



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 195 OF 2017

(FORMERLY MACHAKOS HCCR NO. 28 OF 2015)

REPUBLIC.....PROSECUTION

VERSUS

MUSEMBI WAMBUA NDUKU.....ACCUSED

JUDGEMENT

Introduction:

1. The accused herein **Musembi Wambua Nduku** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that: *On 11th March, 2015 at Kilungu Village, Kikumbulyu, Location Kiwezi District Makueni County murdered Joseph Mutuku Wambua.*
2. The accused pleaded not guilty and the prosecution summoned a total of 3 (three) witnesses in support of its case while the defence called only the Accused.

The Prosecution Case:

3. **PW 1 Pascalina Ndinda Mutuku**, testified that the deceased Joseph Mutuku Wambua was her husband, and that on 11/03/2015 at around 5pm the deceased arrived from work and requested her to give him containers so as he would go and fetch water, she stated that she later followed him to fetch water too, however on her way back she found a crowd that had gathered and the deceased had fallen down and was bleeding from the head and nose, they rushed him to hospital and unfortunately the deceased passed on.
4. She further stated that the deceased is the uncle of the accused and that they occasionally quarreled on the allegations that the accused used to bring stolen properties home. Furthermore she stated that the accused used to sleep at her kitchen and did not have a house.
5. **PW 2 Mwikali Waambua**, testified that she was the mother of the deceased and recalled that on 11/3/2015 the deceased arrived home from work and requested for a container to fetch water, and that she heard the accused quarrel with the deceased, and upon hearing shouting and wailing she came out and found the accused hitting the deceased with a stick. She recalled that the accused hit the deceased 3 times while saying that he would burn his house, the deceased fell down bleeding and they took him to hospital when he was pronounced dead.
6. In addition, she stated that the accused was her grandchild and that she brought him up, however they had issues as the accused used to steal other people things. Further, she stated that she attended the postmortem together with PW1 where she identified the body of the deceased to the doctor, who conducted the postmortem on 17th March, 2015.
7. **PW 3 LMK** testified that the deceased was her uncle and that on 11/03/2015 she was a student at [*particulars withheld*], and that during the material time she was at home for school fees. She recalled that at around 6.00 pm the deceased called her to the gate, where she went and found him carrying water and she requested her to assist him carry the water into his bicycle.
8. She stated that the deceased and the accused were quarrelling, and that the accused came with a stick and hit the deceased on the head twice and the deceased fell down and was bleeding from the nose and the ears. She identified the stick allegedly used by the deceased. She further testified that the accused was her cousin and that PW2 was there and she witnessed the accused hit his uncle.

The Defence Case:

9. At the close of the Prosecution case the Court ruled that the Accused person had a case to answer and put him on his Defence. In his sworn Defence, the Accused told the Court that that he used to work as a barber and that on 11/03/2015, he woke and went to help his wife

who operated a kibanda and that on the material day he came back home at around 4pm.

10. It was his statement that on the material date his uncle while coming back from fetching water came to where he was with his wife and threatened to chase him with his wife away and started demolishing his kibanda and threw away his things and that is when he held him, but he started beating him.

11. He further stated that the deceased mother started beating him with a stick and that when he dodged the second hit the same struck the deceased who fell down. He also stated that the deceased was beating his wife when he fell down.

Issues and Analysis:

12. It is trite that for Prosecution to secure a conviction on the charge of murder, the following three ingredients must be proved against an Accused person. These ingredients are: -

a) ***Proof of the fact and the cause of death of the deceased;***

b) ***Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;***

c) ***Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.***

a) Proof of the fact and cause of death of the deceased:

13. The evidence of PW1 and PW2 as tendered proves the death of the deceased. PW1 **Pascalina Ndinda Mutuku** the deceased mother testified that she accompanied the deceased to hospital when he was declared dead. Additionally, she testified that she attended the postmortem on 17th March, 2015.

14. It has been held that the fact of death can be proved without medical evidence in certain circumstances. In the Nigerian case of **IDEMUDIA VS THE STATE (1999) 5 SCNJ 47** in answer to the issue for determination, His Lordship Lead Judgment (**KATSINA-ALU JSC**)P had this to say:

“This was a criminal trial and in all criminal trials, the onus is on the prosecution to establish its case beyond reasonable doubt. In a murder trial, the prosecution must show conclusively that death was caused by the act of the accused. In other words, there must be a nexus between the act of the accused and the death of the victim. It is now settled that medical evidence though desirable in establishing the cause of death in a case of murder, is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with. That is the situation in the instant appeal. There is abundant evidence from eye-witnesses that the appellant shot and killed Ngozi Okpara instantly. Medical evidence on the circumstances of her death was clearly not essential.”

15. **PW2 Mwikali Waambua** is the deceased mother and testified that she equally accompanied the deceased to hospital when he was pronounced dead and that she also attended the postmortem. The Court therefore in the circumstance is inclined to find as a matter of fact that indeed the deceased herein died. The death was as a result of the attack inflicted on the deceased on the material day in which he died as he was being taken to hospital.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person:

16. It is evident from the foregoing that the deceased died as result of the injuries sustained after being hit by the accused. The evidence of PW2 and PW2 amounts to direct evidence against the accused. They testified that they witnessed the accused hit the deceased with a stick, and consequently the deceased fell down and began bleeding from the nose and the ears.

17. The accused has alleged that it was his grandmother who hit the deceased after an attempt to hit him but missed. This evidence in my view cannot displace the evidence of PW2 and PW3 above, and that leaves the Court with no option but to make reasonable deductions from the available direct and circumstantial evidence taking into consideration the fact that the Accused being an interested party may have lied to save himself.

18. Considering the severity of the injuries suffered by the deceased upon being hit from behind the head, I am convinced that he died from the hitting by the accused.

19. From the foregoing, it is my considered view that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which involved hitting him with a stick fatally which constitutes the ‘actus reus’ of the offence.

c) Proof that the said unlawful act or omission was committed with malice afterthought:

20. Section 203 of the Penal Code provides: -

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

21. The intention to cause death or grievous harm is malice aforethought and under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

“206. 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.”

22. From the foregoing, it is my view that the circumstances of this instant case establish the unlawful act that led to the death of the deceased was committed with malice aforethought. It is therefore my finding that the prosecution in their evidence has proved beyond reasonable doubt that it is the accused who hit the deceased leading to his death. The same was intended to harm the deceased and therefore a clear intention to cause grievous harm which unfortunately led to the death of the deceased.

23. Further, the accused in answer to the chargers casually denied that he was the one who hit the accused but instead unwittingly pushed the blame to the deceased mother. Section 203 of the Penal Code states that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder and Section 204 provides for Punishment of murder to be death.

Conclusion:

24. The law safeguards life and generally abhors taking away life except to the extent authorized by the Constitution or other written law. From the foregoing it is my view that the Prosecution has succeeded in proving that Accused caused the death of the deceased through by an unlawful act with malice aforethought and thus court convicts him for the offence of murder.

25. The court makes the following orders;

i) Accused is hereby found guilty and convicted for an offence of murder.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE