



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

HIGH COURT CRIMINAL CASE NO. 46 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

JAMES NJENGA NJOROGI.....ACCUSED PERSON

JUDGMENT

1. The accused James Njenga Njoroge, was charged on 23rd January, 2013, with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that on the 1st day of December 2012, at Mai Mahiu Township, Naivasha District within Nakuru County, the accused murdered Samson Waruingi Kimuri.

2. This file was first registered as Criminal Case No 6 of 2013 in Nakuru., and was later transferred to Naivasha. The prosecution witnesses and the evidence of the first two defence witnesses (DW1 and DW2) were heard by Meoli, J. After her transfer in 2018, the final defence witness (DW3) and submissions were heard by me.

Prosecution case

3. The case against the accused, Njenga, was stated through the four witnesses called by the prosecution. The star prosecution witness was PW4 Daniel Mwaura Mbugua who was allegedly an eye witness. He testified that he was a scrap metal dealer at the time resident in Maai Mahiu he stated that on 2/12/2012, one Kagombe mentioned that some scrap metal was available for purchase. Although he didn't have money at the time, PW4 went at 9.30pm and met with Kagombe. Whilst there, Kagombe alleged that his scrap had been stolen and sold to PW4, an allegation PW4 denied.

4. Kagombe then led PW4 to the premises of Njenga, who alleged his scrap metal had been stolen and that PW4 had bought it. Njenga threatened to kill PW4 for buying the stolen scrap metal. One Kimani who was present together with the Accused began to assault both PW4 and one "Umri" who was also present. PW4 and Umri were then trussed up and put in Njenga's house at the yard where they were kept until after 3.00am when the assaults ended. PW4 begged to be taken to the police station, and eventually, PW4 and Umri agreed that they would sign a statement at the police station to pay the Njenga.

5. After they agreed to pay the accused, he called for a motor vehicle to take them to the police station. The reporting desk directed that 'Umri' be taken to hospital. He was assaulted with metal and wooden bars, kicks and water poured on him. Njenga, Kimani and a third man assaulted him. However, Njenga left with Peter, Kagombe and never returned. PW4 went to hospital for treatment. The deceased remained at gate of police station, and was taken to hospital by a good Samaritan.

6. According to PW4 Njenga went underground for one year after those events. When he returned he found PW4 in a hotel and revived the issue. That was in 2013. He wanted to beat PW4 again. But members of public intervened and took him to the police station.

7. In cross examination, PW4 said he knew both accused and deceased and at time he had all their phone contacts. He said it was usual to go to yards, which operated from 7.00am to 6.00pm, to trade in scrap. That he met the deceased at Njenga's yard; that the deceased already had injuries on his chest and limbs and his clothes were bloodied and muddy; that the deceased wore a red jacket; that there was light from an electric light in the vicinity; that Njenga is the one who called a pick up to take them to the police station; that Njenga was with wife; that he left the deceased at the gate of the police station, and later learned through a call from Umri's brother Kimuri, that 'Umri' had died about four days later.

8. PW1 Christopher Macharia Kiruki, is a farmer. He testified that on 10/12/2012 I received report that the deceased was attacked at his

place of work at Maai Mahiu. He travelled next day and went to at Naivasha District Hospital where he found the deceased already dead. He then reported at Maai Mahiu Police Station, and later organized for the post mortem and burial. He identified the body for post mortem on 11/12/2012. In cross-examination, he said he got the clothes of the deceased, but did not give them to police.

9. PW2 was PC 47930 Simon Kibithu. He testified that he was attached to Maai Mahiu Police Station at the material time. That on 2/12/2012 whilst he was at the station the OCS directed him to inquire into a case of assault. He waited for the victim he did not come. On 5/12/2012 the brother of the deceased reported that the victim had had passed on. After conducting enquiries he arrested the accused but others who were suspects were at large.

