



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 8 OF 2013

REPUBLIC

VERSUS

JACKSON MUNENE MUCHANGI.....1ST ACCUSED

DAVID KINYUA MUTHONI.....2ND ACCUSED

JUDGMENT

On or about the 22nd day of January 2013, Wilson Mutiso Kaloki's lifeless body was found in a pool of blood beside a public road at Ruringu in Nyeri County. A few hours before his death, the deceased had been engaged in a physical confrontation with the accused at their residence, several metres from where the deceased's body was found.

Owing to these events that preceded the deceased's death, the accused were suspected to have murdered the deceased and so they were arraigned on 17 April 2013 on a charge of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63, the particulars being that on the night of 21 and 22 January 2013 they murdered the deceased at Ruringu area within Nyeri County. They pleaded not guilty to the charge thereby rendering it necessary for the state to present evidence in proof of its case against them.

The first witness was James Mwaniki Kahiga (PW1), the 2nd accused's father; he recalled that on the night of 21 January 2013 he was in his house together with his wife, Cecilia Muthoni (PW2) when he heard some sort of scuffle outside. He ventured out to check what the matter was. His son, the 2nd accused, also came out of his house. Kahiga followed him. He found the 1st accused beating the deceased with a stick. His son approached them and like the 1st accused he too struck the deceased. They then ran towards the road. When he enquired from the deceased what the problem was, he told him that the dispute was over Kshs. 100 which he owed the two accused. The accused had sold him a certain item worth kshs. 300; he had paid them Kshs. 200 leaving a balance of Kshs. 100. While he was talking to the deceased, the accused returned and started hurling rocks at them. Kahiga advised him to return the item he had purchased from the accused and in return they would refund his money. He agreed and promised to return the item the following morning since it was at his place of work.

He went back to sleep but on the same night his son came back and told him that the police wanted to see him. He went outside and found the police together with his son; they pushed open the door to the deceased's house and entered; they picked what the witness described as a TNA card and National Identification waiting card.

When they came out of the house, they went outside the gate and walked for about three hundred metres; they found a police vehicle with a body inside; there was blood splattered at the scene.

He asked his son whose blood it was and he responded that it was the deceased's blood; he also told him that the deceased was running when he fell down and died instantly.

Kahiga testified further that he lived together with the deceased and the accused in the same plot. As a matter of fact, the deceased was his tenant.

He added that when he heard the noise he came out with his wife and neighbours.

Indeed, his wife Muthoni (PW2) testified and confirmed that when they heard disturbances outside their house on the night of 21 January 2013, she followed her husband out together with one Mwangi who had visited them. Initially she testified that they found the accused and the deceased fighting and they stopped fighting only when she asked them to. Later in her testimony she said that her husband arrived at the scene first and by the time she and Mwangi reached there he had already separated the protagonists. It was her evidence that after they were separated everybody went back to their respective houses except the deceased who remained outside. She learnt of the deceased's death the following day at 5 PM. She testified that the accused were arrested on the night of 22 January 2010.

Simon Kaloki Mutiso (PW3), the deceased's son identified his father's body at the mortuary for post-mortem purposes.

Corporal Joseph Cheruiyot (PW4) testified that on 21 January 2010, at midnight, he was at Nyeri police station as the duty officer together with his colleague police constable George Shitoshi (PW5) when he received a call from the control room. They went to the scene and found the deceased's body lying on the ground, besides the road. When they enquired from the people around one of them told them that they knew where the deceased lived. He took them there and in the officer's estimation it was around 500 metres from the spot where the body was found.

The investigations were undertaken by constable Shitoshi (PW5) who testified that he was on duty at the material time. He proceeded to the scene and found the deceased. Blood was oozing from his mouth. The entire body was soaked in blood. He confirmed that the man who directed them to the deceased's house was in fact the second accused; they found him at the scene together with police officers from the dog section.

