



KTL.NO.636/2019

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 5 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MUMO NZIOKI.....1ST ACCUSED

DAVID MBAI.....2ND ACCUSED

MWANGANGI KAKUTI.....3RD ACCUSED

MUTHUI KAKUTI.....4TH ACCUSED

BRENSON MUEKE.....5TH ACCUSED

JULIUS KYALO WAYUA.....6TH ACCUSED

J U D G M E N T

1. **Mumo Nzioki** (1st Accused), **David Mbai** (2nd Accused), **Mwangangi Kakuti** (3rd Accused), **Muthui Kakuti** (4th Accused), **Brenson Mueke** (5th Accused) and **Julius Kyalo Wayua** (6th Accused) are jointly charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **9th day of February, 2015** at **Kaumba Village, Katulani Division** in **Katulani District** within **Kitui County** jointly with others not before Court murdered **Jackson Kanyalu Kisilu** (Deceased).

2. Evidence adduced by the Prosecution is that the Deceased was assaulted by a group of people who included his family members. Investigations carried out culminated into the arrest of the Accused persons who were charged. To prove the case, the Prosecution called nine (9) witnesses.

3. PW1 **Kimanzi Malusi** testified that the Deceased went to his home on the **8th February, 2015** after **1.00 a.m.** He promised to explain why he went to his house that late later on. They slept until about **4.00 a.m.** only to be woken up by people who called him (PW1) out. He recognized the voice of the 4th Accused. Upon opening the door, he saw the 1st Accused who had a torch. Other than the two (2) Accused persons, he recognized other people who were with them namely **Wambua Kalungu, Kachewa Kakuti, Maluki Musyimi, Musembi Mwalwa, Munzui Mwendu** and **Kyalo** (6th Accused). He identified the 1st Accused as having been armed with a panga while the others carried sticks. The two (2) of them (PW1 and Deceased) were removed outside and beaten thoroughly and ordered to walk towards **Kaumba** following allegations that the Deceased had a fight with his elder brother and went to hide at PW1's place. Upon arrival at **Kakuti's** place he managed to escape as people continued to assault the Deceased. At about **7.00 a.m.**, the 2nd Accused went to his home and collected items that the Deceased had left there, being shoes, jacket, catapult and two (2) cellphones. At about midday a group of about six (6) people led by **Musee** went and collected him from his house threatening to burn him. They led him to the house that was being used by the mother of the Deceased to treat people as she was a witchdoctor. He was ordered to set it ablaze. Having complied he was released. He learnt of the Deceased's demise later on.

4. PW2 **Joshua Mutua Kisilu**, the brother of both the Deceased and the 5th Accused got information regarding a fight between his two (2) brothers. The 5th Accused who was not at home then returned with his wife at about **10.00 p.m.** All over a sudden he saw people arriving, amongst them the 1st Accused, the 3rd Accused, 6th Accused, **Mwanzui Mwendu, Kimanzi Muthembwa, Wambua Kalungu, Kachewa Kakuti, Musembi Mwendu** and **Maluki Musyimi**. They had a meeting with the 5th Accused and resolved to discipline the Deceased. They left and he (PW2) returned to his house. In the middle of the night the people turned up who he identified as all that took part in the

meeting except the 3rd Accused. He came out of the house with a hurricane lamp and witnessed as the 1st Accused sent **Mwende** to call the Deceased's wife. The 5th Accused woke up. He joined the 1st Accused, 4th Accused, 6th Accused and **Mwende** went in search of **Kanyalu** in his house but he was not there. Vowing not to give up they left as the 5th Accused went to sleep. They returned at about **2.00 a.m. – 3.00 a.m.** and left. Later on the 6th Accused returned and he left with the 5th Accused. He (PW2) followed them and on reaching the junction to **Kaumba-Kyambiti-Mulango Road** he found the Deceased having been made to sit down and was being beaten. He saw the 3rd Accused hitting him with a stick. Also present were the 1st Accused, 2nd Accused, 4th Accused, 6th Accused and all other people who had been at their home were present. The Deceased who was already injured on the head, had a cut wound and his hands were already tied at the back, was made to stand by **Kimanthi Muthembwa** and was made to walk to **Kaumba**. Upon arrival the 4th Accused ordered him to sit down and the 5th Accused was asked to make a decision, which he did by telling them to assault him. The 4th Accused directed that the 5th Accused be the first to act which he did by kicking him in the abdomen an act that made the Deceased fall down. The rest were given instructions by **Maluki** to act. He identified the 1st Accused as having hit him on the head with a stick, the 2nd Accused hit him on the right leg with a stick until it broke. The 6th Accused used a maasai whip to hit him all over the body while the 4th Accused also hit him on the body. He witnessed the assault as it happened at **6.00 a.m.** The Deceased's plea for forgiveness went unheard. The police arrived with the chief, the assailants except the 5th Accused ran away. Upon arrival at the hospital he was pronounced dead.

