



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO. 31 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMOCK KAMAKYA MBUVI1ST ACCUSED

FRANCIS NZIOKA PETER.....2ND ACCUSED

JUDGEMENT

1. **JAMOCK KAMAKYA MBUVI** and **FRANCIS NZIOKA PETER**, the accused persons herein are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 18th September, 2011 at Simba market, Wolwa Location in Makeni District within Makeni County jointly murdered JACKSON NZIOKA MUTUKU.

2. The prosecution summoned a total of six witnesses in support of its case while the defence called only the accused persons.

3. **PW.1** was **PURITY WAYUA MULI** who testified that she is a resident of Loitoktok and is a vegetable trader. It was her testimony that on 18/9/2011 at about 5.30 p.m, she was at her sister's home in Simba market in Wolwa Location, when the deceased who hails from the same village in Masimba in Wolwa as hers came and greeted her whereupon the 1st accused approached while riding a motor cycle and ferrying the 2nd accused as a pillion passenger. She knew the accused persons as her neighbours in Masimba area and that the 2nd accused alighted from the motor cycle and went to his home in the neighbourhood while the 1st accused approached the deceased and told him he had been looking for him. She saw the 1st accused and the deceased walking to the inside of the plot where her sister lived and she followed them up to the corridor where they were and heard the 1st accused inform the deceased that the deceased had insulted him and called him a fool and that the deceased sought forgiveness when the 2nd accused came from the rear door of the plot and held the deceased by the shirt collar. The deceased insulted the 2nd accused and told him to release him. It was then that the accused persons and the deceased started fighting that the 2nd accused and the deceased started fighting then using their bare hands. She testified that the wife to the 2nd accused and his sister came to the scene and tried to separate the combatants who were fighting to no avail. Then the 2nd accused left briefly and came back with a stool and hit the deceased three times with it on the head using the said stool (MFI-1) and some parts of the stool got broken. She testified that she knew the stool as it belonged to her sister who used to keep it in her nearby bar. It was her testimony that the deceased fell down after he was hit with the stool and the broken part of the stool was used by the 1st accused to hit the deceased who was already down and then the accused persons ran away. She testified that the deceased's employer was telephoned and she came with a motor vehicle and took the deceased to hospital. It was her testimony that the deceased could not be able to talk by the time he was taken to the hospital and the following day she heard that the deceased had passed away. She recorded a statement with the police. On cross-examination, she testified that her sister was a waiter at a nearby bar that was closed and was not operational at the time and that she knew the 1st accused as a "boda boda" operator and further that when the 2nd accused arrived and held the deceased by the collar, the violence began. She testified that the 1st accused appeared drunk but the 2nd accused and the deceased did not appear to be drunk. On cross examination by the 2nd accused, she testified that the 2nd accused's wife is called Ichuoni Mbithe and his sister Nzilani. She testified that she had known the 2nd accused since his school days and his full names are Francis Nzioka Peter that she heard being called out in court, however she knew him previously as Nzioka. She testified that the deceased's body was found in the residential plot and that she did not mention Nzioka's three names in her statement but however did not know any other Nzioka in the neighbourhood other than the 2nd accused. She testified that the stool was taken by the police officers from the scene and she was only able to tell that the 1st accused was drunk as he was staggering and talking like a drunk person. She stated that the deceased insulted the 2nd accused before the fight broke out but however she did not indicate the same in her statement. On re-examination, she testified that Nzioka the 2nd accused is the one she had known since their school days.

4. **PW.2** was **ANGELLA KIOKO** who testified that she was a housewife who hailed from Simba market in Wolwa location of Makeni County. She told court that on 18/9/2011 at about 5.45 p.m. while at home she received a report that her worker had been injured and she took a "boda boda" and went to Kisawathe bar where along the corridor she found the deceased on the floor and there was a broken stool

next to the body of the deceased. She testified that the corridor where she found the deceased was within the building that houses the bar but at the rear. She testified that the deceased was bleeding from the nose and mouth and was unconscious, and could not talk and noticed that Purity (PW.1) was around. She then looked for transport and took the deceased to Makindu Hospital where he was admitted and was informed at 3.00 a.m. that night that the deceased had passed away. She went to the hospital the following day where she confirmed the death of the deceased and made a report to the police. She identified the broken stool (MFI.1) that she found at the scene. On cross-examination, she testified that she was telephoned by a neighbor and that she found the deceased alone at the scene. She told court that the bar was closed and was not operational at the material time and confirmed that the deceased was her domestic employee. On cross-examination by the 2nd accused she testified that she entered the building that houses the bar and found the deceased at the corridor adjacent to the bar that was near the rear of the building. She testified that she found the deceased alone but Purity (PW.1) came in while she was there though her statement did not mention Purity.

