



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 65 OF 2008

REPUBLIC

VERSUS

SAMUEL WACHIRA NDERITU.....ACCUSED

JUDGMENT

The accused was arraigned on 10 February 2009 on a charge of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63 particulars being that on the 29th day of June 2008 at Kiboya village in Nyeri North District within Central Province, he murdered Joseph Maina Murage.

Having been examined by a psychiatrist, Dr. Owino (PW8) and found to be fit to stand trial, the accused pleaded not guilty to the charge and so his trial begun in earnest.

The first prosecution witness was Macharia Magana (PW1), a mason who lived at Burguret; he testified that on 29 June 2008, the deceased joined him at his home before they proceeded to a nearby shopping centre to drink alcohol. They drank in two different bars. While in the second bar, he fell asleep and only woke up to find the deceased and accused either fighting or shoving each other. He held the deceased while the owner of the bar held the accused apparently to separate them. It was his evidence that they were quarrelling over a Kshs. 30 debt which the accused owed the deceased's mother. The dispute was resolved when the accused agreed that he would settle the debt. Magana left them in the bar, drinking together.

It was Magana's evidence that he knew both the accused and the deceased; both of them were his neighbours. They were both drunk when they confronted each other.

The deceased's daughter Catherine Wangari (PW2) testified that on 29 June 2008, about 5.00 P.M., she was on her way to see her grandmother when she heard a commotion behind her. She checked and saw the accused cutting the deceased; it was her evidence that he hit her father and also strangled him. She ran to tell her grandmother (PW3). He grandmother could not, however, come to her son's rescue because she had a problem with one of her legs which compromised her movement. She, instead, asked one Ruth, her daughter-in-law to go and check what the problem was. Ruth went and separated the deceased and the accused. Her father, according to her evidence, was badly hurt. She attempted talking to him but he couldn't respond. Perhaps out of fear of what may probably have happened, she fainted and couldn't tell what happened until was later told that the deceased had died. It was her evidence that the scene of the fight was at the gate to her grandmother's compound; it is in the same compound in which the deceased lived and therefore they had a common gate. It was also her evidence that she knew the accused and the deceased to be friends.

Monica Muringe (PW3) swore that on 29 June 2008, her granddaughter (PW2) came and told her that her father was being assaulted. She managed to get outside her house but she could not rush to the scene because of her bad leg. She still managed to reach there but she arrived after Ruth had separated the deceased and the accused. She called the deceased but he could not respond. She picked him up and tried to make him seat. She asked the accused who was standing by whether he had killed the deceased but he did not respond; he just left the scene and went his way.

Ruth and Monica carried the deceased home; they couldn't get a motor vehicle to take him to hospital and therefore they called for a motorbike. But the deceased couldn't seat on the motor-cycle on his own; his legs were dangling or dragging on the ground; apparently, he was not strong enough to hold on to the motorcycle. They therefore abandoned the trip to the hospital and took the deceased back to the house. They called his father (PW5); he advised that they get a vehicle to get the deceased to the hospital. It was not until the following day that they eventually took him to hospital where he was admitted but unfortunately, he died a day after the admission.

The witness testified that Ruth's house and her house are next to each other in the same homestead.

Simon Thanja (PW4), who identified himself as Ruth's husband, testified that he ran to the scene when she heard Catherine (PW1) shouting. He found when his wife had separated the deceased and the accused. It was his evidence that the accused took his bicycle and left. At that

time, the deceased was lying on the ground. He testified further that they were unable to get a vehicle to take the deceased to the hospital on the material day.

The accused, according to Thanja, fled and could not be found until four months later. In fact, it is him who arrested the accused when he was cited in the village. His father called the police who rearrested him and took him in to their custody.

The deceased's father, John Murage Gichohi (PW5) testified that on 29 June 2008, he was at his place of work when he was called by his wife and informed that the accused and the deceased had fought. However, he only managed to make it home the following day. On that day he made a report of assault of his son at Naromoru police station; but the deceased died after he had lodged his report and so he had to go back and report of the death. This time round the police accompanied him to the accused's house, apparently, to arrest him. They couldn't find him; his mother, whom they found at the home, could not tell his whereabouts. It is only after five months that he was traced.

