



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 62 OF 2016

REPUBLIC

VS

JOSEPH JUMA SIMIYU.....1ST ACCUSED

EMMANUEL SIMIYU NYONGESA....2ND ACCUSED

JOSEPH WANYONYI NYONGESA.....3RD ACCUSED

JUDGMENT

1. The three accused persons herein are charged with the **offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code**, of one Francis Njuguna on the 15/10/2016 at Nyakinywa village, in Njoro Sub-County within Nakuru County.

They pleaded not guilty. The prosecution summoned seven (7) witnesses to discharge the burden of proof beyond reasonable doubt that it was the accused persons who committed the offence as charged.

2. Section 203 of the Penal Code provides

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

Section 204

Any person convicted of murder shall be sentenced to death.

Section 206

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.

3. The burden of proof in a criminal trial always rests with the prosecution. The standard is beyond reasonable doubt. **Section 107 (1) of the Evidence Act** states that

“whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts, which one exerts must prove those facts exist”.

4. The court must be satisfied on the truth of the facts in dispute to the exclusion of any reasonable suspicion. There is no burden on the accused to prove his innocence. Suspicion alone cannot be a basis upon which a conviction can be based. It can also not be based on

probabilities but upon beyond reasonable doubt. If reasonable doubt is cast in the court's mind, the benefit of doubt tilts in favour of the accused person- **Republic – Vs Andrew Omwenga (2009) e KLR, cited in Criminal Case No. 4 of 2016 at Kajiado R Vs Ismail Hussein Ibrahim (2018) at KLR.**

5. In a murder trial, the prosecution is under a duty to prove the three ingredients stated under **Section 206 of the penal code.**

- a. The death of the deceased and cause of the death.
- b. The intention by the accused to cause the death or grievous bodily harm.
- c. The knowledge that the commission would cause the death or grievous harm.

6. In the present case, the death of the deceased and the cause were sufficiently proved by the autopsy conducted on the body of the deceased by the pathologist, **Dr. Ngulungu – PW6** – who by his report –Pexhibit 2 stated as **head injury attended by brain contusion due to multiple blunt force trauma.**

7. Malice aforethought on the part of the accused, is the moral culpability or blame worthiness. It can be inferred from the nature and type of weapon used and the severity of the injuries inflicted to the victim – **Earnest Asmi Bwire Abang Alias Onyango Vs Republic, CACKA No. 32 of 1990, James Masomo Mbacha Vs. Republic (2015) e KLR.**

Prove of any one of the combination of the existence of the circumstances stated under **Section 206** is sufficient proof of the offence of murder **Republic Vs. Daniel Onyango Omoyo (2015) e KLR.**

8. PW3 Samuel Gakuna is the son of the deceased Francis Njuguna, then 74 years old. He was an eye witness to the events that led to his father's death. His evidence was that he knew the 1st accused, and that about 7.00p.m. as he walked with his father (the deceased) back to their house, they met a group of six young men including the accused persons who started beating him, claiming that he had stole their television. It was his evidence that when his father intervened to rescue him, accused No. 1 hit him on the head with a stick, which injury felled him on the ground while accused 2 and 3 felled him to the ground and continued beating him.

10. He testified that he pleaded and begged the young men, the accused persons to to, instead take them to the police station, and that they indeed took him to the police station where he was locked up in the cells. Later, he was informed that his father the deceased had died. He later recorded a statement at the police station.

11. **PW4** Jonathan Mwareri Njuguna, a son of the deceased testified that he knew the three accused persons as they used to work as brokers in sale of farm produce at Mau Narok. He however was not present when the deceased and PW3 were attacked.

12. **PW1** Samuel Muteru testified to have known the accused persons as brothers and neighbours. He visited the scene of crime where he found the deceased dead, lying on the ground. The area assistant Chief **PW2** also visited the scene. She testified to have known the accused persons.

It was her evidence that when she went to the police station, she found PW3, the deceased son, who narrated to her what had happened. She testified that the 1st accused who was at the police station, and who told her that his house had been broken into and his goods stolen, and that he suspected a relative of **PW1**, one Mungai, and that the stolen items had been hidden in PW3's house.

13. It was the evidence of **PW6** PC Richard Kirui and **PW7** Cpl John Opundo that they accompanied the 2nd accused to the house of the Samuel Gakuna (PW3) to search for the stolen property but did not recover any.

Analysis and Findings.

14. The Investigating Officer, PW7 testified that the accused persons took themselves to the police station, and upon questioning them, as well as members of the public, he established that the accused persons suspected that **PW3 Samuel Gakuna** had stolen their T.V. and when they met him with his father the deceased, they attacked him and when the deceased intervened to rescue his son, they also attacked him leading to the fatal injuries.

15. In their unsworn statements of defence, the accused persons, by each of them confirmed that the 1st accused's house was broken into, and a TV set stolen, and that neighbours told them that it was PW3 who had stolen. For the **1st accused**, it was his evidence that when the police officer accompanied him to PW3's house, they recovered nothing. He denied hitting the deceased on the head with a stick, or killing him.

The **2nd accused** denied having participated in the killing of the deceased or beating PW3. **The 3rd accused** denied participating in the events that lead to the deceased's death. He however testified that when the 1st accused together with PW7 visited PW3's house to search for the alleged stolen T.V and other items, they recovered the stolen property, contradicting his co-accused's evidence, that nothing was recovered from PW3's house.