10. In cross examination, the PW2 stated that the entry in the Occurrence Book was Number 16 of 2nd December 2012. That the report states that an assault report was made by the deceased who said he was assaulted while at a scrap metal yard at Maai Mahiu on account of alleged theft. That he was not at the station when the report was made. That the reportee was treated at a dispensary before reference to the hospital. That the report did not mention the assailants. That he was not aware of a report by the accused at the station. That members of the public arrested the accused at Maai Mahi Police Station, and he re-arrested the accused from members of public. He also admitted that he did not search accused's house upon arrest; that he did not get the clothes of the deceased because all along he believed it was a simple assault. That he did not get a murder weapon. That he conducted initial investigations as investigating officer and recorded statements of witnesses, namely, one Mwaura who was with deceased at time of attack. That the scene was a scrap metal shop at Maai Mahiu where the assault occurred at 2.00am. That he did not take any expert witness to scene of crime. That he revisited it after the death was confirmed, and that was the only time he visited.

11. On re-examination the story becomes even more confusing in that PW2 states that he visited the scene of crime and concluded that the murder occurred at the scene. He then refers to it as the scene of robbery.

12. The record shows that on 11/5/2017, PW2 (PC Simon Kibithu) was recalled to give evidence. The record is somewhat confusing because PW2 is stated to have testified that he "took over the file from PC Kibithu (PW2)". His role was essentially to produce the post mortem report (Exb 1) done on the deceased by Dr Opile, which shows that the deceased died due to spinal injury.

13. PW3, No. 70799 PC James Bondo, testified that on 10th December, 2012 he went to Naivasha Hospital Mortuary to witness the postmortem of the deceased by Dr. Obure and that the body of the deceased was identified by his brother.

Defence Case

14. The accused gave a sworn defence and testified that he resides in Maai Mahiu and is a scrap metal dealer. He stated that on 1st December 2012 he was in his house but since he was tired he retired to bed by 9.00p.m. He said that his scrap metal yard has a small room which he used as a residence. While sleeping he says he heard sounds on the door as if someone was fiddling with the padlock and suddenly he heard the door open. He woke up and met a man who shone a torch on his face and struck him on the left hand. He screamed and raised an alarm. His wife also raised alarm. The man who knocked him down sat on him. Due to the alarm, members of the public came to the scene and attacked the intruder. It was dark so he couldn't see well but the intruder was assaulted in the house.

15. The following morning, he made the report at 1.00 a.m. The OB 3/2/12/12 was drawn at station by PC Njiru and the police told him to get treatment then go back. He was treated at Kijabe hospital and had plaster on his hand. He went back to the police station on the 3rd day but was told not to bother as the deceased matter was reported. The accused further testified that Daniel Mwaura owed him Kshs, 5,000/= and when he asked for it, Daniel said they go to the police station but when they arrived, Daniel turned on him and claimed that the accused had assaulted him. The accused was hence arrested and the deceased's matter revived. During the scuffle on 1st December 2012 he called the area chief to come to the scene.

16. On cross examination the accused stated that the deceased was well known to him as he hawked fruits around the stage. On the day of the attack, he did not know that it was him who had broken in until later on because when he screamed, the members of the public responded immediately and flocked his premises. He says that he believes there were two intruders and that he hurt his left hand during the scuffle with the intruders. He says he did not have or use any weapon be it wooden or metallic, during the scuffle he was using his bare hands to try block the blows and that his wife helped him. He was treated at Kijabe hospital.

17. The accused's evidence is corroborated by his wife, DW2, Elizabeth Wambui Njenga, who added that when the deceased died, the police came looking for the accused and that Daniel Mwaura is the one who led the accused to the police station.

18. DW3, Zacharia Kuria Igeria, Senior Chief Mai Mahiu Location, testified that he is aware of the case and he knows both the accused and the deceased. That on 1st December 2012 he was called on telephone by a member of the public Mr. Kigo who told him that a theft had occurred at Narok Junction at accused's shop. He took a motorbike and proceeded to the accused's shop where he found about 100 people, some outside and some inside.

19. There were about 40 people inside and they had beaten the deceased. He asked them to stop the beating and instead take the victim to Mai Mahiu police station. On asking what was happening he was told that the victim had entered the shop to steal and the accused has raised alarm. That since the shop in near the stage, many people came to help. He saw the accused who was injured and crying, the deceased was on the floor. He stated that he was surprised that the accused had been arrested and charged.

Analysis and determination.

