he received information that the accused had been arrested by police from Central Police Station for dumping and rearrested him. At the station they found that he had made a report on 7<sup>th</sup> June of having been assaulted by the deceased on 6<sup>th</sup> June 2017.

11. In cross examination he stated that when they found the body of the deceased on bed, it did not have any visible injuries. He confirmed that the accused had on 7<sup>th</sup> June 2017 reported to Central Police Station that the deceased had robbed him of his phone.

12. When put on his defence, the accused stated that on 5/6/2017 he proceeded to his place of work as a hawker from 6.00 pm up to 11.00 pm when he closed and took his wares to the store. He then proceeded to a function where he had been invited by one Dennis at Club Terminal 2 where he met a gentleman called Kevin, Moses and Salim. They were there between 2.30 – 3.00 a.m. It was his evidence that in the process of dancing, the accused knocked down Moses who was drunk and he became angry. A fight then arose between the two and they were thrown out of the Club by bouncers.

13. It was his evidence that he followed them outside and tried to mediate between them and while at it Kevin threw a punch at Moses who deflected and kicked the deceased and they started to run after each other. He then saw Mose hit the deceased with a rod. The deceased then found an escape route and ran away. That was the last time he saw the deceased. The next day when he went for his goods, he found the hawkers discussing the death of the deceased who was allegedly poisoned which is what they believed to have happened.

14. It was his further evidence that the following day, he met Moses whom he had left with the deceased the previous day, who told him that he also parted way with the deceased thereafter and that was the last time he saw Moses. He thereafter continued with his duties until the 25<sup>th</sup> June 2017 when he was arrested for dumping and taken to Central police station. The following day while at the station, he was informed that there was an ongoing investigation which the police wanted him to assist in and on 27<sup>th</sup> June 2017 officers from Kamukunji Police Station went for him and was subsequently charged with the offence before the court.

15. In cross examination he confirmed having known the deceased for a period of two years. He denied telling the police that he was in Meru when Moses called him for a mobile phone which he had found for him. He confirmed having reported to the Central Police Station on a case of robbery which occurred the same day the deceased was killed. He confirmed being with the deceased and Moses on the night he was assaulted. He confirmed having been rearrested at Central Police Station having earlier been arrested for the offence of dumping.

16. He further confirmed that he saw Moses hit the deceased with a cub which might have contributed to his death.

## **SUBMISSIONS**

17. At the close of the defence case, Mr. Mwangale for the accused stated that he had filed written submission while Mr. Okeyo for the prosecutor stated that he had looked at the said submissions and opted to adopt his submission at the no case to answer stage, but at the time of writing this Judgement there were no submission or record and therefore shall proceed to determine the case on the basis of evidence tendered before the court at the trial.

## **ANALYSIS AND DETERMINATION**

18. To sustain a conviction on the charge of murder the prosecution is required to prove beyond any reasonable doubt the following elements of the offence:-

*a) The fact and cause of death.*

*b) That the said death was caused by unlawful act on the part of the accused person*

*c) That it was caused with malice aforethought.*

19. The fact and cause of death of the deceased was proved beyond any measurable doubt through the evidence of **PW1 ONESMUS MWITI MUTHEE**, **PW2 MICHAEL THURANIRA LODIANI**, **PW3 JULIUS LODIANI** and **PW5 KENNETH MWITI NAFTALY** all who confirmed the death of the deceased. The accused in his defence confirmed having heard of the death of the deceased who he last saw the night he was allegedly assaulted by one Moses who remains at large. **PW6 PC JAPHETH MULUMO** received a report of the said death at Kamukunji Police Post and subsequently attended to the post-mortem on 12/6/2017.

20. The cause of death was proved through the evidence of PW1 **DR. SILVESTER MAINGI** who conducted post-mortem examination on the body of the deceased and as a result of his examination formed opinion that the cause of death was raised intracranial pressure due to

surachnoid hemorrhage as a result of blunt force trauma to the head. As at the time of this judgement there was no evidence that the deceased had risen from death either through the power of Jesus Christ, “the mighty prophet of the Lord” or any of the “pretenders to the throne” who claims rightly or wrongly to have powers capable of rising the dead. It therefore followed that the fact and cause of death was proved on the required degree.

21. The only issue in dispute is whether the said death was caused by unlawful act on the part of the accused person. Whereas the prosecution evidence was that it is the accused together with one Moses who remains at large who caused the death of the deceased, the accused in his defence maintained that he was not responsible for the same.

22. At the close of the defence case, the following issues remained undisputed:- the accused and the deceased were placed together with one Moses at the material night. The accused was known to **PW1 ONESMUS MWITI MUTHEE** whose evidence was that while together with PW2 at Terminal two next to Tea Room, they saw two people chasing the deceased, he then noticed the accused whom he knew as ‘Kim’, together with Moses Mutua who was holding a wooden log, as the people who were running after the deceased. The deceased fell down and managed to run away and that is the last time he was seen alive.

