



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MUINDI MUNYAU.....SUBJECT

JUDGMENT

1. David Muindi Munyau (“Subject”) is seventeen years old. He is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing David Njoroge on 20/01/2017 at Kenlands Estate, Nakuru Town in Nakuru West Sub-County within Nakuru County.

2. The Prosecution presented four (4) witnesses in its attempt to prove its case beyond reasonable doubt.

3. It emerged unmistakably from both the Prosecution witnesses and the Defence witness that the Subject and the Deceased were friends. PW1 (David Oloo) and PW3 (Rogers Marucha) testified that the Deceased was a friend to the Subject. Indeed, David Oloo testified that it was the Subject who introduced him to the Deceased. David, Rogers and the Subject used to play soccer together while the Deceased would sometime watch as they played. All four youngsters were minors – aged around seventeen (17) years at the time of the incident.

4. On 20/01/2017, David and the Subject played soccer at Jubilee Grounds in Nakuru after school as was their routine. They parted company. Shortly thereafter, David heard through their other friends that the Subject and the Deceased were engaged in a fierce fight. David and his other friends rushed to the scene. By the time he got there, the Deceased was already lying on the ground with an apparent injury to his head. David found the Subject frantically and frenetically trying to resuscitate him; admonishing him to wake up. The Subject then rushed to get some milk which he hoped would help resuscitate the Deceased. But it was to no avail. Eventually, the youngsters had to call the Deceased’s mother – who arranged to transport the Deceased to hospital. Unfortunately, the Deceased passed on three days later.

5. Rogers Marucha largely corroborated David’s story. Rogers was late to the soccer practice that day. So, Rogers joined the group of other boys as they headed from the practice field. They were heading towards the Deceased’s home. The Deceased appeared riding the Subject’s bicycle. The Subject was not amused. He confronted the Deceased and sought to know why he was riding his bicycle without his permission. By Rogers’ rendering, the argument degenerated. The Deceased challenged the Subject to a fist fight. Since they were near the Deceased’s house’s gate and the Deceased’s mother runs a kiosk just by the gate, Rogers testified that the Subject told the Deceased that they go fight out a little further away.

6. And so it was. The Subject apparently took his bicycle home and went to the agreed venue. A crowd of boys followed to witness the fist fight. Rogers testified that he remained behind speaking with a girl by the name Mirriam and that he only rushed to the venue when he got word from another friend that the fight had turned “serious”.

7. When Rogers got to the place where the fight was taking place, he testified to finding the Subject crying and sobbing heavily. In Rogers words, this is what happened next:

As people were trying to separate them [the Subject and the Deceased], the Subject picked up something and hit the Deceased. On looking, I saw the Deceased bleeding. He fell to the ground. He was not talking but was looking at us.

The Subject panicked and ran to get some milk. Then someone called Deceased’s mother who came and took him to the Hospital.

8. Rogers was the only eye witness to the fight who testified in Court. As presented above, David Oloo was not present when the fateful action occurred; he arrived immediately after only to find the Deceased already on the ground.

9. In my opinion, Rogers gave a straightforward and candid account of what happened. He was forthright that the Subject was his friend. But he was equally forthright that he saw the Subject pick up something and hit the Deceased on the head. The Deceased then fell down.

10. The pathologist's report upon conducting post-mortem examination opined that the object which the Subject used to hit the Deceased on the head must have been a blunt object with a sharp edge which penetrated the head. This was because, Dr. Ngulungu, the Pathologist, found a puncture wound to the scalp at the upper aspect of zygomatic arch which was "communicating with anterior cranial cavity." That scientific language for saying that while the blunt object caused rounded lacerations, its sharp edge penetrated beyond the scalp. The Post-mortem examination concluded that the cause of death was "brain injury attended by laceration, intraventricular hematoma a raised intra-cranial pressure and blunt/penetrating sharp-pointed injury to the brain in keeping with fatal assault."