16. The three accused persons who are brothers all denied that they knew the deceased nor participated in the beatings that lead to his death.

This is in contradiction to the evidence by the prosecution witnesses, PW1, PW3, PW4 who knew the accused persons as brothers and neighbours of the deceased. Thus, I find the evidence of the accused persons that they did not know the deceased and PW3 to be a

fabrication. Indeed, when the accused brothers set to look for the suspect who they alleged had stolen their TV, they went out to look for PW3, by name Samuel, who they found walking with his father, the deceased, and pounced on him and while the deceased tried to shield his son him, they beat him ruthlessly inflicting the fatal blows.

PW3 saw the 1st accused hit the deceased with a stick while the other two accused person fell PW1 to the ground and beat him.

17. It is trite that for the prosecution to secure a conviction on the offence of murder, three ingredients must be proved:

- a. Proof of the fact and cause of death.
- b. Proof that the death was the direct consequence of an unlawful act or omission. Which consists the 'actus reus' of the offence.
- c. Proof that the said unlawful omission was committed with malice afore thought which constitutes the 'mens rea' of the offence.

See **Republic –Vs- Awuor Juma (2018) e klr.**

18. Proof of the fact and cause of death was adduced by PW5, Dr. Ngulungu who produced **the post mortem report stating the cause of death as head injury attended by brain contusion due to multiple blunt force trauma.** It is dated the 19/10/2016 – Exhibit 5.

There is no doubt that the death was a direct consequence of an unlawful act by the accused persons as stated above. They were placed at the scene of crime by the prosecution witnesses who also testified to have witnessed them attack and beat the deceased who was in the company of his son, PW3, who was ruthlessly beaten. The accused persons were positively identified as the assailants by PW3 and PW4, being brothers and neighbours in the village.

19. When the accused persons descended on the 74 year old man, (the deceased) they had knowledge that their actions, beating him with a stick on the head would probably cause grievous harm or death, to him. They had no reason to attack him. He was alleged to have stolen accused No. 1 TV or any other property. The only reason for the attack was that he tried to shield his son, PW3, from the beatings by the three accused persons.

Section 206 of the Penal Code provides that it matters not that the person injured or murdered was the one intended or not. They had the intention, by their actions, to commit the felony.

21. In **John Mutuma Gatobu Vs. Republic (2015) e KLR**, the Court of Appeal rendered that

“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the penal code ----- that our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought”

Clearly, by inflicting the injuries to the deceased's head, they ought to have known that such injury would cause grievous harm or death.

22. The accused persons defence, cannot in the circumstances be tenable. They went out to look for the person they had information had stolen the T.V. They knew him, by name as Samuel. And indeed they found Samuel Gakuna (PW3) walking home with his father the deceased. They beat the two ruthlessly without first ascertaining and prove that it was the said Samuel who had stolen the TV. Evidence adduced was that upon search of his house, no TV was found, a fact confirmed by the accused persons, except accused No.3.

23. **PW3's** evidence was plain ,clear and cogent, and straight forward.

In the case **Ndungu Kimanyi Vs. R (1979) e KLR**, the court held that;

“The witness in a criminal case upon whose evidence it is proposed to rely on should not create an impression in the mind of the court that he is not straight forward person, or raise suspicion about his trustworthiness, or do (or say) something which indicates that he is of doubting integrity, and thereof an unreliable witness which makes it unsafe to accept his evidence”.

24. The three accused persons set to look for the person named Samuel allegedly that he stole the 1st accused's Television. They had a common purpose and indeed executed it when they met the said Samuel (PW3) and the deceased.

25. **Section 21 of the Penal Code provides that**

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

In the appeal **Mabel Karati Vs. Republic (2014) e KLR**, the Court of Appeal that in a murder offence “----- so long as the persons charged are proved to have been present, it matters not who among them did the act resulting to the death”.

26. Further, in **Njoroge Vs. Republic (1983) KLR 197**, the Court observed

“--- if several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who were 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 assault of the assembly”.

The same observations were held in the case **Republic Vs. Ismael Hussein Ibrahim (2018) e KLR.**

27. It is evident from the prosecution evidence, notably PW3 that the accused's had a common intention to commit an unlawful act, described above. It is the 1st accused who inflicted the fatal blow to the deceased on the head with a stick while the 2nd and 3rd accused persons were ruthlessly beating PW3. I am satisfied that the three acted in concert, with a common intention in the commission of the offence and therefore all must be held liable for the death of the deceased.

28. The accused persons took the law into their hands, and only reported the incidence to the police station after injuring the said Samuel and the deceased. They indeed presented themselves to the police and upon interrogation were arrested and charged for the offence facing them. The issue of identification does not arise, as they were positively identified, having been neighbours of the deceased and his son, PW3.

29. I am satisfied without a doubt that the accused persons, and no other person, committed the heinous offence. They must face the consequences of their unwarranted and unlawful actions.

Accordingly, I find and hold that the prosecution has proved the charge of murder against the accused persons to the required standard of proof, beyond reasonable doubt.

The accused persons are hereby convicted for the offence of murder of the deceased, Francis Njuguna , as charged.

Mitigation and sentencing on a date to be taken.

Delivered, signed and dated at Nakuru this 6th Day of May 2020.

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J.N. MULWA

JUDGE.