20. It is the prosecution's role to prove the charges against the accused person beyond any reasonable doubt. Evidence adduced must prove three ingredients for the offence of murder under **section 203** of the **Penal Code**. These are: First, that the accused persons carried out an

unlawful act or omission; Second, that in the execution of the unlawful act or omission they caused injury to the deceased person resulting from which the deceased person died; Third, that at the time the unlawful act or omission was executed, the accused persons had formed the intention to either cause death or grievous harm to the deceased person.

21. An intention to cause death is malice aforethought. **Section 206** of the **Penal Code** provides the circumstances which constitute malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- 1. 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,***
- 2. 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;***
- 3. An intent to commit a felony;***
- 4. 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.”***

22. In this case the issues arising for determination from the evidence by the prosecution and defence are as follows:

- 1. Whether the evidence that the prosecution witnesses adduced is sufficient to establish beyond doubt that the accused person caused death of the deceased;*
- 2. Whether the prosecution has established malice aforethought against the accused;*
- 3. Whether the defence of the accused person is plausible and tenable.*

Analysis and Determination

Whether the Prosecution evidence establishes death of the deceased by the accused

23. The evidence of the star prosecution witness PW 4 is the core evidence in the prosecution case. The events recited by PW4 and the defence are polar opposites. PW4 initially states he was called by Kagombe to go to the accused's premises which he did. In cross examination, he said Kagombe, who had called him, picked him up with a motorbike and took him to Njenga's place. He stated that the calls and his going to the scrap yard there happened at around 9.30p.m on 2/12/012 and that they were held in the accused's premises having been beaten until 3.00 a.m the following morning, which would have been 3/12/2012.

24. PW4 did not mention any mob of people who came to the house, only that there were two other people present. He stated that after going to the police station to record a statement on that night, the accused and the other two persons did not return. That they went underground for about a year and that is when the accused was arrested when he tried to beat him up for some amount of money that he owed the accused

25. Further, PW4 testified that after he was taken to the police station, he left and went to hospital. He did not say whether he reported his having been beaten. No OB record was produced on that issue. If he was beaten why would he not record that fact? What did he do at the police station – did he write a statement agreeing to pay the accused? According to him, the deceased however remained at the gate of the police station, and the police directed that he be taken to hospital. At the same time he says the deceased was taken to hospital by a good Samaritan. How is it that despite saying he knew both the accused and deceased, and since he and deceased were allegedly and tied together and beaten together, they did not go to hospital together? Did he walk to hospital?

26. The evidence of PW2 is rather confusing and contradictory. He stated that he was at the police station on 2/12/2012 when the OCS asked him to inquire into an assault case which was reported by the deceased. The OB report is said to have been Number 16 of 2/12/2012. He stated that the assault occurred at 2.00am. That the deceased did not come back and that he learnt from the deceased's brother on 5/12/12 that the deceased had passed on. He stated that the report by the deceased did not have the name of the assailants.

27. PW2 further testified that he conducted inquiries and arrested the accused but others were at large. He stated that he and members of the public arrested the accused and then he re-arrested accused from the members of the public. Surprisingly, the witness did not state the date of arrest, but it must have occurred in 2013 because PW4 said that accused went underground and the two met in a hotel when accused wanted to beat him. It was then that the members of the public arrested the accused. PW2 confirmed that members of the public arrested the accused and he re-arrested accused from them. However, he did not state how he got to know of this incident in 2013 or where he was when it happened and how he then came to be the arresting officer. He also stated that after the arrest he did not search the accused's house or make any recoveries because he thought all along it was a simple case of assault. Yet he also said that on 5/12/2012 he had heard from the deceased's brother that the deceased had died. It appears that there is a complete disconnect between the incidents and the matter he was investigating on instructions from his OCS,

28. In addition, PW2 stated that he visited the scene to take the statement of PW4 since he was with the deceased on that day. He also did not take any expert witness to the scene of the crime and he visited the scene when he was informed that the deceased passed on and that was

the only time that he went there. He did not say on which date he made that visit, but it must have been in 2012 because he also stated that he **“revisited after death confirmed”**. The confusion in the evidence persists when PW2 stated that **“this was the only time I visited the scene”**.