5. PW3 **Allan Kasango Solomon** was woken up at **4.30 a.m.** the **9th February, 2015** by a voice intonation of the 4th Accused who was known to him for eight (8) years. His neighbor **Allan Mutinda** had also woken up. They went to check on what was happening and at **Kaumba Junction** they found the Deceased having been made to sit down. There was moonlight and people who had gathered had torches. He identified the 1st Accused, his neighbor and a former teacher, the 2nd Accused, 4th Accused. The 5th accused joined them later and the 1st and 3rd Accused to confirm whether the Deceased was the one who injured him. He did and the 5th Accused was told by the 4th Accused to act whereby he kicked him on the chest. He (PW3) told the 4th Accused who was a village elder to call the police instead of injuring the Deceased and he was ordered to leave the vicinity. He watched as they assaulted the Deceased.

6. PW4 **Allan Mutindi Tene** was woken up by noise and he recognized the voice of the 4th Accused, his relative. He teamed up with his neighbour, PW3 and was able to see what transpired as there was moonlight and people had torches. He confirmed in material particulars what PW3 stated.

7. PW5 **No. 234545 APC Jonathan Bonaya** went to the scene following a report received and found the Deceased already injured.

8. PW6 **Dr. Patrick Mutuku** performed a postmortem on the body of the Deceased.

9. PW7 **Simon Kalumu** was woken up by the 1st Accused at **10.00 p.m.** and asked to go and look for the Deceased. He went out and found other people that he recognized as the 2nd Accused, the 4th Accused, **Kalewa Kakuti, Munzuu Mutende, Pastor Kimanzi Musembi, Maluku Musyimi**. Following orders given by the 1st Accused he followed them until the 2nd accused's home who was woken up by the 1st Accused. They went to **Mzee Muthomi Katii's** in search of the Deceased. Ultimately they found the Deceased in the house of PW1. He saw the 1st Accused hit the Deceased at the outset and the rest participated in the act of assaulting him. He witnessed the 5th Accused arrive at **Kaumba** and how he complied following instructions to assault the Deceased. It was his testimony that the 2nd Accused, 3rd Accused, 4th Accused and 6th Accused assaulted the Deceased in his presence.

10. PW8 **No. 23235157 Inspector Alex Mwangi** investigated the case, arrested the suspects and caused them to be charged.

PW9 **No. 235229 Inspector Nicholas Mulei** an officer, appointed by the DPP under **Section 78(1)** of the **Evidence Act** and duly gazetted per the **Kenya Gazette Notice No. 5548 of 30th June, 2015** processed the memory card he received from PW8 and prepared photographs taken of the Deceased.

11. Upon being put on their defence, the Accused persons denied having committed the offence. DW1 **Mumo Nzioki** stated that on the material date he got information from his niece, the wife of a brother to the Deceased that he had been stabbed by the Deceased. By the time he reached the Deceased's homestead he encountered very many people that he approximated to have been 100. He joined the group that was looking for the friend of the Deceased, one **Simon Alum** who had already been found and people ordered him to trace the Deceased. They traced him at PW1's house. It was his argument that as opposed to beating the Deceased he was the one protecting him. And as they took him to **Kyuluni Police Station**, upon arrival at **Kaumba** there were many people who stoned him. Since he could not protect him he ran to call the chief **William Maseki** who in turn called the police.

12. DW2 **David Mbai** stated that he woke up at **4.00 a.m.** and took a jerrican to go and fetch water and he returned home. While there, he saw PW1 running and he asked him if he could rescue the Deceased. He went but did not find them. He heard voices and when he reached **Kaumba Market** the Deceased lay down and was bleeding from the head. He moved close to him, called him out but he was not responding. Nobody told him what the Deceased had done therefore he went back home.

13. DW3, **Mwangangi Kakuti**, the village elder testified that he heard screams and went to the home of **Mueke**. He found between 30 – 40 people at the homestead. Both **Mueke** and his wife were on the ground and were bleeding. The Deceased was nowhere to be seen. The wife of **Mueke** stated that they had disagreed over bricks that had been baked. With the assistance of the 6th Accused they took them to hospital. After treatment they returned with the 5th Accused home while his wife declined. He left going home. At about **2.00 – 3.00 a.m.** he heard noise. He went to the junction of **Kyuluni** and found the Deceased having been surrounded. People were agitated. They took him to **Kaumba** and assaulted him using stones and sticks. That it was within his knowledge, an administrator that they were required to take him to the police station therefore he did not assault the Deceased.

