REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 38 OF 2011

REPUBLIC

-VERSUS-

GEORGE MWANGI ONYANGO

JUDGMENT

On 8 December 2011, the accused in this case was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. The particulars of the offence were that on the 13th day of February 2011 at Mason village, Warazo location within Nyeri county, he murdered John Mwangi Muthee.

Once the psychiatrist, Dr. Moses Richu Mwanda (PW8) certified him fit to take plea and stand trial, the accused entered a plea of not guilty.

To prove its case, the state called eight witnesses the first of whom was Samuel Mwaniki Mwangi (PW1). He testified that on 13 February 2011, at about 11.00 PM he was at Kanini bar when the accused and one Joseph Gachanja came in and started insulting him. He described them as young men whom he knew before. They threatened to kill him. They started fighting him but John Mwangi (the deceased) came to his rescue.

He then went outside the bar and called the area chief to report the incident. The chief directed him to Munyu police patrol base to make his report there. He made his report to the police who promised to visit the scene the following day.

It was his testimony that one Wilson Wahome (PW4) and the owner of the bar Margaret Wanjiru (PW3) witnessed the incident.

Apparently, he never returned to the bar and he couldn't tell whether the accused beat the deceased though he left both of them in the bar. He couldn't also tell when they left the bar.

Chief Inspector Benjamin Kisela (PW2) testified that on 22 February 2011 he was at Kiganjo police station where he was then the deputy officer in charge of the station when he got a call from the officer in charge of Munyu police patrol base, corporal Victor Kaberua, informing him that a suspect in an assault case was in his custody. The suspect turned out to be the accused. On the same day, the accused was brought to Kiganjo police station. He directed constable Alex Wambua (PW5) to deal with the case. The accused was initially charged with the offence of assault before the magistrates' court on 23 February 2011 but the murder charge was subsequently preferred when the police officers got information on 24 February 2011 that the complainant in the assault case had died.

On 3 March 2011 constable Wambua attended hospital when the post-mortem on the deceased's body was conducted. On 7 March, 2011, the officer together with constable Wambua visited the crime scene and recorded statements from witnesses who included Margaret Wanjiru (PW3).

Wanjiru (PW3) was the owner of Kanini bar where the accused and the deceased had been drinking on the material night. It was her evidence that the deceased came to the bar at 7 PM. He was served with a soft drink. At About 8.00PM, the accused and his friend, one Gachanja, came in and joined the deceased at his table. At about 9 PM, the deceased left briefly and came back with a packet of maize flour and a packet of milk. He gave her these items to keep for him and went back to his table.

Samuel Mwanki (PW1) later joined them on the same table. He was drunk. Since he was creating disturbances, Wanjiru ejected him from the bar. But he later came back to take his phone which he had given to Wanjiru to charge for him. At 11 PM she asked some people, including the deceased to leave. They left but the deceased came back for his flour and milk. He left with the accused and Gachanja. She then closed the bar at about 11.30 PM.

On 14 February 2011, she learnt that the deceased had been assaulted and had been found lying in a trench. She knew the accused and Gachanja because they all hailed from the same area and they also used to patronize her bar.

Wilson Wahome (PW4) testified that he went to Kanini bar at 9.30 PM together with one Mwarari and one Michael Ndegwa. They found the deceased, the accused and Gachanja in the bar. He left the bar at 11.00 PM by which time the deceased, the accused and Gachanja had left. The three of them, according to his evidence, had left together. He gave the same information to the police the following day. He recalled that the deceased asked for some things when he left. He knew the accused before.

Police constable Alex Wambua (PW5) testified that the accused was escorted to Kiganjo police station by police constable Miriti of Munyu police patrol base on 22 February 2011. He also brought with him statements of witnesses and a duly filled P3 form in respect of the injuries the deceased had sustained. Based on the statements and the P3 form he preferred a charge of assault against the accused.

However, on 24 February 2011 he received information that the complainant had died; he visited the hospital on 27 February 2011 and indeed confirmed that the deceased had died. He further attended the post-mortem on 3 March 2011.

Sgt. Victor Cameron (PW6) testified that the deceased's family members brought him to Munyu police base of which he was in charge and reported a case of assault. This was on 13 February 2011. They reported that the deceased had been beaten by the accused and Anthony Gachanja outside a bar. He entered the report in the occurrence book and referred the complainant to hospital for treatment. The accused was brought to the station on 20 February 2011 and was escorted to Kiganjo police station the following day. He recorded the deceased's statement on 21 February 2011. By then the deceased was undergoing treatment. On 24 February 2011, he got information that the deceased had died. In the absence of the deceased, he read and produced the deceased's statement.

Dr Ayub Gitaka Macharia (PW7), the pathologist, produced a report on the post-mortem conducted on the deceased's body at Nanyuki General Hospital on 3 March 2011. According to the report, the body was of an African male in his late 20s. It had multiple bruises on the face, trunk, upper and lower limbs and distended abdomen. One of his left ribs was fractured. The left lung had collapsed and there was tension in the hemothorax where there was also food debris. The stomach was perforated near the sphincter and the duodenum. There was food debris in the abdominal cavity. The head had multiple bruises. On the nervous system there were multiple intracranial hematoma. The pathologist opined that the deceased must have died as a result of cardiorespiratory arrest due to severe medicestinitis and peutomotis secondary to blunt abdominal and thoraic injury and severe head injury secondary to assault. He certified the deceased's death vide a certificate No. 136619.