23. The issue therefore for determination is whether the condition prevailing were ideal and suitable for identification as was stated in the case of **WAMUNGA v REPUBLIC (1989) eKLR 424** thus:-

*“Where the only evidence against a defendant is evidence of identification on recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”*

24. In the case of **NZARO v REPUBLIC (1991) KAR 212** The Court of Appeal stated that the evidence of identification by recognition at night must be absolutely water tight to justify conviction.

25. With the above in mind, I must therefore interrogate whether the conditions prevailing were suitable for the identification of the accused person. It is not disputed that he was known to PW1 as ‘Kim’. The person who was with him was equally known to the witness as ‘Mose’. Whereas it was at the earlier hours of the morning, the evidence of PW1 was that there was adequate light which enabled him to identify the accused. This evidence was corroborated by **PW5 KENNETH MWITI NAFTALY** whose evidence was that once the deceased was brought into the house, he told them that ‘Mos’e and ‘Kim’ wanted to kill him. He did not know them but described them as one being tall and brown while the other was dark. It was his evidence in cross examination that he knew Mose who was a friend of the deceased.

26. The accused put himself at the scene in his defence and stated that it was the said Moses who was fighting with the deceased and that he went after them so as to stop them from fighting, after the deceased had allegedly knocked down the drink of the said Moses. However the accused account is contradicted by his report to the police at Central Police Station on the night the deceased was assaulted to the effect that the deceased had robbed him of his mobile phone make J7 valued at Ksh.7,000/= and cash Ksh.6,000/= for which he was issued with OB5/7/2017.

27. I am therefore satisfied that the accused was positively identified and placed at the scene and the conditions prevailing were suitable for his identification through recognition.

28. Having placed himself at the scene together with Moses who was not arrested and charged, the question for the court to determine is whether the accused can be held liable for the death of the deceased having stated in his defence that he had not hit deceased whereas the evidence of the prosecutor witness is that he participated in the assaulting the deceased.

29. Section 20 of the Penal Code provides as follows:

*“20(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say,*

*a) Every person who actually does the act or make the omission which constitute the offence*

*b) Every person who omits to do any act for the purpose of enabling another person to commit the offence.*

*c) Every person who aids or abets another person in committing the offence.*

*d) Any person who counsel or procures any other person to commit the offence and in the last mentioned case he may be charged either with committing the offence or with counseling or procuring courts commission.”*

30. Section 21 thereof provides as follows:

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another and prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of said purpose each of them is deemed to have committed the offence”*

31. The Court of Appeal had in the case of **DICKSON MWANGI MUNENE & ANOTHER VS REPUBLIC, CR APPL. NO 314 OF 2011**, looked at this Section and had this to say thereon:

*“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon MUNGAI v REPUBLIC [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.*

*In NJOROGI v REPUBLIC, [1983] KLR 197 at p. 204, the Court of Appeal stated that:-*

*“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”*

*As to its proof, referring to its earlier decision in REPUBLIC v TABULAYENKA s/o KIRYA (1943) EACA 51, it continued to state that:-*

*“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”*

*56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In DRACAKU s/o AFIA v REPUBLIC [1963] E.A. 363 where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief.”*

32. Having been placed at the scene through the evidence of prosecution witnesses who saw him kick the accused and having taken into account the defence offered by the accused, I am satisfied that the death of the deceased was caused by unlawful act of the accused and the therefore find the same culpable.

33. The final issue is whether the same had malice aforethought which is deponed as fraud in Section 206 of the Penal Code:-

*“Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-*

*(a) An intention to cause death 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, by a wish that it may not be caused.*

*(c) Intention to commit a felony.”*

34. I have looked at the evidence of PW1 and PW5 both who saw the deceased being assaulted by both the accused and Moses looked at against the accused’s report to the police of an alleged theft of his phone and money and the injuries sustained by the deceased and find and hold that malice aforethought was established beyond any reasonable doubt. The accused had the intention to cause the death of the deceased either because the same had stolen his mobile phone and money or to get the same from him and in that process succeeded in causing his death.

35. In the final analysis, then I find that the prosecutor proved beyond any reasonable doubt all the elements of the offence of murder contrary to section 203 of the Penal Code against the accused person and accordingly find the same guilty and convict him of the murder of **KELVIN KINYUA** on the 6<sup>th</sup> of June 2017 as charged and order accordingly.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of May 2020 through Google Teams.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of**

*Ms. Onunga for the State*

*Mr. Mwangale for the accused*

*Karwitha - Court Assistant*

*Accused person present*