14. DW4, **Muthui Kakuti** testified that he was on his way home from a meeting when he heard people who had gathered by the roadside

talking about a fight involving the 5th Accused and his wife who were injured. A taxi arrived bringing them from hospital. The 5th Accused's wife declined to go to her matrimonial home. He joined the ladies who were escorting her to their neighbour's place. On returning home he heard noise and saw people taking the Deceased to 3rd Accused who rang the Assistant Chief. He went home but prior to entering the house he heard noise. He went to **Kaumba** and found the Deceased lying down. It was alleged he had been assaulted. He looked for the 3rd Accused so that he could make a telephone call. Subsequently, the police arrived. They made the Deceased to stand and he stated that he had been assaulted.

15. DW5, **Brenson Mueke Kisilu** stated that he returned home at **6.00 p.m.**, having imbibed some alcohol. And as he knocked the door he was shocked to be hit. He turned to find it was his brother, the Deceased. He said that he would kill him. He came to his senses to find himself in hospital. He was sutured and while in pain he saw **Kaswili, Mama Thomas** and **Mwangangi Kakuti**. He was taken home after his wife refused to go back with him. He found many people at their home. He woke up at **5.00 a.m.** feeling dizzy. After answering a call of nature he got a call from an unknown number. The caller notified him that his brother had been assaulted. He went to **Kaumba** and found the Deceased having been put in the police vehicle. He was made to go along so as to make a report to the police.

16. DW6, **Julius Kyalo Wayua** was a cousin of the Deceased. He alluded to having received a call from the wife of the Deceased at **8.30 p.m.** which he ignored as he had a customer. When she called again he responded and on being told that things were bad. Prior to reaching **Kinyai**, the 3rd Accused his uncle rang him seeking assistance. He went to where the Deceased was and found approximately seventy (70) people. He went to the homestead and found the 5th Accused and his wife who were injured. He carried them but along the way they encountered many people. They decided to call for a taxi, to take them to hospital. He was paid **Kshs. 1,000/=** by a pastor. The 3rd Accused his uncle went along with the injured person. He got a customer and went to **Mosa**. Upon returning at **11.30 a.m.** he went to sleep. At midday he was woken up by noise. He heard people telling the 3rd Accused not to hide the person. His uncle told him to watch over children as they took him to the Administration Police Camp.

17. DW7 **Celestine Wambua Mbotela** a neighbour testified that upon hearing screams she went and found the 5th Accused having fallen down and was bleeding. She called her cousin **Daniel** who availed the motor-vehicle that took the 5th Accused to hospital. The allegations were that he had been assaulted by his brother. She returned to her home. At about **6.00 a.m.** she heard screams and joined other villagers. They reached **Kaumba** and found a person lying down.

18. DW8 **William Willy Odida** alluded to having heard noise at **8.30 p.m.** When he went to his neighbour's home he found the 5th Accused having been injured. He was taken to the roadside where a motor-vehicle arrived and took him to hospital. When he returned at **11.00 p.m.** his wife decided not to sleep at home. At about **4.00 – 5.00 a.m.** upon hearing noise, he followed people upto **Kaumba**. A person was beaten but he did not reach him.

19. At the close of the defence case it was urged that the Prosecution case had a myriad of gaps and inconsistencies. In this regard the case of **Republic vs. Patrick Muriithi (2016) eKLR** was cited where it was held that:

“In my view, the above contradictions are substantial and create serious doubts in the mind of the court. The court is obliged to consciously remind itself to be careful while considering evidence with such glaring contradictions. In addition, the court should seek to safeguard or reduce the risk of a wrong finding based on suspect evidence.”

20. That PW1 recognized the assailants by voice and voice recognition is unsafe to place on reliance. In respect of visual identification, the argument raised is that the source of lighting was moonlight and circumstances surrounding identification were not conducive or clear enough to rule out an error on the part of witnesses. In this regard the case of **Hamisi Swaleh Kibuyu vs. Republic (2015) eKLR** was cited where it was stated that:

*“On this issue of recognition, we are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see **Kamau versus Republic (1975) EA 139**). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error.”*

21. As to whether the Accused persons were involved in commission of the offence, it was urged that the Accused persons went to the scene as people who were curious to witness what was happening therefore the presumption of common intent could not arise.

22. It was urged for the State that the fact of death was proved. The *actus reus* was proved as the Accused persons were criminally culpable for the act that led to the death of the Deceased. The *mens rea* was similarly proved as all the Accused persons had the intention to cause death or at least do grievous harm to the Deceased with full knowledge that he would probably be harmed. That they had a common agenda of finding the Deceased in order to punish him after he fought his brother and wife and upon finding him they rendered respective wraths on him which amounted to murder.

23. The Prosecution was duty bound to prove beyond reasonable doubt:

- (i) The fact of death.
- (ii) The cause of death.
- (iii) The fact of the unlawful act that caused death having been perpetrated by the Accused persons.
- (iv) Whether it was committed with malice aforethought.

24. A postmortem on the body of the Deceased was conducted by PW6 who formed the opinion that the cause of death was cardio pulmonary arrest due to a head injury and haemothorax due to blunt trauma.