29. When re-examined, PW2 said :

“I concluded the murder occurred at scene...The scene of the robbery was not in a market place but small enclosed structure behind some shops”

30. This confusion in PW2’s mind between a robbery and a murder appears to aid the accused’s story about how he was robbed on the material night. PW2 did not explain how he concluded that the murder occurred at the scene; what signs he saw of struggle, or blood stains or the like, particularly since there was no scenes expert he had with him.

31. The evidence of PW1 and PW3 on the other hand is not very weighty as they just confirm that the deceased died, he was identified and post mortem conducted. That is not disputed and therefore not an issue in this case.

32. Finally, with regard to the post mortem, the cause of death is mentioned as cervical spine injury leading to respiratory distress with concomitant tibia of the left side. The possible cause of such injury is not mentioned. How is the court supposed to weigh the consistency of the nature of injuries with the nature of assault from the evidence given by PW4?

33. The role of the police is also not clear. When deceased and PW4 reported to the police station, why did PW4 not make a report yet accused presumably did? When deceased was reported to have died, why is it unclear what investigations were done consequent to the death? How did PW2 get involved in the incident that occurred between accused and PW4 after they met a hotel in 2013 leading to the arrest of accused by members of the public? Was any record of this latter event recorded at the police station so as to make a connection between the 2012 incident and the 2013 incident?

34. All in all, more questions about the whole incident or series of incidents arise than are answered. It was the duty of the prosecution to clear up all these questions through their witnesses and to provide a clear, cogent and consistent story of how the alleged murder occurred. The prosecution has not satisfied this burden. In the absence of this proof, it is unnecessary to discuss the issue of malice aforethought.

Whether the defence of the accused person is plausible and tenable.

35. The evidence of the defence does not, in my view, suffer the type of inconsistencies suffered by the prosecution evidence. The accused stated how the whole incident occurred; his wife gave a similar corresponding narration of events. The only difference is that she was unable to remember exactly which finger the husband got hurt on but was clear that it was on the left hand. The accused showed the injury to court.

36. DW2, The area chief also corroborated the evidence of the accused. He stated that he was called to go to the scene. When he got there he found about 100 people. About 40 were inside and others outside; and that they had beaten the deceased. He testified that on inquiry, he was informed that the accused had raised an alarm of a theft and the members of the public immediately responded as the incident occurred just near a stage.

37. The accused’s wife (DW1) gave similar evidence. There were no further contradictions except that the date of his arrest is also not mentioned. This corroborates the accused’s evidence that the deceased was beaten by a mob that responded to his alarm. She went as far as saying that it was she who was in the vehicle that took deceased to the police station. She knew the deceased as a hawker near their yard.

38. The prosecution did not respond to the issue of the mob justice; accused raised the issue of mob justice and gave his evidence but the prosecution has not responded to this issue. Apart from alleging that the deceased contributed to the assault together with two other people who are at large, the prosecution has not contested the issue of there being a mob. The question remains, was there or was there not a mob that assaulted the deceased? The chief said he found the accused injured and crying and the deceased on the floor. The accused said he did not have any weapon but used his hands to block blows from the deceased that is why his left hand was injured.

39. Malice aforethought can be inferred from the facts if it is shown that an accused person had knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person. This is irrespective of whether that person is the person actually killed or not, and even though 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.

40. In this case, the prosecution did not prove malice afore-thought. It stated that the reason for assault was theft, but failed to prove it. The accused’s answer was that the deceased was assaulted by a mob and the prosecution did not have a response to this through cross examination.

41. The issue of weapon recovery was raised by the accused. The courts view the failure to produce an exhibit, or the murder weapon as not being fatal to a conviction See: **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.”

Equally, the Court of Appeal in **Karani v Republic (2010) 1 KLR 73** held:

“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”.

42. I have taken these cases into account in coming to my determination. All in all, I find that the defence of the accused person

43. was plausible and tenable. Accordingly, it would be unsafe to convict the accused on the implausible, confusing and contradictory evidence availed by the prosecution.

44. Accordingly, I acquit the accused, and order that he shall be set free unless otherwise lawfully held.

45. Orders accordingly

Dated and Delivered at Naivasha this 2nd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Ms Kaimugor holding brief for Dola Indidis for Accused
3. Accused - James Njenga Njoroge - present
4. Court Clerk – Quinter Ogutu