REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 90 OF 2013

REPUBLIC.....PROSECUTOR

Versus

DAVID GITONGA.....ACCUSED

JUDGMENT

[1] **DAVID GITONGA** ("the accused") has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code 63 of the Laws of Kenya.** The particulars of the offence being that on the 19th day of October, 2013 at Ruungu village, Kamao Trading Centre, Kabachi Location in Igembe North District within Meru County murdered **HENRY MUTIA** ("the deceased"). The prosecution called six witnesses to establish its case.

[2] **PW1 Joshua Gitonga** testified that on 18th October 2013 at about 9. 30 PM he was at Mutwati at Kamao Town outside Destiny Bar buying miraa. He was with Richard Kithia and John Kiambati and many other people. They saw the accused pass them holding a big stone weighing about 3 Kgs. The accused went to the corridor where the deceased was closing the corridor doors and hit him with it. The deceased was 5 meters away from them as they were facing the main road. When he heard a person groaning, he checked and saw the accused hit the deceased on the back. He did not however see him hit him on the head. They screamed and rushed to get the accused but he disappeared. They called the owner of the bar, Gerald, who came and they took the deceased to hospital. Later at 2.00PM he was informed that the deceased had died. He said that he knows the deceased very well as he is his relative; their grandfathers are brothers. The accused and the deceased were like brothers as they come from the same clan.

[3] **PW2 John Kiambati** corroborated what was stated by **PW1**. He affirmed that the accused hit the deceased twice with the stone he was carrying at the back of the head. They did not just hear sound but also saw the accused hit the deceased when he was shutting the door. He did not know the accused very well before the incident but he had seen him a week earlier as he used to come to the miraa market; thus, he recognized him on the material day.

[4] **PW3 Dr. Maria Muthoni Mwangi** produced the post-mortem report as P. Ex 1. She asserted that the cause of death was severe head injury and haemorrage due to assault with a blunt object using great force.

[5] **PW4 Paul Mugambi** and **PW5 Daniel Kwajaja** both testified that when they heard screams they went to find out what was happening. They met many people who were saying that Gitonga was running away and so they followed them. As he was running, Gitonga hit a miraa tree and he was arrested and took him to the police camp.

[6] **PW6 Gerald Willy M'Irigua** affirmed that after receiving the call from **PW 1** at 9.30PM informing him what had happened he went to the scene where he found the deceased lying on the ground. He took him to hospital only to be informed later that he had died.

[7] **PW7 No. 48292 CPL George Mbugua** told the court that on 19th October 2013 he was at Mutwati Police Station where he was based at that time. He perused the OB and found a report of assault made on 18th October 2012 at 2340 hours of which he was to investigate. He went through the report and found that the complainant, the deceased, was locking the door to the corridor when he was hit with a stone and fell down. He died while undergoing surgery. When he visited the scene he found that the corridor had been cleaned. He did not also find the murder weapon. At the scene he interviewed witnesses who informed him of what transpired on the 18th October 2013 at around 2130 hours. He also visited Maua Methodist Mortuary where he confirmed that the deceased had died.

[8] When he interviewed the accused he informed him that on the material day he went to the shamba to guard his miraa plantation and on arrival he found his father guarding the miraa. A quarrel erupted between them and the accused decided to go to Destiny Bar with the intention of taking a beer where he found many people and decided to leave for the shamba. Upon reaching the shamba, he found his father had left. He alleged that he stayed there till midnight when he saw a group of people coming to his direction and calling his name. They accused him of assaulting the deceased and brought him to the police. He later charged the accused with the offence of murder.

