



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 19 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

PETER KINYUA JASON.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 12th day of May 2015, at Mufu market, Mufu sub-location in Embu county murdered ERNEST NDWIGA JASON. He pleaded not-guilty to the charge.
2. The prosecution called eleven (11) witnesses in support of their case which is summarised herein.

B. Prosecution Case

3. PW1 testified that on the material day he was in bar in Mufu town that was also patronised by the accused. He testified that the deceased walked in the bar and headed to the counter holding Kshs. 20 coin and asked for a beer. He testified that the accused approached the deceased from his seat and hit him on the arm after which the Kshs. 20 coin fell from the deceased's hand. PW1 further testified that as the deceased picked his coin which had rolled to near the door, the accused followed him and hit him on the lower jaw with his fist forcing him to fall on his back unconscious.
4. PW2, a wife of the deceased did not witness the deceased's death but testified that the accused was his nephew and had previously got into confrontations with the deceased. She testified that on the material day, the accused had beaten her husband. She further testified that on the 13/5/2015, she received a call from a bar owner in Mufu town that her husband had been injured. She proceeded to the bar and was shown where her husband was lying on the floor. She later made arrangements for her husband to be taken to hospital but he died the following day.
5. PW3, the bar attendant testified that both the accused and deceased were regular customers at the bar and that on the material day the deceased approached her with Kshs. 20 coin for a drink but before he could hand over the money to her, the accused hit his hand forcing the coin to fall down. She further testified that the accused then hit the deceased on the lower jaw forcing the deceased to fall over on his back. Upon inquiry from the accused as to why he hit the deceased, the accused told PW3 that the deceased had been intimidating him since he was a child. PW3 further testified that the deceased sustained an injury at the back of his head and blood was oozing from the mouth and nose.
6. PW5, Dr. Moses Maina carried out the post-mortem on the deceased and concluded that the deceased had died as a result of head injuries due to trauma. PW6, P.C. James Karanja testified that on the 13/5/2015, PW2 made a report that the deceased had been assaulted by the accused the previous night after which he was instructed by the Officer in Charge of police post to arrest the accused as the deceased was in serious condition.
7. PW8 testified that he was part of the investigations team of Runyenjes Police Station. He said that the investigations revealed that the accused knocked the deceased against the wall and further that there was an earlier assault report against the accused by the wife of the deceased.

C. The Defence

8. The accused testified that he did not go to the bar on the 12/5/2015 as alleged by various witnesses and that he went home and slept. He further testified that on the following day he was arrested by the police who did not explain to him his right. He denied murdering the deceased.

9. DW2, the mother of the accused and sister to the deceased testified that on the material day she was at home with the accused and that he did not leave to go to the bar. He gave a narrative of a long-standing land dispute between her family and that of the deceased. She accused the deceased of harassing her and her children.

10. The defence counsel Ms. Muriuki submitted that there was no evidence, forensic or otherwise that connected the accused with the assault of the deceased and that there was no proof that he hit the deceased on the head as alleged.

11. It was further submitted that the ingredients of murder and culpability of the accused had not been proved. Further the accused submitted that the whereabouts of the deceased could not be accounted for almost 12 hours and thus the possibility of intervening events could not be ruled out as was held in the cases of the **Supreme Court of India in Criminal Appeal No. 413 of 2007 Nizam Another v State of Rajasthan** as well as in the case of **Court of Appeal in Nyeri Criminal Appeal No. 308 of 2011 GMI v Republic**.

D. Analysis of the Law

12. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

a) *the death of the deceased occurred;*

b) *that the accused committed the unlawful act which caused the death of the deceased; and*

c) *that the accused had malice aforethought.*

13. In regard to the death, I note that the post mortem report indicated that the cause of death was head injuries due to trauma. The doctor who conducted the post mortem noted that the deceased had blood clots under the left side of the scalp and fracture on the left temporal area of the head.

14. PW3's evidence was that on the night of 12/5/2015, PW3 the accused hit the deceased on the lower jaw forcing him to fall over on his back. The deceased remained in that helpless condition until his wife PW2 took him to hospital. The owner of the bar informed PW2 about her husband in the morning as she was going to sell her milk.

15. The accused raised an alibi in his defence. He did not talk of the events of 12/5/2015 except that he was at home and slept there the whole night. In the case of **Kiarie vs Republic [1984] KLR** the Court of Appeal held that: -

“An alibi raises a specific defence and an accused person who puts forward an alibi as an 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”.

16. PW3, the bar attendant at the bar was well acquainted with both the accused and the deceased who were regular customers. She testified that on the material day the deceased approached her with Kshs. 20 coin for a drink but before he could hand over the coin, the accused hit his hand forcing the coin to fall down and that the accused then hit the deceased on the lower jaw him to fall over on his back. There is evidence that the deceased had been intimidating him since he was a child. PW3 saw an injury at the back of his head and blood oozing from the mouth and nose immediately after the fall and assault.

17. I have already stated that in my endorsed opinion the defence of the alibi by the accused and his witness was an afterthought and incredible with a lot of long history of differences between the accused and the deceased's family. The accused told PW3 that the deceased had intimidated him ever since he was a child. The accused was a man full of bitterness and seemed to have got the right opportunity to hit back.

18. PW5 testified that the cause of death was the head injuries. There was a 12cm fracture of the temporal bone. PW3 said the accused hit the deceased on the jaw which assault could have caused this fracture on the side of an epidural haematoma according to the post-mortem report.

19. The cause of death according to PW5 head injuries on the left side of the head. The doctor did not single out any of those injuries caused the death of the deceased.

20. The defence argued that the deceased's whereabouts could not be accounted for a period of twelve hours. This argument was dislodged by the evidence of PW2 and PW3. PW2 said she was informed of the assault of her husband by the owner of the bar the following morning. She went there and found him still lying on the floor in the bar.

21. PW3 who witnessed the assault also confirmed that when she reported on duty the following morning, she found the deceased lying near the door of the bar. This was the scene of the assault the previous night and the deceased was found at the same premises in a critical condition. There is no evidence that any other person assaulted the deceased. It is therefore not correct to say that the whereabouts of the deceased for twelve hours could not be accounted for.

22. I find the defence not plausible but just a mere denial on the face of the overwhelming evidence of the prosecution witnesses.

23. It is my finding that the prosecution have proved that the accused inflicted the head injuries that caused the death of the deceased. I find him responsible of the actus reus.

24. The prosecution has a duty to establish malice aforethought against the accused in any of the circumstances stated under **Section 206 of the Penal Code**. What can be deduced from Section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that: -

“an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”

25. There is evidence that the accused on the night of 12/5/2015 attacked the deceased without any provocation. It was PW3's evidence that the accused accosted the deceased when the deceased attempted to buy beer from PW3. Even though the deceased seemed to ignore the accused focusing on recovering his fallen Kshs. 20 coin, the accused followed him and hit him on his lower jaw.

26. PW3 may not be very accurate that this blow landed on the left lower jaw but PW5 confirmed that this is the injury on the left temporal side of the scalp that caused the death of the deceased.

27. The accused told PW3 that the deceased had been intimidating him since he was a child which was the reason for the attack. The accused was a bitter man who found a golden opportunity to revenge on his uncle. From his own words, the accused seems to have prepared the attack in his mind and was only waiting for a chance to execute it.

28. This is in my considered view premeditated killing that falls under **Section 206 of the Penal Code**.

29. Consequently, I find that the prosecution has proved malice aforethought on the part of the accused.

30. I find the accused guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code** and convict him accordingly.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for the accused

Accused in person