11. The only other Prosecution witness was the Investigating Officer who narrated about the investigations. His story converged with that of PW1 and PW3. The critical part of his testimony was that they never recovered the object that was used to assault the Deceased.

12. When put on his defence, the Subject gave a sworn testimony. His narrative did not deviate much from that given by Rogers (PW3). He testified about confronting the Deceased when he found him riding his bicycle without his permission; and about the Deceased's challenge to him to a duel – which, the Subject admitted, he accepted. The Subject, however, claimed that he was "winning" the fight and that the Deceased suddenly plucked a pole from a nearby fence and attacked him with it. The Subject testified that he grabbed the pole from the Deceased and aimed it at him with the intention of giving him a body blow. However, the Deceased ducked by bending with the result that the blow ended up hitting his head. The Deceased then fell down.

13. The Subject pleaded with the Court to believe that he had no intention to hurt or kill the Deceased but that they had only agreed to engage in a childish fight. Unfortunately, the childish fight had fatal consequences.

14. The real question in this case is whether the Prosecution evidence meets the high threshold required in criminal cases: to displace all reasonable doubts that it is the Accused Person who committed the offence charged by proving every element of the offence.

15. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

16. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

17. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. 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.

18. In its closing submissions, the Defence focuses on two issues:

- a. First, the Defence argues that from the evidence presented by the Prosecution, it has not been established beyond reasonable doubt that it was the Subject who had malice aforethought. The Defence argues that the evidence on record shows that it is the Deceased who had "incessantly challenged the Subject into a mock fight which the Subject reluctantly agreed to." The Defence further argues that the piece of wood used to hit the Deceased cannot be said to be an offensive weapon which the Subject could reasonably have expected would cause death.
- b. In the second place, the Defence argues that it is unclear whether the Subject caused the death of the Deceased. Rather, the Defence argues that the Deceased died "due to poor medical intervention since the incident took place during the prolonged doctors' strike and the Deceased was not attended to in good time as they kept moving him from one hospital to another seeking for treatment."

19. It is common between the parties that the Deceased died on 24/01/2017 following an incident at Kenlands Estate in Nakuru Town within Nakuru County. It is also common that the incident involved the Subject and the Deceased. It is, further, common that the Subject hit the Deceased with a blunt object causing him to fall to the ground and necessitating his transport to a hospital under an emergency. The only two issues that present themselves for determination when the elements of murder are juxtaposed against the evidence presented, are as

presented by the Defence:

- a. Did the Subject have the requisite malice aforethought which is a necessary element for the offence of murder when he hit the Deceased?
- b. Was the act by the Subject the proximate cause of the death of the Deceased?

20. I will begin with the second issue. As I understand it, the Defence argues that one cannot draw a safe inference that satisfies the legal standard of beyond reasonable doubt that the Subject's action of assaulting the Deceased caused the death of the Deceased since, due to the doctor's strike, it took long for the Deceased to get medical attention. Hence, it is fair to say that the death could have resulted from the delay in getting the Deceased medical attention he needed.

21. This argument fails for two reasons. First, there is no evidence which was placed before the Court (even enough to satisfy the burden of production to raise reasonable doubt) to indicate that there was a delay in getting the Deceased medical attention. There was no attempt at all to demonstrate such delay except through the arguments by counsel. Related, when Defence Counsel put this question directly to the Pathologist, his answer was unequivocal: given the nature of the injury suffered by the Deceased, no amount of medical intervention no matter how skilful and how expeditious would have saved the life of the Deceased.

22. In any event, even if it were established that the doctors' strike led to a delay in intervention which could have contributed to the death of the Deceased, that would not be a sufficient answer to the charged offence. In order for that line of defence to succeed, the Subject would have had to demonstrate that the blow he delivered to the Deceased was not the proximate cause of death. Differently put, the Defence would have to show that the chain of events was broken hence making the Subject the factual cause of the death but the legal cause of the death. Differently put, the Defence would have to persuade the Court that the delay in medical intervention (if proved) was an intervening, superseding event that broke the chain of causation.