Defence

[9] When placed on his defence, **DW1, David Gitonga,** the accused, made a sworn testimony. He testified that on 18th October 2013 at 5. 00 PM he entered Mutwati Kamao bar owned by **PW6** where he took two bottles of Napoleon, soda and Allsops beer. He became drunk and left through the rear door where he met three people he did not know. This was about 20 meters from the bar. One of them held him by his jacket and another hit him with a panga at the back. They searched him and took the balance after spending Kshs. 1080 from Kshs. 2000. They threatened him and started hitting him. He took a stone to defend himself and went through the corridor near the bar. He took the stone and threw it at them and ran through the corridor. They pursued and kept pushing him. He became unconscious and regained consciousness in the police cells. He affirmed that he did not plan to injure anyone and he was not armed. He insisted that he only threw one stone so that he could get a chance to escape from the people who were attacking him. He confirmed that he knew Henry and had no grudge with him. He emphasized that the witnesses lied for they could not see from the miraa area where they were.

Submissions by the defence

[10] In his submissions, the accused submitted that the prosecution has failed to prove its case beyond reasonable doubt. He argued that they did not produce the alleged stone that he is said to have used. He urged the court to grant the accused the benefit of doubt. He relied on the case of **Republic v Martin Mucee Makembo [2018] eKLR.**

ANALYSIS AND DETERMINATION

[11] Under **Section 203 of the Penal Code**:-

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

From this definition the following four key elements of the offence of murder emerge which the prosecution must prove beyond reasonable doubt:

1. ***The fact of death of the deceased***

2. ***The cause of death of the deceased***

3. ***Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused***

4. ***Proof that the said unlawful act or omission was committed with malice aforethought.***

Of fact and cause of death

[12] The first and second elements, to wit, the fact and cause of death of the deceased could be handled together. The prosecution witnesses told the court that after the deceased was taken to the hospital they were later informed that he had passed on. **PW7** affirmed that he went to the mortuary where he confirmed that the deceased had died as a result of the injury he sustained. According to the post mortem report produced by **PW3** on behalf of Dr. Njeru, Joshua Gitonga and Julius M'Mwirabua identified the body subject of examination to be that of the deceased. The report shows that the cause of death was cardiopulmonary arrest due to severe head injury and haemorrage due to assault with a blunt object using great force. Accordingly, the fact and cause of death of the deceased has been proved.

Was death due to unlawful act of the accused?

[13] The next question is whether there is proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, that is *actus reus*. I see a small discrepancy. According to the Information filed in court, the offence took place on the 19th day of October 2013. However, the evidence presented was that the incident took place on the 18th day of October 2013. The discrepancy is merely about when the offence was committed and does not relate to the nature of offence. The date of the offence is easily ascertained from the evidence. Therefore, the discrepancy neither causes an injustice nor any prejudice to the accused. It is a discrepancy which does not require an amendment of, and does not invalidate the information. The error is simply curable under section 275(2) and 382 of the CPC as the case may be. See *Obedi Kilonzo Kevevo v R* (Court of Appeal Criminal Appeal at Nairobi No. 77 of 2015) for example, held that the fact that the charge sheet indicated that the offence occurred a month before the date established by the evidence did not prejudice the appellant and was curable under sections *275 (2)* and *382* of the CPC. Similarly, in *Peter Ngure Mwangi v R* (Court of Appeal at Nairobi criminal appeal No. 44 of 2010, a typographical error in the name of the complainant was held not to prejudice the appellant and was curable.

[14] In spite of the error, it is evident from the prosecution witnesses as well the defence that the incident herein took place on 18th October 2013. From the prosecution evidence it was alleged that the accused hit the deceased with a stone on his head as the accused was locking the corridor door. **PW1** and **PW2** who were seated at the verandah and that they saw the accused hit the deceased with the stone which made him fall down. The accused disappeared but people pursued and arrested him.

[15] According to the accused, after leaving the bar drunk he was attacked by three people. He threw a stone at them so as to stop them from pursuing and chasing after him. Something does not add up, especially when he stated that he threw a stone to defend self and then went through the corridor near the bar. Weigh this defence against the following facts which are safely inferred from the defence and prosecution witnesses. First, the evidence by the accused show that his alleged attackers were not in the corridor; he is not expected to run towards them. This is inferred from his evidence that he was running away from them. Second, he could not therefore have thrown the stone towards the corridor. H did not even claim that he threw the stone towards the corridor. And yet, the evidence shows that the deceased was at the corridor locking the door and that is where he was hit by a stone. His claim therefore that he took the stone and threw it at perceived attackers and ran through the corridor does not hold sway.