5. **PW.3** was **DANIEL MBOYA MUTUNGA** who told the court that he was a carpenter hailing from Kangundo and that on 21/9/2011 at about 9.00 a.m in the morning he went to Masimba market to see a sick relative named Nzioka Mutuku who had been assaulted (the deceased). He testified that the deceased passed away following the assault and further on 22/09/2011 he went to Makindu Hospital Mortuary where he identified the body of the deceased to the doctor who carried out the post mortem that took place on 21/09/2011. On cross-examination, he testified that the deceased was alive on 20/09/2011.

6. **PW.4** was **DAVID MAKAU MUTALA** who testified that he was a farmer from Kangundo and that on 21/09/2011 at 9.00 a.m he was at Makindu Hospital Mortuary where he identified the body of Nzioka Mutuku (the deceased) who was his nephew to the Doctor who carried out the post mortem and he later recorded his statement. On cross examination, he testified that he knew the deceased as Nzioka Mutuku and did not recall the Christian name of the deceased.

7. **PW.5** was **NO. 38287 PC. MICHAEL KILONGOZI**. He told the court that he was stationed at Kitengela Police station and formerly was stationed at Sultan Hamud Police Station. It was his testimony that on 19/09/2011 at about 2.35 p.m. a report of a serious assault was made at Sultan Hamud Police station by PW.2 and the victim was said to be the deceased herein. He stated that the assault was said to have taken place the previous day at Simba Market but due to lack of transport he went to the scene on 20/09/2011. He testified that the scene was at a building known as Kisenani and that Pw1 who was at the same building and was an eye witness narrated what had happened as well showing him broken piece of a wooden stool which was said to have been used in the assault. He told the court that the stool was inside the building at the corridor and that the building was comprised of a shop and a bar which corridor was at the rear of the shop and the bar. He went on to add that he took possession of the stool and recorded the statements of the witnesses and then proceeded to Makindu District Hospital to visit the victim but however on arrival he learnt that the victim had passed away the previous day on 19/9/2011 while undergoing treatment. He and another officer went to the mortuary and saw the body of the deceased then returned to the police station where he kept the stool that was recovered from the scene as an exhibit (M.F.I.1). It was his testimony that on 21/09/2011 while in the company of the relatives of the deceased they proceeded to Makindu Hospital Mortuary where the relatives identified the body of the deceased to the doctor who carried out the post mortem. He also informed the court that on 17/09/2012 the 1st accused was arrested by members of the public and brought to Sultan Hamud police station and he re-arrested the and placed him in the cells and had him charged. He told court that on 6/7/2013 the 2nd accused was arrested by police officers from Emali police station where he was placed in the cells and also charged. He told the court that the accused persons were implicated by the eye witness Purity Wayua Muli (PW.1). He produced the stool as an exhibit (Exhibit 1). On cross examination he told the court that he arrived at the scene two days after the offence and found the stool at the scene but could not tell if the stool had been interfered with but maintained that according to Purity (PW.1) and Angelina PW.2 nobody had interfered with the stool. He told the court that the 1st accused was not arrested on the material day and further that he could not tell if he was drunk, nevertheless the arrest took place after one year because the 1st accused was nowhere to be seen and was being looked for. On cross-examination, he testified that he found the stool at Kisenkui bar and did not see the accused commit the offence nor did he find the 2nd accused at the bar. He told the court that he did not find any blood stains at the scene and did not establish who the owner of the bar was. He testified that according to the eye witnesses the 2nd accused was with the 1st accused at the material time and he was given the name of the 2nd accused as Nzioka but not the full names. He went further to add that the deceased was also known as Nzioka but both the 2nd accused and the deceased were mentioned by witnesses as sharing a common name of Nzioka. He informed the court that the 2nd accused was identified to the OCS as a culprit and the OCS re-arrested him. Further that no identification parade was carried out.

8. **PW.6** was **DR. MAKAU DOUGLAS** a Medical doctor stationed at Makindu Level 4 Hospital. He told court that he has a bachelor of Medicine and surgery from the University of Nairobi where he graduated in the year 2009. He testified that on 21/09/2011 while at the same Hospital he carried out a post mortem on the body of Jackson Nzioka Mutuku (the deceased) which body was identified to him by the doctor. He testified that the body was dressed in blood stained clothes and stiffness of the body had set in following the death. He observed that there was blood in both eyes, nose and mouth, there was a deep cut wound above the left eye brow, there were open wounds on the frontal bone (the forehead), the occipital bone was depressed at the back of the head and the depression may have been caused by a blunt object hitting the same hard. He further observed that there was a strangulation mark on the neck. According to his observations, internally, the left lung was collapsed and this meant that the lung had been depressed of air and therefore collapsed. There was bleeding in the lung (exsanguinations) cavity due to trauma. There was a trachea at the border between the occipital and frontal bone. There was also epidural haematoma and subdural haematoma and. He told the court that these injuries were caused by trauma use of a blunt object. He told the court that there was rupture of the middle cerebral artery and middle meningeal artery and these injuries were also caused by a blunt object. His opinion was that the cause of death was cardio pulmonary arrest due to massive cerebral haemorrhage caused by blunt force trauma. He filled and signed the post mortem form on 21/09/2011 and produced it as an exhibit (exhibit 2). On cross-examination, he testified that the injuries were caused by a blunt object and that falling could not lead to such injures as there was also strangulation and strangulation could not have been caused by falling down. Further that the strangulation deviated the blood to the eyes which meant the deceased was being held by the neck and being hit at the same time with a blunt object.