Senior Superintendent of Police Alphonse Munga (PW6) testified he was the officer commanding Naromoru police station at the material time; on 1 July 2008, when he received a report from John Murage Gichohi (PW5) to the effect that his son had been assaulted on 29 June 2008 by the accused. He had been taken to Nanyuki District hospital in a coma on 1 July 2008. He directed an officer to accompany the deceased's father to the scene. They did not get the accused since he had fled. They also confirmed that the deceased had died. On 11 November 2008, he received a call from the deceased's father to the effect that the accused had resurfaced and had been arrested by members of the public. He directed two police officers to arrest the accused.

Dr. Joseph Karimi Kinyua (PW7) produced the post-mortem report though the post-mortem on the deceased's body was conducted by Dr. Mathaiya. According to the report, the body was identified as being of an African male in his 40's. He had bruises on the forehead, the neck region, supraclavicular region, bilateral and sternal regions. The lower limbs and the jaw regions were also bruised. The cervical joint was loose and rotating easily. The deceased was vomiting bile and smelling alcohol. There was a fracture of the sternal. On the head there was extradural haematoma, on the parietal and temporal regions; multiple facial and scalp bruises. On the nervous system there was injury on the right temporal parietal region. On the spinal column there was fracture dislocation of the cervical spine. The cause of death was opined to be cardiorespiratory arrest due to depression of cardiorespiratory centres in the brainstem. The pathologist certified the deceased's death and issued a death certificate to that effect.

In his defence, the accused swore and testified that he knew the deceased as a friend and a neighbour. On 29 June 2008, he went to drink at a bar but before then, the deceased had insulted him. The deceased, according to him, was drunk at the time. He wanted the accused to pay Kshs. 35 he owed his mother. The accused went to the bar and the deceased followed him and together they sat on the same table. The accused bought him beer. After about 20 minutes, the deceased started insulting him again. The deceased's uncle got annoyed and slapped him. He left together with the deceased from the bar on their way home. The deceased was pushing his bicycle. It was his evidence that he kept falling on the way; according to his evidence he fell three times on the way. Just before they reached home, the accused proceeded to the deceased's brother's house who, allegedly owed him some money. He wanted to be paid so that he could, in turn, settle the debt he owed the deceased's mother. He did not find him. As he approached the deceased, the latter made as if to strike him with his bicycle. The accused took his bicycle and went home to sleep. He left for Wiyumirie from where he learnt of the deceased's death, a month after the incident. He denied that he fled but that he was working at Jikaze. He also denied fighting the deceased. He denied that he fled after the incident but that he lived at Jikaze.

In cross-examination, he admitted that the deceased's daughter (PW2) witnessed what happened at the gate; his mother (PW3) too, he admitted, was at the gate. Her daughter-in-law also witnessed what transpired though she did not testify.

Section 203 of the Penal Code which is the law under which the accused is charged ties the definition of the offence of murder to a person who commits it; it states as follows:

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

Thus, the offence is committed when a person, other than the deceased, is involved to the extent that he does or omits to do something which, either way, is unlawful, the result of which is the death of the deceased. Nonetheless, his unlawful act or omission will not amount to murder unless it is informed by malice aforethought or the mental element to cause the death.

In the present case, the death of one Joseph Maina Murage has been proved beyond doubt; besides his parents' evidence that their son died while undergoing treatment, the pathologist (PW7) testified that not only was a post-mortem conducted on Maina Murage's body but also a certificate of his death was issued.

Going by the same pathologist's evidence, the deceased died of injuries which, by no means, could possibly have been self-inflicted. They were multiple injuries some of which were so severe that they caused fractures to parts of his skeleton including the vertebrae or the spinal cord. He also suffered a head concussion both on the temporal and parietal regions. These injuries could not have been caused by a bicycle as the accused suggested in his defence. If the bicycle fell on him as the accused wanted the court to believe, most probably only a particular part of the deceased's body would have been injured and even then, the degree of injury or injuries from such an accident wouldn't go to the extent that the pathologist described. I am thus satisfied that the act out of which the deceased sustained injuries that turned out to be fatal, was caused by some other person as contemplated under section 203 of the Penal Code.