[16] Consider further his evidence that the perceived attackers hit him at the back but he was not injured. In addition, consider his claim that the perceived attackers stole his change. No receipt was produced to show that he was in the bar and took beers and soda as he alleged. Again, he did not state or present anything to show that he made a report of the alleged assault on him as well as theft of his money by three persons on the material day. His claim that het he did not intend to harm or kill the accused but only threw the stone to enable him escape from his attackers or thwart further attacks by the alleged three persons does not hold sway? But, what does the evidence portend?

[17] The post mortem report shows that the deceased suffered a severe head injury which was caused by a blunt object using great force. This corroborates the evidence given by the prosecution witnesses who saw what happened. The stone is a blunt object which can inflict such an injury. Furthermore, the witnesses said that the deceased did not struggle for he was facing a different direction when he was hit by the accused with a stone. **PW2** stated as much during cross-examination. The account as to how the incident occurred as narrated by the prosecution witnesses is consistent and believable. It is also certain that the deceased was attacked unawares by the accused and so he did not even attempt to defend himself. The accused also admitted having a stone at the time except he claimed that he threw it at his attackers in order to escape. I have evaluated that defence and dismissed it. Accordingly, evidence show, and I do find that the stone herein existed at the time of the offence and was used by the accused to inflict the injuries upon the deceased which injuries resulted to his death.

Non-recovery of murder weapon

[18] But the defence seems to place preponderant weight on the fact that the prosecution failed to produce the stone allegedly used to injure the deceased. Can failure to produce the murder weapon fatally affect the case of the prosecution?

[19] This was answered in the case of **Ekai v Republic [1981] KLR 569** where the court held:

> ***"That failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon."***

[20] Furthermore, the Court of Appeal in the case of **Karani v. Republic [2010] 1 KLR 73** expressed as follows*:*

> ***"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".***

Accordingly, I am of the considered view that in spite of the murder weapon not having been produced I am satisfied that the weapon (the stone) did exist at that moment, and eye witnesses as well as the defence proved a stone existed at the time/ Medical evidence supported the fact that blunt weapon was used to injure the deceased which I am satisfied was the stone herein. Consequently, the prosecution proved that the accused hit the deceased with a stone, thus, killing him. Accordingly, I find that the deceased met his death as a result of an unlawful act on the part of the deceased.

Of malice aforethought

[21] Did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines malice aforethought as follows:-

> ***"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) ….."***

[22] **PW2** stated that the accused hit the deceased twice on the head. According to the post-mortem report the deceased was injured on the head by a blunt weapon using a great force. The head is regarded as a sensitive part of the body. The fact that the accused hit the deceased on the head twice with a stone and applied great force shows that he was aware that he would cause grievous harm or death of the deceased. In **Republic v O M G [2017] eKLR** it was held that:-

> ***"In the present case, the accused hit the deceased twice with a fork jembe at the back of her head, a very sensitive part of the body. The accused must have been aware that such an act could lead to death or cause grievous bodily harm to the deceased."***

In this regard, I am satisfied that the accused had requisite malice aforethought in causing the death of the deceased.

[23] Consequently, I am satisfied that the prosecution has discharged its burden and proved its case beyond reasonable doubt that with malice

aforethought the accused unlawfully caused the death of the deceased. Accordingly, I find the accused David Gitonga guilty of the murder of Henry Mutia and convict him accordingly under section 322 of the CPC.

Dated Signed and delivered in open Court at Meru this 16th Day of January, 2019

F. GIKONYO

JUDGE

In presence of -;

Kiogora for Mrs. Kaume for accused person

Namiti – present.

F. GIKONYO

JUDGE