When he was put on his defence, the accused opted to give a sworn statement. He admitted that on 13 February 2011 he went to Kanini bar at about 8.00 PM. He found the deceased, Gachanja and Mwaniki in the bar. They are people he knew because they all worked together, apparently at the same place. As they drank, Mwaniki (PW1) came in. He was drunk and disorderly. He sat at the same table where they were seated but because of his disorderly conduct the owner of the bar ejected him from the bar. It was his evidence that he had intervened to separate the said Mwaniki from the rest of his colleagues with whom he was quarreling. He agreed that after Mwaniki had been removed from the bar, he called the chief who in turn told him to report his case to the police at Munyu. He learnt that Mwaniki had made a report to the police when he was arrested. He also admitted further that he left the bar at about 11 PM together with Gachanja, Mwaniki and the deceased. Soon after they left, the deceased went back to the bar to collect his items. It was his evidence that they never met him again; he further denied having anything to do with the deceased's death. If anything, so he testified, the deceased was his friend and that they never quarreled that night. And with that he closed his case.

The burden on the state in prosecution of a murder charge is normally four-fold. First it must prove death of a person; second, it must proof that the death was caused by an act or omission of another person; third, it must prove that the act or omission was unlawful; and finally, it must prove that the perpetrator had malice aforethought.

These elements are captured in section 203 of the Penal Code under which the accused was charged; it reads as follows:

> ***203. Murder***
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> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

The deceased here died in hospital while undergoing treatment; prior to his death, he had been to the police station twice; he was there for the first time when a report of his assault was made and again when he went to record a statement in respect of his complaint. Corporal Cameron (PW6) saw him on both of these occasions. His colleague constable Wambua (PW5) was at the mortuary to confirm his death and also when the post-mortem on his body was conducted. The pathologist certified the deceased's death and signed a certificate to that effect. The fact of death of a person was thus proved to the required standard.

Still on the evidence of the pathologist, the nature and extent of injuries which the deceased sustained would suggest that they were caused by some other person. The deceased himself alleged that it was the accused who perpetrated these injuries. Whether the accused was the assailant is a question that will be determined in due course but for the moment the facts show that the injuries were, at the very least, not self-inflicted; they were caused by another person.

There is also nothing in evidence to suggest that the attack on the deceased was justified and thus his death was as a result of an unlawful act of another person.

The critical question is whether the accused was the assailant. The evidence presented by the prosecution in answer to this question is primarily the deceased's statement to the police on his complaint against the accused; with the deceased's death, the statement turned out to be a dying declaration. The rest of the evidence is, by and large, circumstantial though it might as well be corroborative of the dying declaration.

As far as the dying declaration is concerned, the deceased did not just implicate the accused, he went to the police station the morning after he was attacked; a report was made to the effect that he had been assaulted by the accused. He couldn't record statement then because of the

state in which he was; he needed medical attention and for this reason he was referred to hospital for treatment. He finally recorded his statement in which he gave finer details of how he was attacked. This statement was exhibited in court and in it the deceased stated, inter alia, that he could clearly remember the events of the night of 13 February 2011. In particular, he recalled that he was at Wanjiru's (PW1's) bar at 10.30 PM when the accused and Anthony Njogu asked him to accompany them outside the bar. While out there, they told him that he was going to pay for having rescued Mwaniki (PW1) whom they wanted to beat. They then descended on him and assaulted him using what he described as tree branches, offcuts, rafters, sticks and stones; generally speaking, they employed what one would refer to as crude weapons to attack him.

He screamed for help but none was forthcoming; he lost conscious till the next morning at 6.00 AM when he regained it. A good Samaritan by the name Kigandi called his family and informed them that he had been attacked and that he needed medical attention. His family members responded and found him where he had been abandoned; they hired a vehicle that took them to Munyu patrol base where a report of the attack was made before they proceeded to the hospital for his treatment.

This statement is corroborated by at least three of the prosecution witnesses; to begin with, the fact of there having been some sort of fracas involving the accused and his friend Gachanja and in which the deceased intervened was alluded to by Samuel Mwaniki Mwangi (PW1). It was his evidence that the accused and one Joseph Gachanja insulted him while he was in Kanini bar at about 11 PM. They threatened to kill him and it is only after the deceased intervened, that apparently, they left him. He testified further that he went outside the bar and called the chief to report the matter; the chief directed him to make a report at Munyu police station. The fact of his report to the chief and later to the police was even confirmed by the accused himself who in his testimony said that Mwaniki called the chief and the police at the material time. As far as the skirmishes in the bar are concerned it was his side of the story that it was Mwaniki who was drunk and disorderly.

