



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.17 OF 2013

REPUBLIC.....PROSECUTOR

- V E R S U S -

JULIUS M'MARIO MARUNGU.....ACCUSED

J U D G M E N T

Julius M'mario M'Arungu (the accused) is charged with the offence of *murder contrary to section 203 as read with section 204 of the Penal Code*.

The particulars of the charge are that on 7/2/2012 at Gituine Village, Akirangondu Location, murdered **David Mukaria M'itabari (the deceased)**.

The prosecution called a total of six witnesses in support of its case and it was led by learned counsel **Mr. Mulochi**.

On the other hand, the accused gave a sworn testimony in his defence and did not call any witness. He was represented by learned counsel, **Mr. Kiogora**.

PW1 Adriano Ikiu was at Ithundia at about 10.00 a.m. on 7/2/2012, where he had taken his sheep to graze. He heard screams on the road and on going to check, found accused, Julius and Karuti Mboyo beating the deceased; that he told them to stop beating the deceased but they ignored him; that the deceased fell. PW1 went to inform Bernard PW2, the deceased's brother and left to go and look after his sheep. He later recorded his statement at the police station. He knew both accused, Karuti and the deceased before the incident.

PW2 Benard M'Ithaa of Akirangondu was at his home when he was informed by one Moses Kandenge that his brother David had been assaulted by Julius M'mario and Karuti Mboyo. He went to the scene and found David already dead and together with Kandenge, they reported to the police who went and collected the body.

PW3, Dr. Muthuri Kenneth of Meru Hospital produced a postmortem report prepared by Dr. Njuguna who performed the postmortem on the deceased. The Doctor found that the deceased had multiple bruises on the face, scalp and the head had fractures. The doctor formed the opinion that the cause of death was severe head injury.

PW4 Titus Kimathi was at his house in Gituine on 7/2/2012 about 10.00 a.m. when he heard screams from a nearby farm. He went there and found Karuti and accused beating the deceased with sticks (pieces of wood). He pleaded with them to stop but it fell on deaf ears and he went to call PW2. On returning, he found deceased already dead and they went to report at the Laare Police Station. They found that deceased's cousin, Kandenge had already reported the incident. He knew the accused who used to guard their *miraa* whereas the deceased was his uncle.

PW5 Patrick Muthoni M'Itabara was on 7/2/2012 taking his child to school when at Gituine, he heard screams and saw a group of people. He went to check what was happening when he found David Mukaria's hands had been tied with a rope and those around were Karuti M'Mucheke, Julius (accused), Kenneth (PW4), Adriano (PW1). He enquired why deceased was tied and he saw accused hit deceased with a stick; that Karuti who was armed with a stick also hit him; that the deceased managed to stand up and ran to a nearby farm and at that stage, PW5 left for school but returned later, found PW1, PW4 and PW2. The deceased was lying in their farm. Later, he recorded a statement at the police station. He knew Karuti, accused and the deceased.

PW6 CPL Victor Nambwenya was the investigating officer. He recalled 7/2/2012 when he found an assault report recorded at the station, the victim being David Mukara. The report had been made by Kandenge and that even before they acted, another person made the same report whom I believe it is PW4. PW6 went to the scene at 5.00 p.m; found the body of deceased's on the land and PW1, 2 & 5 were present. He collected the body and recorded witness statements in which it was alleged the deceased was a *miraa* thief but on that day, there was no evidence that he had stolen. They could not trace the suspects till after about a year in February 2013 when accused was arrested.

When called upon to defend himself, accused stated on oath that on 7/2/2012, he left home at 5.20 a.m., went to harvest his *miraa* at Karimwene till 9.00 a.m. took it to Muringene where he sold the *miraa* and stayed at the market till noon. He went to bring more *miraa* at Kimongoro, finished work at 8.00 p.m. and went home at 9.00 p.m. arriving there at 10.00 p.m. He denied having met the deceased or any of the witnesses; that he never left home till February, 2013 when he was arrested in his farm. In cross examination, he said that he was framed by Muthomi who is a member of deceased's family because they had a case in which he was a witness in 1994. As for PW1, he said they had a case in which his *miraa* was stolen and accused testified therein.

The accused is charged with the offence of murder under section 203 of the Penal Code which provides as follows:

“Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The prosecution therefore has a duty to prove beyond reasonable doubt the following:

- (1) The cause and death of the deceased;***
- (2) That the accused caused the unlawful act or omission that caused the death;***
- (3) That the accused had malice aforethought as defined in Section 206 of the Penal Code.***

Doctor Njuguna who conducted the postmortem found that the deceased had sustained bruises on the face, the scalp and fracture of the left temporal bone, and had intracranial haematoma and the cause of death was the severe head injury. PW1, 4 and 5 who claimed to have seen the deceased being assaulted said that accused and one Karuti were armed with sticks. PW1 did not specify where they beat the deceased. PW4 said the deceased was beaten all over the body while PW5 said he saw accused hit deceased in the side of the ribs while Karuti hit him on the head. The findings by the doctor that injuries on the deceased were inflicted by a blunt object do corroborate PW1, 4 & 5's evidence. PW1, 4 & 5 were not present throughout the incident. They witnessed the assault at different times. I am satisfied that the deceased died as a result of the blunt injuries inflicted on him.