9. This court took over this case from Justices Thurairaja Jaden and Ogola which had proceeded up to the close of the prosecution's case. As is mandatory this court explained to the two accused persons that under section 200 as read with section 201 (2) of Criminal Procedure Code they had a right to continue with the matter from where it had reached or to have the trial begin afresh and to recall the witnesses. However the two accused persons chose to proceed with the matter from where the earlier judge left it.

10. At the close of the Prosecution case, this Court ruled that the Accused persons had a case to answer and put them on their defence. The

1st accused opted to remain silent in defence while the 2nd accused elected to tender a sworn testimony. The 2nd accused testified that on 18.9.2011 he was at home at Simba Market with his three children and that he heard some noise and when he ventured out he heard that some people had been fighting. He testified that the owner of the building was not in good terms with him hence he did not approach the building where the noise came from. He testified that the owner of the building claimed that he had bought the plot from his father but had no documentation. He told the court that the testimony of Pw1 was false because there are many Nzioka's in the area at Simba Market. He told the court that on 6/7/13 he was arrested but no identification parade was done to enable Pw1 positively identify him and therefore he maintains that he was fixed by Pw1. He testified that he did not know the deceased. On cross-examination, he testified that the land dispute was settled in favour of his father. He testified that he knew Pw1 for long, however he came to know the 1st accused in court. He testified that he heard noise when he was at his home and it sounded like furniture was being broken and that he was with his children at home but did not intend to call them as witnesses.

11. Mr. Machogu learned counsel for the prosecution submitted that the death of the deceased and the cause are evidenced by the autopsy report by Pw6 and the evidence of Pw4 who identified the body of the deceased. Counsel submitted that with regard to malice aforethought and the identity of the perpetrator, Pw1 who was then with the deceased saw the accused persons alight from a motorcycle and that the 1st accused came and indicated that they were looking for the deceased and they requested him to join them and went together to a nearby plot. She followed them there and saw the 2nd accused emerge from the building and who held the deceased by his collar shirt whereupon the deceased insulted him and a fight between the two ensued. The 1st accused joined in and assaulted the deceased. Further that the 2nd accused went and came back with a stool and hit the deceased and the stool broke and a piece of the same was used by the 1st accused to hit the deceased. Pw2 came to the scene and found the deceased bleeding and saw the broken piece of the stool next to him. Counsel submitted that the accused persons were well known to Pw1 and they caused the death of the deceased. With regard to malice aforethought, counsel submitted that within the meaning of section 206(a) of the Penal Code, the accused persons had the intention of inflicting injuries on the deceased that led to his death because other than attacking him with their fists they used a wooden stool to injure him. Again the evidence of Pw1 who knew the accused persons placed them at the scene of crime as she witnessed the incident. There was no need for an identification parade as she duly recognized them. Counsel went on to submit that there was malice aforethought on the part of the accused persons since the injuries inflicted left no doubt that they had intention to cause grievous harm which led to the death of the deceased. Finally counsel submitted that the prosecution has discharged its burden of proving their case beyond reasonable doubt against the accused persons and that they be found guilty of the offence of murder and sentenced accordingly.

12. Mr. Mutia learned counsel for the 1st accused submitted that the prosecution has failed to prove its case against the 1st accused. He submitted that the element of malice aforethought on the part of the 1st accused has not been proven as there is no evidence to connect the 1st accused with the death of the deceased. Mr. Mutinda Kimeu learned counsel for the 2nd accused submitted that no identification parade was conducted hence the 2nd accused was not identified. He submitted that the failure to produce the blood stained clothes and photographs meant that the case was fabricated. He further submitted that malice aforethought was not proven and relied on the case of **Rv Malombe Muli(2014) eKLR**

13. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In **Anthony Ndegwa Ngari vs 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.

(a) The death of the deceased

14. The evidence on the death of the deceased has been proved by PW3, Pw4, who saw deceased's body that was lifeless and witnessed the post mortem as well as by the postmortem form (Exh2) produced by PW6 that confirms that the deceased *died of* cardio pulmonary arrest due to massive cerebral haemorrhage caused by blunt force trauma.

