



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

PETER GITONGA MBOGO.....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 24th December 2017, at Hague Bar in Karingari village of Embu North Sub-County within Embu County murdered Kennedy Murimi Muriithi. He pleaded not guilty to the charge.
2. The prosecution called eight (8) witnesses in support of their case which is summarised herein.

B. Prosecution Case

3. PW1 testified that he was in the company of the deceased on the material day at Hague bar when the accused attacked the deceased and hit him with a rungu.
4. PW2 and PW7 were called by PW1 to go to Hague Bar where the deceased was lying in a critical condition and take him home which they did. PW2 said the deceased was lying on the floor with blood oozing from the nose and mouth. PW7 said the deceased was in a critical condition.
5. PW4, Dr. Joseph Thuo, examined the accused and found him mentally fit to stand trial. PW5, Dr. Ndirangu Karomo carried out the post-mortem on the deceased and concluded that the deceased died of cardiopulmonary arrest due to severe head injury inflicted by a blunt object.

C. Accused's Case

6. In defence, the accused testified that on the material day, the deceased and PW1, who were visibly drunk, came to Hague Bar and started drinking there. He said that after taking a few more drinks the deceased fell down backwards and hit his head on a table. He denied that he struck him on the head as alleged by the prosecution witnesses.

D. Analysis of the Law & Evidence

7. For 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.

8. The evidence of PW1 is that he was with the deceased at Hague Bar on 24/12/2017 from 6.00 p.m. As they were having their drinks and playing a game, the accused who was their neighbour and the bar watchman came to the bar. He confronted the deceased for refusing to buy

him a drink, he got hold of the deceased and knocked him down.

9. PW1 further testified that the accused got hold of him too and knocked him against the wall and when PW1 asked him why he was assaulting the deceased. The accused took a club (rungu) and hit the deceased on the head causing him to fall down unconscious. The deceased died the following morning as his family were preparing to take him to hospital.

10. PW2 and PW7 were the relatives of the deceased. They were called by PW1 to go to the Hague Bar and take the deceased home. They found him bleeding from the nose and mouth. PW3 said that he was given a bill for the deceased's drinks which he paid. The deceased was taken home in an unconscious state.

11. The postmortem report by Dr. Karomo found the cause of death to be cardio-pulmonary arrest due to a severe head injury inflicted by a blunt object. The deceased injuries on the head hematomas of the right parietal and subdural area.

12. The accused denied the offence saying that the deceased fell backwards due to drunkenness and injured his head. He further stated that the deceased fell on a table before falling down on the floor. If this version of the fall was true, the injury would not have been fatal because the table would have eased the force on the head.

13. The court believed the evidence of PW1 that the accused first knocked down the deceased, then hit his head against the wall before hitting him on the head with a rung. The assault of knocking the head of the deceased on the wall and hitting him with a rung on the head was consistent with the postmortem report description of the weapon as a blunt object. Both the wall and the rung are blunt objects. This was after a confrontation between the deceased and the accused that was authored by the accused.

14. Although PW6 the investigating officer said that there were two witnesses whom he questioned who said the deceased fell down in the bar, he did not avail the said witnesses. The evidence of PW1 therefore was not contradicted by any other witness.

15. In the case of **Ogeto versus Republic [2004] KLR 19** a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows: -

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

16. I have warned myself of the danger of relying on a single witness but I am convinced beyond any doubt that PW1 was a credible witness whose evidence remained unshaken.

17. I find that the prosecution have established that the accused did the unlawful act that resulted in the death of the deceased.

18. The prosecution has a duty to prove existence of malice aforethought on 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.*

19. The unrebutted testimony of PW1 is that the accused picked a fight with the deceased on the material date after the deceased had refused to buy him a beer. The accused initially knocked the deceased then hit his head against the wall. He then down proceeded to the store and took a rung which he used to hit the deceased with on the head. The post mortem carried out by PW5 confirmed that the accused's death was as a result of injuries sustained after being hit by a blunt object on the head.

20. The doctor described the injury as a "severe head injury" which led to cardio-pulmonary arrest. The deceased died the following morning after being in an unconscious state for several hours. The infliction of such an injury was aimed at causing grievous harm or death as described under **Section 206 (a) of the Penal Code**.

21. It was held in the case of **Ogeto Vs Republic 2 KLR 2004** that the act of stabbing the deceased with a knife on the chest was intended to cause death or grievous harm and therefore amounted to malice aforethought.

22. Although the accused started by a confrontation on the deceased, he was the aggressor and moved to arm himself with a club which he used to inflict the fatal injury.

23. It is my considered opinion that the prosecution have proved malice afore thought on the part of the accused.

24. Consequently, I find that the prosecution have proved beyond any reasonable doubt that the accused murdered the deceased.

25. I find him guilty of the offence of murder and convict him accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms. Muriuki for Guantai for Accused

Accused present