Corporal David Sambu Musyoki (PW7) testified that on 22 January 2013 he was attached at Nyeri police station and on that particular date he was on patrol duties as the night duty officer at 10 PM when he received a call from Chief Inspector of Police Mohamed Jarso who was the officer in charge of Nyeri police station; he instructed him to go to the police dog unit at Ruringu and team up with other officers who were in the company of another man who had information of a person who committed murder. Corporal Musyoki proceeded to the area and found other officers at the scene. He testified that they found Kahiga (PW1) who volunteered to give information on who killed the deceased. He told the officer that the deceased was killed in the neighbourhood of his residence. He asked the officers to accompany him to arrest the suspects. The old man eventually identified the accused who were then arrested and subsequently charged.

Like corporal Sambu, Senior Sergeant Abednego Sila Ndonge (PW8) testified that he also received a call from chief inspector Jarso on 22 January 2013 at about 11.30 PM. He proceeded to Jarso's office and found two other people in his office who had come to report a case of murder. He identified one of these people as Mwaniki (PW1). He recorded their statements. They told him that there had been a confrontation the previous night between the accused and the deceased at the residence of Mwaniki. He then went to the scene with police constable Oloo and the driver. There was blood at the scene. The scene, according to him was about 100 metres from Mwaniki's house. He established that there was no blood at Mwaniki's compound where the accused and the deceased had confronted each other. He then went to the mortuary where he established that the deceased had sustained multiple stab wounds on different parts of his body. The suspects were arrested by corporal Musyoki on 22 January 2013 at 6 PM.

Dr Obiero Okoth (PW6) conducted the post-mortem on the deceased's body at Nyeri Provincial General Hospital. He observed that the body had turned pale because of bleeding. There were stab wounds on the left posterior axillary region; left iliac region extending to the urinal region; posterior track or paraspinous region and in the lumbar region. The lungs had collapsed and there was bleeding behind the abdomen.

As a result of these injuries, the doctor formed the opinion that the deceased died as a result of exsanguinating haemorrhage secondary to stab wounds. In other words, severe bleeding led to the deceased's death.

Dr James Mburu (PW9) who subjected the accused to mental assessment testified that he found them to be fit to stand trial; the accused were aged 16 at the time of the psychiatric assessment but their ages were not medically assessed; according to the doctor he was more concerned with their mental status than with their age.

The first accused opted to testify on oath when the court ruled that a case had been made out against them sufficient enough as to require them to make a defence. He testified that as at January 2013 he was 16 years old and was in class seven. He knew the deceased as he had rented a house in the same plot where the accused lived. It is also in the same plot that the 2nd accused lived. His parents and those of the 2nd accused were family friends. On 21 January 2013, the deceased was at the plot drunk. According to him, he was insulting him and the 2nd accused. It is then that the 2nd accused's parents came out and spoke to them and each one of them went to their houses. He couldn't tell where the deceased went though. On the following day, between 9.30 and 10 PM somebody knocked at his door. Before he opened, the police broke into his house. They arrested him and took him to the police station where he learnt that he had been arrested because of the deceased's death.

On cross-examination he admitted that there was a disagreement between him and the 2nd accused on the one hand and the deceased on the other and that the deceased had been insulting them.

The second accused opted to give unsworn statement. It was his version of the story that on the night of 21 January 2013 he found the deceased making noise outside. He talked with the deceased and his parents also talked with him and everybody went to sleep. On the following day at night, he was told that he was required outside; when he came out of his house, he found police officers. He was asked to accompany them to the police station and it is there that he was told that he murdered the deceased.

Section 203 of the **Penal Code** which is one of the provisions under which the accused were charged defines the offence of murder; it states as follows:

203. Murder

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

From this statutory expression it is apparent that in order to establish the offence of murder it is incumbent upon the state to prove, beyond reasonable doubt, the fact of death of a person and that the death was in itself unlawful; that the cause of death was an act or omission of another person who, it has also to be proved, was actuated by malice aforethought in his actions or omissions.