In many ways the pathologist's evidence corroborated the evidence of the deceased's daughter that she saw her father being assaulted by the accused. She might not have given the vivid details of how her father was attacked but whatever she saw was enough to cause her to believe that her father's life was in some danger and thus the need to raise alarm. She ran to inform her grandmother who also corroborated her testimony in this respect. It is because of the information that her grandmother received that she asked her daughter-in-law, Ruth, to quickly rush to the scene to find out what was happening. She was, in a way, handicapped but she finally got to the scene and found the deceased lying down, unconscious, while the accused stood beside him.

The assault of the deceased at his home's gate and out of which he sustained the injuries to which he later succumbed was a culmination of an earlier physical confrontation between him and the accused, that had begun a few hours earlier in a bar. Magana's (PW1's) testimony was to this end. He helped separate the deceased and the accused but it was his testimony that he left them in the bar. In Wangari (PW2), there is an eyewitness who saw the two of them fighting or the accused assaulting the deceased.

I am therefore satisfied that the injuries that the deceased sustained and to which he succumbed were occasioned by the accused. His suggestion that the deceased may have been injured as a result of the several times he is alleged to have fallen on the way home or was injured by his bicycle is not only contrary to the facts but is inconsistent with the pathologist's evidence on the nature and extent of the injuries that the deceased sustained. In any event, from what I gather, the bicycle which the accused seems to hinge much of his defence on was his and no reason was given as to why the deceased may have been pushing it or was in its possession.

There is no evidence and neither was it suggested that the accused's act in harming the deceased was justified. From the available evidence, and the accused admitted as much, the cause of their differences was a debt of Kshs. 30/= or 35/= which the accused admitted owing the deceased's mother. The fact that the deceased asked for settlement of this debt shouldn't have been a cause for his assault and subsequent death. In a nutshell the accused's act was unlawful.

It has been noted that the offence of murder is not complete until malice aforethought is established and so the final question here is whether the accused's unlawful act was informed by malice aforethought.

As noted earlier, malice aforethought is the mental element for 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))**).

It 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.

It has been admitted by the prosecution witnesses as much as it was the accused's defence that the deceased and the accused were long-time friends. Magana (PW1) testified that the two were friends. And the deceased's daughter had this to say about the relationship between her father and the accused:

“I had known Wachira as my father's friend since I was a child.”

On her part the deceased's mother testified:

“I have known Wachira since childhood. I have never had any problem between the two. They had been brought up together since childhood. I do not know whether they were friends but they were brought up together in the same village.”

The deceased's brother's (PW4') testimony was along the same lines; he testified that the deceased was a friend to the accused.

The picture that emerges from this evidence is that there was nothing sinister between the accused and the deceased that would have driven one to harm the other to such an extent as to cause his death. In other words, there is reasonable doubt that the accused intended to cause the death of the deceased or to do grievous harm. It is also highly probable that the accused may not have known that his acts would probably cause the deceased's death or cause him some grievous harm. Again, there is no evidence that the accused was out to commit some felony. In short, I am persuaded that the accused did not have malice aforethought.

But the accused cannot escape liability for the deceased's death; there is sufficient evidence and indeed, it has been established as a fact that he assaulted the deceased; while he may not be culpable for the offence of murder, the evidence available reveals that he is culpable of a lesser offence of manslaughter. This offence is defined in section 202 of the Penal Code which reads as follows:

202. Manslaughter

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

It is apparent that the presence or absence of malice aforethought separates the offence of murder from that of manslaughter; in other words, malice aforethought is the difference between the two offences. Thus, I find the accused guilty of the offence of manslaughter under section 202 of the Penal Code; he his convicted accordingly.

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

Ngaah Jairus

JUDGE