(b) Proof that accused persons committed the unlawful act which caused the death of the deceased

15. The 1st accused remained silent whereas the 2nd accused has denied that he committed the unlawful act which caused the death of the deceased. He has raised an alibi, and from the evidence the death appeared to have been a combined effort by both accused persons who were later charged. The 2nd accused has maintained that he was at home on the material time with his three children. The person who saw the accused persons attacking the deceased is a single identifying witness (Pw1) and who gave an account of the events from the time that the accused arrived to the time they left and this court is cautious of the danger of relying on a single witness. This court is cognizant of the fact that even without corroboration, the trial court can convict an accused person so long as it is satisfied with the quality of the evidence of the single witness especially as regards the witness' truthfulness. The court warns itself of the danger of acting on the uncorroborated testimony of Pw1. However having tested the evidence of Pw1 against the decisions given in the cases of **Abdalla Bin Wendo & Anor vs R[1953J 20 EACA 156** and noted that the accused persons were well known to Pw1, she had enough time to see them and follow them to the corridor where the deceased met his death. I am satisfied that all the factors put together leave no doubt as to Pw1's ability to positively identify the accused persons. The identification was by recognition as she had known them prior. In fact the said eye witness confirmed that the 2nd accused was a former schoolmate while she had known the other one for about a year and that both hailed from her village within Masimba area. Under those circumstances I find there was no need to conduct an identification parade. The statement by the said eye witness produced by the defence as an exhibit confirms that the names of both accused persons were clearly indicated and that the witness duly narrated how the incident happened. There was no issue of mistaken identity whatsoever as the incident took place in broad daylight. Her testimony is corroborated by the evidence of Pw6 who conducted the postmortem and who formed the opinion that the cause of death was cardio pulmonary arrest due to massive cerebral haemorrhage caused by blunt force. Pw1 stated after the accused persons finished with assaulting

the deceased using their fists they used in turns a wooden stool nearby to land the killer blow on him. A piece of the wooden stool was produced by Pw5 as an exhibit who recovered it at the scene and which was positively identified by Pw1.

16. From the foregoing I find that the Prosecution has been able to prove beyond reasonable doubt that the accused persons did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence. The defence evidence given herein does not shake that of the prosecution. Indeed it transpired from the evidence of the eye witness that the 1st accused was in company of the 2nd accused when they approached the said witness who was then with the deceased and informed her that they had come for the deceased over a certain issue. The 1st accused was found by members of public at the scene but he managed to hoodwink them that he would assist to ferry the injured deceased to hospital only for him to speed away on his motor cycle.

17. The 2nd accused has claimed that no identification parade was conducted. However I am guided by the case of **Maitanyi versus Republic (1986) KLR at page 198** where the Court of Appeal held:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made...if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description.”

18. Going by the above authority an identification parade is essential especially where the witness is not sure of the identity of the suspect at the time of the incident. However in the present case the accused person were well known by Pw1 as they hail from the same area. In the circumstances identification parade would have served no useful purpose as Pw1 gave the names of the assailants to the police. Further identification parades are not the only evidence of identification as in this case the identification evidence was based on what Pw1 saw and who described everything in detail in her statement made on 20/9/2011. Suffice to add that the defence has also sought reliance on that statement when it produced it as D.ex1.

(c) Proof that the accused had malice afterthought

19. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **Roba Galma Wario v Republic [2015] eKLR** where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

20. Malice aforethought was defined in the following cases;

(a) **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intention to cause death

- Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR**, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

21. The accused persons were said to have hit the deceased on the head. The 2nd accused brought a stool and broke it on the head of the deceased and the 1st accused used the broken piece to hit the deceased. Those actions on a sensitive part of the body manifest the requisite intention to cause grievous harm. Indeed the doctor who performed the autopsy noted the severe injuries inflicted upon the deceased and formed the opinion that the cause of death was cardiopulmonary arrest secondary to massive cerebral haemorrhage due to severe physical trauma on the head. After considering the injuries occasioned to the deceased as per the post mortem report as well as the evidence on record in which the accused persons were identified beating the deceased, I am satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code. It also transpired from the evidence of Pw1 that the accused persons went on attacking the helpless deceased who was already on the ground and subdued. This left no doubt that the accused persons had intention to cause grievous harm upon the deceased who subsequently succumbed to those injuries.

22. From the foregoing, the defence offered by the 2nd accused and the silence of the 1st accused does not dislodge the evidence on record against the said accused persons and I have come to the conclusion that the state has proven its case beyond reasonable doubt. I find each of the accused persons guilty of the offence of murder and convicted accordingly.

It is so ordered.

Dated and delivered at Machakos this 16th day of September, 2019.

D.K. Kemei

Judge