That a person identified as Wilson Mutiso Kaloki died on or about 21 or 22 January 2013 is a fact that is not subject to dispute. There was sufficient evidence from Mwaniki (PW1), his wife Muthoni (PW2) and even the accused that the deceased was not only a person they knew but also that he lived with them. The deceased's son Simon Kaloki Mutiso (PW3) positively identified his body at the mortuary for post-mortem purposes. And finally, the pathologist (PW6) certified the deceased's death and his report to this effect was admitted in evidence. In short, the prosecution proved beyond doubt the death of the deceased.

Was the death unlawful? It certainly was. According to the post-mortem report, the deceased sustained multiple wounds on different but sensitive parts of his body from which he bled and died; to be precise, and in the language of the pathologist, the deceased died of 'exsanguinating haemorrhage secondary to stab wounds'. Thus, the death could not have been a natural occurrence but was deliberately caused by unlawful act or acts of another person; it is not possible that the injuries out of which the deceased bled and died were self-inflicted. Finally, no justifiable cause was demonstrated why the deceased had to die the way he did and therefore his death was, for all intents and purposes, as a result of unlawful acts of another person.

A rather difficult question to determine is whether the accused perpetrated this crime. It has been admitted by the state, and rightly so, that the evidence against the accused is largely circumstantial for the obvious reason that none of the witnesses saw them attack the deceased, at least at the scene where his lifeless body was recovered. However, as much as direct evidence would ordinarily be the best evidence it turns out that more often than not, crimes are committed in discreet circumstances and, partly for this reason, courts accept and convict on indirect or circumstantial evidence whenever it is appropriate to do so. Reference to this sort of evidence is found in section 164 of the Evidence Act, cap. 80 which states as follows:

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

This provision of the law is understood to mean that where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. Where the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence. There is always a caveat, however, that owing to its indirect nature, circumstantial evidence must be narrowly examined before drawing any inference of guilt on the accused. The trial court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused.

In **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** the Court of Appeal for Eastern Africa discussed this type of evidence and cited *Wills on Circumstantial Evidence*, where it is stated that:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

In **Simon Musoke versus Republic (1958) EA 715** cited with approval the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where the need for caution in convicting on circumstantial evidence was expanded so that besides the incompatibility of the inculpatory facts with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt, a trial court is bound to consider whether there exist any other co-existing circumstances which can either weaken or destroy altogether the inference of guilt; in that case, the Privy Council held (at page 489) that: -

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

With this in mind, the immediate question that emerges is this; what are the inculpatory facts that link the accused with the deceased's death?

There is evidence that two or at most three hours before the deceased's body was recovered not far from his house, there had been an altercation between him and the accused. Although it was Muthoni's (PW2's) evidence that there was sort of a brawl amongst them, her husband who arrived ventured outside their house earlier was categorical that he saw both accused assaulting the deceased. In any case, Muthoni said later in her evidence that she arrived when her husband had separated the accused and the deceased and so her evidence that the deceased and the accused were fighting may not be reliable. Both of them, however, recognised the deceased and the accused; they were both positive that they are people they lived with and more so, the 2nd accused was their son. According to Mwaniki (PW1) there was electricity light. In short, the accused were positively identified as the people who were in confrontation with the deceased a few hours before his apparent violent demise.

Were the accused at the scene of the murder? When the prosecution evidence is considered in its entirety, the accused are placed at the scene of the murder; for instance, according to Mwaniki (PW1) for instance, the accused ran away towards the road when he approached them but as he was talking to the deceased, they came back and started hurling rocks at them; that is the last thing he saw of them. Contrary to the testimony of his wife, he did not see them go back to their respective houses.

I find Mwaniki's evidence in this regard more believable than that of his wife for this reason; his wife testified that she entered her house first and left Mwaniki and the deceased outside. Logically, if Mwaniki went back to his house before the accused returned, there is no way his wife would have seen the accused going back to their houses. When these facts are put together, the only logical conclusion that one can make is that the accused did not go back to their houses even after Mwaniki and his wife retired to sleep. If Mwaniki's evidence is anything

to go by, they went down to the road.