25. Eye witnesses who were at the scene confirmed that the Deceased was assaulted and he sustained injuries that he succumbed to. This was confirmed by the Doctor who found him having sustained multiple bruises on both the lower limbs, fracture of the right upper 1/3 of the tibia/fibula bone with an open wound; multiple cuts on the skull. There was bleeding from nostrils, multiple cuts on the buccal aspect of lips, bruises over the face and neck and a fracture of the 8th, 9th and 10th ribs of the left side.

26. The act of assaulting an individual and injuring fatally is illegal, intolerable hence unlawful. The Prosecution called evidence that proved the fact of the Deceased having sought refuge at the house of PW1 where the individuals removed him prior to taking him to where he met his death.

27. PW1 was woken up by a person and he identified the voice to be of the 4th Accused. Upon opening the door, he saw the 1st Accused, the 4th Accused and 6th Accused amongst other people and at **7.00 a.m.** the 2nd Accused went to collect the Deceased's items. PW2 a brother of both the Deceased and the 5th Accused was at home when a meeting was held and a resolution made to discipline the Deceased. He identified the 1st Accused, 3rd Accused, 6th Accused and 5th Accused as having been present. And when they returned the second time at midnight the 4th Accused was with them. At the point of the Deceased being assaulted at the wee hours of the morning he identified all the Accused persons as having taken part in the unlawful act.

28. It is argued that voice and visual identification in the circumstances were not cogent. In the case of **Karani vs. Republic (1985) KLR 280** it was held that:

“Identification by voice is recognized but care has to be taken to ensure that the voice recognized was that of the suspect.”

29. This is a case where PW1 was aided by moonlight and light from torches to see the Accused persons. These were people known to him and they communicated as they led him to a place where they caused him to set ablaze a house. There was ample time for him to recognize them.

30. In the case of PW2, he was present when the individuals deliberated on issues pertaining punishing the Deceased. He had a hurricane lamp which aided him to see.

31. In the wee hours of the morning as the Deceased was being given a final blow, PW2 recognized the assailants, the 1st Accused, 2nd Accused, 4th Accused and 6th Accused when they went in search of the Deceased. Having not found him they left, later on when the 6th Accused returned to their home and collected the 5th Accused, he (PW2) followed them. At the scene, the 5th Accused had to grant permission prior to the rest embarking upon assaulting the Deceased. Both PW1 and PW2 saw him hit the Deceased in the abdomen. Although the Accused persons denied having assaulted the Deceased their explanation that they were present to either assist or as onlookers, evidence adduced by the Prosecution as to how they participated in committing the unlawful act was overwhelming.

32. This was a case of mob justice. **Section 21** of the **Penal Code** provides thus:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

33. In the case of **Wanjiro d/o Wanerio vs. Republic 22 EA CA 52**, the Court held that:

“Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with.”

34. There is unchallenged evidence that the people who battered the Deceased met at the house of the 5th Accused deliberated and reached an agreement to punish the Deceased. They went in search of him and pulled him out of PW1's house. The plan was therefore premeditated.

35. The question to be answered is whether the unlawful act was committed with malice aforethought.

36. **Section 206** of the **Penal Code** defines malice aforethought thus:

“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.”

37. In the case of **Rex vs. Tubere s/o Ochen 1945 63** the Court held that:

“To determine whether malice aforethought has been established, the Court has to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the Accused before, during and after the incident.”

38. This is a case where the Accused persons decided to avenge what happened to the 5th Accused. Per the investigations carried out by PW8, it was established that the 5th Accused arrived home and confronted the Deceased his younger brother and fight ensued. The wife of the 5th Accused intervened and both were injured. As they were taken to hospital, the Deceased fled. The Deceased was found at PW1's house prior to being attacked.

39. The 5th Accused adduced in evidence a P3 form that was filled on the **13th March, 2015**. The Accused persons were arrested and arraigned in Court on the **3rd March, 2015**. No Court order was sought for the 5th Accused to be taken to hospital for purposes of filling the P3. That notwithstanding, the P3 shows that he sustained a cut wound on the right occipital temporal area that was classified as harm.

40. The Deceased having been a suspect following a fight he had with the 5th Accused, he was supposed to be arrested and taken to the police station so as to be investigated and if necessary to be arraigned in Court. Instead of the Accused persons complying with the law, they met and agreed to discipline him. The disciplinary action invoked was contrary to the law. Those who acted were fully aware that their action would either cause death or at least grievous harm to the Deceased.

41. The conscious intent to cause either death or grievous harm having existed, malice as a required element did exist.

42. Therefore, I find the Prosecution having proved the charge of murder against each and every Accused person. They are guilty and I convict them as charged.

43. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of November, 2019.

L. N. MUTENDE

JUDGE