Similarly, Wanjiru (PW3), the owner of the bar where the confrontation arose confirmed that the accused, his colleague Gachanja, the deceased and Mwaniki (PW1) were at her bar at the material time. As a matter of fact, it was her evidence that the accused and Gachanja joined the deceased on his table. She also alluded to the confrontation between Mwaniki and the accused except that it was her side of the story that Mwaniki was the cause of the confrontation; he came to the bar drunk and disorderly and it is for this reason that she ejected him.

Regardless of who may have initiated the confrontation, there is evidence corroborating the deceased's statement that he was not only with the accused, amongst other people, but also that prior to his attack there was some confrontation in which he was caught up between Mwaniki, on the one hand, and the accused and his colleague Gachanja, on the other.

Further, it was Wanjiru's testimony that the deceased left with the accused and his friend before she closed the bar. Going by this evidence, the last persons to have been seen with the deceased were the accused and Gachanja.

In his statement, the deceased also made reference to one Wahome whom he claimed to have witnessed the confrontation in the bar. Indeed, Wahome testified as the fourth prosecution witness. He corroborated the deceased's statement that the deceased, the accused and Gachanja were at Kanini bar and that they left together before 11.00PM.

The law on dying declarations is found in section 33 of the Evidence Act, cap. 80 Laws of Kenya which states as follows:

> ***33. Statement by deceased person, etc.,***
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> ***When Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—***
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> ***(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question***

This law was considered and discussed in **Jasunga s/o Okumu versus Republic (1954) 21 E.A.C.A** 331. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.

The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty.

In discussing the admissibility of the deceased's statements, the court to which an appeal against the trial judge's decision had been preferred held as follows:

> ***In Kenya the admissibility of a dying declaration does not depend, as it is England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.***
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> ***In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to the dying decelerations in***

this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England.

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.

The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and...the particulars of the violence may have occurred in circumstances of confusion and surprise calculated to prevent their being accurately observed…The deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.

Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R v. Ramazani bin Mirandu (1934) 1 E.A.C.A 107; R v. Muyovya bin Msuma (1939) 6E.A.C.A 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

It worth noting here that Section 32(1) of the Indian Evidence Act which the court made reference to is in *pari materia* with section 33 of our Evidence Act; the former Act applied in this country prior to the enactment of the latter Act.

Regarding the question whether corroboration is necessary for one to be convicted solely on the evidence of a dying declaration, the court had this to say:

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 E.A.C.A 90; re Guruswami (1940) Mad. 158, and there may be 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 a dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. R v Said Abdulla, (1945) 12 E.A.C.A 67; R v Mgundwa s/o jalo and others, (1946) 13 E.A.C.A 169, 171.).

In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.

As to the question of the sufficiency, admissibility and the weight to be attached to a dying statement; the court ruled as follows:

The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was un acknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (Waugh v The King, (1950) A.C 203) … It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).

Turning to the accused's case, I am minded that the deceased was not suffering from 'extreme exhaustion' or faced imminent death so that the solemnity of the situation can be regarded as creating an obligation imposed by an oath. Such conditions, it has been held in the decision to which I have made reference are not necessary and do not represent the law in this country. In fact, section 33 (a) dispels any doubt on whether the admissibility of a dying declaration is dependent upon such circumstances; it is clear, and perhaps for avoidance of doubt, that '***such*** statements ***are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death***'.

I am prepared to find that the deceased's statement was well corroborated and it is not only admissible but I also find no reason to doubt its contents. Accordingly, I hold the accused accountable for the deceased's murder.

The accused's suggestion that the deceased left the bar alone was discounted by the evidence of Wairimu and Wahome who testified that the deceased left with the accused and his friend Gachanja.

The final question is whether the accused had malice aforethought.

Malice aforethought is the mental element necessary for one to be convicted of the offence of murder; it is either express, implied or constructive. 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 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 Kimanthi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007 (unreported).**

This element 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.***

The accused deliberately, set out to harm the deceased merely because he had intervened and restrained him and his friend from harming Mwaniki who they accused of having insulted them. They appear to have been more annoyed with the deceased when, according to the accused, they learned that Mwaniki had taken up the matter with the police. They therefore sought to vent their anger on the deceased.

It is apparent to me, that going by the deceased's statement, he must have been subjected to a brutal attack. The pathologist's evidence is a testament to this. It was his report that the deceased sustained generalised injuries on the face, trunk, upper and lower lumbar regions. He also suffered a distended or perforated stomach and intercranial haematoma. He concluded that the deceased succumbed to these injuries.

The nature and extent of the injuries would suggest that in attacking the deceased the way they did the accused and his accomplice must have intended to cause his death or to do him grievous harm. Alternatively, they must have been aware that the attack on the deceased would probably cause his death or cause him grievous harm but they were indifferent whether death or grievous bodily harm would result. Still, they may have been in the process of committing a felony. Whichever the case, I am satisfied beyond all reasonable doubt, that the malice aforethought was established to the required standard.

In the ultimate I find the accused guilty of the offence of murder and I convict him accordingly.

Dated, signed and delivered this 4th day of May, 2020

Ngaah Jairus

JUDGE