According to constable Shitoshe (PW5) they found the 2nd accused at the scene together with police officers from the police dog unit. It was his evidence that it was the 2nd accused who showed them where the deceased lived.

Constable Shitoshe's evidence would appear to corroborate that of the 2nd accused's father (PW1) who testified he was awakened by his son either on the night of 21 January 2013 or in the wee hours of 22 January 2013; he was in the company of police officers who, according to constable Shitoshe's evidence were Shitoshe himself and his colleagues.

And according to corporal Musyoki (PW7) it was in fact the 2nd accused's father (PW1) who volunteered information that not only led to the arrest of the accused as the suspect of the deceased's murder but he also led the police officers to where they lived. Mwaniki's evidence in this regard was obviously crucial because the last time he saw the deceased was when he was being assaulted by the accused who ran away towards the road where the deceased's body was found.

The investigations officer (PW5) corroborated the testimony of Musyoki (PW7) and confirmed that Mwaniki (PW1) had on 22 January 2013 at 11.30 AM reported a case of murder. An earlier report had been received the previous night or in the early hours of 22 January 2013. He established in the course of his investigations that the deceased's body was found about 100 metres from where he lived together with the accused.

These facts were uncontroverted and I find the testimony of these prosecution witnesses not to have been shaken by the defence either in cross-examination of the prosecution witnesses or by their respective statements of defence. For instance, though the 1st accused testified that they all went back to their houses after the 2nd accused parents talked to them on the material night, none of them disputed Mwaniki's testimony that they ran towards the road from where they hurled rocks at the deceased and Mwaniki himself. They also did not deny that they had a dispute between them and the deceased; though the 1st accused denied it, there was uncontroverted evidence that the dispute ended up in a physical confrontation in which the deceased turned out to be the loser.

The 2nd accused did not deny that he was found at the scene of murder on the material night. He also did not contest or deny his father's testimony that he, the second accused, had told him that he saw the deceased fall and die instantly. He could not have seen these things if he was in his house.

When I consider all this evidence, in its entirety, I am persuaded to come to the conclusion that what I consider as the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of their guilt. I am satisfied that the prosecution has discharged the burden of proving facts to such standard as this court to be entitled to draw from them the inference of guilt on the part of the accused. In the same breath, I do not find anything in the accused's defence that presents evidence of other co-existing circumstances which would weaken or destroy that inference of guilt.

The final question is motive of the attack or the malice aforethought. This notion is the *mens rea* or the mental element of the offence of murder; (See **Woolmington v DPP [1935] AC 462**); it is either **express or implied**; it is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), and it is implied whenever it is proved that there was an intention to unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**). It finds statutory expression in Section 206 of the **Penal Code** which prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

206. Malice aforethought

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.**

The evidence of the 2nd accused's father was that the accused was subjected to attack by the accused because he owed them Kshs. 100. According to him, the accused had sold him a certain item for Kshs. 300 out of which he had paid Kshs. 200/=. It was not clear whether he was unable or had simply ignored to pay the balance; what was clear though is that there was an outstanding balance of Kshs. 100 which was apparently the source of the disagreement between them. In my humble view, this prosecution evidence was not displaced.

According to the pathologist, the deceased died of haemorrhage as a result of multiple stab wounds. What this brutality to which the deceased was subjected suggests is that the accused either intended to cause the death of the deceased or wanted to cause him grievous bodily harm. By stabbing the deceased the way they did, the accused must have been aware that the injuries would probably cause his death or do him grievous harm and they were also indifferent whether death or grievous bodily harm would result. In the alternative, they may have intended to commit a felony.

All these intentions were proved by the state beyond reasonable doubt but, according to section 206 of the Penal Code, any one of them is sufficient to constitute malice aforethought. I am satisfied that the state has proved malice aforethought beyond all reasonable doubt.

In the final analysis I find and hold that the accused are guilty of the offence of murder as charged.

Dated, signed and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE