



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: A. C. MRIMA, J.]

CRIMINAL CASE NO. 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WILSON WAMBUA MAIRO..... ACCUSED

JUDGMENT

1. **Wilson Wambua Mairo** and **Julius Boke Mairo** were blood brothers. Wilson Wambua Mairo is the accused person in this case. Julius Boke Mairo is the deceased herein. I will henceforth refer to them as '**the accused person**' and '**the deceased**' respectively. They lived next to each other in Kwiheмба village in Kuria East Sub-County of Migori County. The accused person was married and had daughters. The deceased had sons and daughters out of his marriage.

2. The deceased died out of injuries he sustained on 02/09/2016 at his home. The prosecution and the defence gave different versions of what exactly happened.

3. Resulting from police investigations the accused person was charged with the death of the deceased. He denied the information and a trial was held. The prosecution availed 6 witnesses in a bid to prove the information. **PW1** was **Jackline Bitengo Boke**. **PW1** was the wife of the deceased. A daughter of the deceased testified as **PW2**. She was **Sylvia Boke**. A neighbour and a close relative to both the accused person and the deceased one **Rioba Magige Nyasuguta** testified as **PW3**. He was a friend to the deceased.

4. **Dr. Sylvester Ochieng Olano** produced a Post Mortem Report on behalf of **Dr. Sammy Ruwa Mwatela** who conducted an autopsy on the body of the deceased. He was **PW4**. **PW5** was a Police Officer **No. 67595 Cpl. William Ogeto Onuko**. He was one of the arresting officers. The investigating officer was **No. 81670 Sgt. Hellen Koech** who was attached to the Kuria East DCI Office. He testified as **PW6**. I will refer to the witnesses in the sequence in which they testified before Court.

5. **PW1**, **PW2** and **PW3** were eye-witnesses. They testified that in the afternoon of 02/09/2016 they were all at the home of the deceased. **PW1** and **PW2** were family members of the deceased. **PW3** who was a friend to the deceased had visited him. There arose a scuffle between a daughter of the accused person and a son of the deceased. The said daughter sustained a small injury on the nose. She rushed home. Suddenly the accused person appeared while armed with a panga. He was breathing fire. He bitterly complained that he was not respected in the village because he only had daughters.

6. The deceased was at his home working on some pieces of iron on a fire. He was a blacksmith. He requested the accused person to cool down and undertook to take the daughter to hospital. The accused person did not hear anything. He attacked **PW1** and cut her with the panga. All her fingers on one hand were chopped off.

7. The deceased arose to intervene. As he stood, the accused person cut him on the head with the panga. The deceased fell. **PW2** started running away. The accused person pursued her. He fell her and severely beat her with kicks and blows. **PW3** stood at a distance of about 6 metres and witnessed all what happened. The accused person then fled.

8. **PW2** aided **PW1**. They walked to the nearby hospital. The deceased who was unconscious was rushed to the hospital in a motor cycle. **PW1** was treated and discharged. The deceased did not survive. He passed on.

9. The incident was reported to the police. The police visited the home of the deceased on 03/09/2016. They found the deceased lying on a mat inside a house as the family prepared to bury him. **PW6** was among the police officers' who visited the scene. She took photographs of the body of the deceased and the scene. The body was taken to Migori County Referral Hospital Mortuary (hereinafter referred to as '**the MCRH**') for further police action.

10. **PW6** revisited the scene on 05/09/2016 and recorded statements from witnesses. She also organized for the photographs to be processed

by the Scenes of Crime personnel. She further organized for a post mortem examination. It was conducted on 12/09/2016 by Dr. Sammy Ruwa Mwatela at MCRH. A Post Mortem Report was prepared.

11. As the accused person had disappeared from his home, the police kept vigil through the local chief and village elders. It was alleged that the accused person may have gone to Tanzania.

12. On 14/06/2018 PW4 was among some police officers who raided a *chang'aa* drinking den. Several people were arrested. They were taken to Ntimaru Police Station. On 15/06/2018 the police received information that the accused person had a pending murder case. He was released to the DCI. On 29/06/2018 the accused person was escorted to MCRH for mental assessment. He was found fit to plead. He was subsequently charged.

13. PW4 produced the Post Mortem Report on behalf of his colleague. PW6 produced the photographs and the Certificate, the Mental Assessment Report for the accused person and statements of two other eye witnesses who could not be traced for bonding to attend Court.

14. It is the forgone chronology of events that led this Court to find that the accused person had a case to answer. That was at the closure of the prosecution's case.

15. Placed on his defence, the accused person elected to and gave an unsworn statement. He did not call any witness. He denied committing the offence. The accused person stated that he used to work with the deceased as blacksmiths. That on the day the deceased was injured the accused person and the deceased had worked and decided to refresh themselves by taking some *chang'aa*. That, out of fatigue the accused person fell asleep. He was only awoken by a commotion. He saw the deceased and his wife fighting. The deceased was armed with a panga. The accused person attempted to separate them and also disarm the deceased. The accused person further stated that in the course of the struggle the deceased was injured on the head and he later succumbed to the injuries.

16. At the close of the defence case, the matter was left to the judgment of this Court.

17. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused is guilty as charged.

18. As the accused person is charged with an information of murder, the prosecution must prove the following three ingredients: -

(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 aforethought which constitutes the 'mens rea' of the offence.

19. There is no doubt that the deceased died. All the witnesses save PW5 confirmed as such. As to the cause of death, PW4 took this Court through the Post Mortem Form which was prepared by his colleague after conducting the examination. It was opined that the cause of death was severe brain injury due to sharp object trauma to the head. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

20. On the second ingredient as to whether the accused unlawfully caused the death of the deceased, several witnesses were at the home of the deceased. They witnessed all what happened. They narrated the ordeal in Court.

21. I have carefully considered the evidence before Court. On placing the prosecution's evidence and the defence on a balanced scale, the result is that the scale tilts in favour of the prosecution. The prosecution evidence was well corroborated, cogent and water-tight. The witnesses testified before Court and were quite forthright and answered all questions put forth. I formed the opinion that they were truthful and hence believable. I therefore do not believe the defence put forth by the accused person. I hereby reject it.

22. I now find that it was the accused person who unlawfully caused the death of the deceased. The second ingredient is also answered in the affirmative.

23. As to whether there was malice aforethought in the accused causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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(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 fight or escape from custody of any person who has committed or attempted to commit a felony.*

24. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55". (emphasis added).

25. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

26. In this case there was evidence that the accused person was angered by the injury to her daughter. The incident occurred spontaneously. Everyone who witnessed the ordeal wondered the pace at which it all happened. The accused person acted in anger. In those circumstances I find no evidence of malice aforethought. The third ingredient fails.

27. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

28. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

29. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Muniko, Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.