The next question then is whether it is the accused who inflicted the said injuries on the deceased. PW1, 4 & 5 testified to having seen the accused and Karuti assaulting the deceased although PW1 told the court that when he saw the deceased being assaulted, there was nobody else present. From an analysis of the evidence, I find that the witnesses saw the deceased at different times. PW1 found the deceased being assaulted along the road. On the other hand, PW4 found the deceased being assaulted in Kanuti's farm. PW4 said he first saw the assault and left to go and call PW2. PW5 on the other hand was on the road to Gatuine when he found the deceased being beaten but that the deceased stood up and ran to their farm. PW6 who went to the scene later in the day said that the body was in the deceased's farm. It means that the deceased was assaulted elsewhere and ended up in their farm. PW5 told the court that when he arrived at the scene, he found PW1 and PW4. It is also clear from the evidence that the three later went to the scene after the death of the deceased. I do not find any contradiction in the prosecution evidence because these witnesses witnessed the incident at different times. It is also evident that PW2, PW4 and PW5 and one Moses reported to the police about the assault and murder of the deceased. The report was made on the same day. The testimonies of PW1, 4 & 5 were never shaken during the cross examination. This incident occurred during the day and the issue of identification does not arise.

The accused raised an alibi in his defence that he was busy harvesting and selling *miraa* at Muringene and Kimongoro and that he returned home at 10.00 p.m. An alibi defence means that accused was not at the scene where the deceased was murdered but elsewhere. When an accused person raises an alibi defence, he does not assume any duty to prove its truth. The burden always remains on the prosecution to prove its case against the accused beyond reasonable doubt. In the case of *Karanja v Republic (1983) KLR 501* the court held that the burden of proving the falsity, if at all, of an accused's defence of alibi lies with the prosecution. The court also held that the court may, in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused's guilt is established beyond all reasonable doubt and that if an alibi is raised late in the defence, the court should take into account the fact that the alibi defence was put forward at a late stage of the case that it cannot be tested by those responsible for investigation and prevent the suggestion that it is an afterthought.

In *Kiarie v Republic (1984) KLR* the Court of Appeal said:

“An alibi raises a specific defence and an accused person who puts forward an alibi in answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable..”

During the prosecution case, there was no indication that the appellant intended to raise an alibi. The alibi was raised for the first time during the defence. It is in the cross examination that accused alleged to have been with one Moses Kabui on the fateful day but after the defence was allowed an adjournment to call the said Moses, he was said to be deceased. The prosecution was therefore never accorded any opportunity to investigate the said alibi. During cross-examination of the accused by the prosecutor, he also raised another defence that he was framed by PW1 and PW5 for having given evidence in cases against them. PW1 and PW5 testified in court and no such allegations were put to them for them to answer. Clearly, these were afterthoughts. In fact had the prosecution not questioned him, he was not going to make the above allegations. I find that the alibi defence does not introduce any doubt in the prosecution in any way and I dismiss the defence as an afterthought and untrue. In the trial, I found that there is overwhelming evidence placing accused at the scene of the crime and he was one of the two who assaulted the deceased.

Whether the accused had malice aforethought; Section 206 of the Penal Code defines malice aforethought as an intention to cause grievous harm or an intention to cause the death of a person. The defence counsel referred this court to the case of *Milton Kabulit and 4 others v Republic 2015 CRA.340/2012 (2015 KLR)* where the court in considering whether malice aforethought had been proved relied on the decision in *Republic v Tuper S/O Ocher (1945) 12 EACA 63*, where the East African Court of Appeal said:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear, knife than from the use of a stick.....”

In the instant case, the accused used sticks. From the narration of events by the witnesses, they were not small sticks but thick. Besides, the conduct of the accused of beating the deceased indiscriminately when he was tied up and moved him from the road to the farm, even after he ran, they still chased and ensured that they totally subdued him, means the accused meant to cause him grievous harm. If at all deceased was a thief, they had a duty to take him to the police station. Indeed PW1, 4 & 5 said they tried to intervene but it fell on deaf ears. By accused’s conduct and the resultant injuries on the deceased, I am satisfied that the accused intended to grievously injure the deceased or end his life. Malice aforethought flows from accused’s actions.

I am satisfied that the prosecution has proved beyond any doubt that it is the accused who grievously assaulted the deceased and had malice aforethought. I find accused guilty as charged and convict him of the charge of murder.

Dated and Signed at NYAHURURU this 7th day of February, 2018.

.....

R.P.V. Wendoh

JUDGE

Delivered by A. MABEYA (J) at MERU this 21st day of March, 2018.