23. However, even if factually true, a demonstration that the doctors' strike led to a delay in giving medical attention to the Deceased possibly leading to his death after the assault by the Subject, would not be a defence to the charge of murder. This is because it is totally foreseeable that the Deceased would experience a delay in getting the necessary medical treatment. In fact, common law jurisprudence establishes that it is foreseeable that even medical malpractice could compound an injury originally inflicted exacerbating it to be homicide. Hence, as early as 1907, the Washington Appeals Court, in *State v Baruth 47 Wash. 283, 296, 91 P. 977(1907)* held:

*Where one unlawfully inflicts upon the person of another a wound calculated to endanger or destroy life, it is no defense to a charge of murder where death ensues to show that the wounded person might have recovered if the wound had been more skillfully treated.... He must show that the negligent and unskillful treatment was the sole cause of death, before he can escape the consequences of his unlawful act on this ground. *1165 Accord *State v. Karsunky, 197 Wash. 87, 99, 84 P.2d 390 (1938); State v. Richardson, 197 Wash. 157, 164, 84 P.2d 699 (1938).**

24. More recently, in *State v Perez-Cervantes*, the Appellant had stabbed the Deceased during an affray causing a puncture of an artery between the Deceased's ribs, which caused blood to rush into the left side of his chest cavity. The blood eventually exerted enough pressure on Thomas' left lung to dangerously restrict his breathing. The Deceased was taken for emergency surgery and was released from hospital after a few days. However, he developed breathing problems few days after that; he did not make it to the hospital. The pathologist concluded that at the time of his death, the Deceased had approximately five liters of fresh blood in his left chest cavity. The pathologist found significant hematoma around the area of the stab wound and, therefore, ruled out any other trauma as the cause of the Deceased's internal bleeding and death. He determined that Thomas' "death was due to a stab wound," with chronic obstructive pulmonary disease as the only "contributing factor." The Accused Person attempted to introduce arguments to show that the Deceased was a chronic user of heroin and that this could have prevented his seeking medical attention sooner which could have saved his life. The Washington Appeals Court disagreed that even if proved that would have been enough to constitute an intervening supervening act to break the chain of events. It stated:

Under the law established in the aforementioned cases and the jury instruction given in this case, Perez-Cervantes' counsel would only have been entitled to argue that there was an alternative cause of death if the evidence admitted at trial supported a theory that some act of the victim or another superseded the stabbing as the cause of Thomas' death. Specifically, there would have to be evidence that Thomas' drug use or failure to seek medical attention caused a fatal injury independent of the stabbing, or that these acts constituted a subsequent, proximate cause that Perez-Cervantes could not have reasonably anticipated. There was no such evidence. Indeed, as we have noted, the only evidence concerning the cause of Thomas' death was the testimony of the Pierce County medical examiner, Dr. Lacsina. This evidence, even when viewed in the light most favorable to the defendant, as it must be, only supports one possible inference that Thomas died as a result of the stab wounds inflicted by Perez-Cervantes.

25. Applying the same reasoning to the facts in the case, it is readily obvious that the Deceased here died as a result of the injury inflicted by the Subject. But for the assault, the Deceased would not have needed the medical intervention he was seeking in hospitals. Hence, even if proved the delay in getting medical intervention would not be a sufficient superseding cause in this case.

26. I will deal with the question of malice aforethought. The Defence argues that the Prosecution has not proved this element beyond reasonable doubt. I have already reproduced the provisions of section 206 of the Penal Code which defines malice aforethought. In *Nzuki v R (1993) KLR 171* the Court of Appeal remarked as follows:

There was a complete absence of motive and there was absolutely nothing on the record from which it can implied that the Appellant had any of the intentions outlined 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 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.

27. These remarks by the Court of Appeal in the *Nzuki Case* are applicable in the present case. Clear and uncontroverted evidence in this case shows that it was the Deceased who repeatedly challenged the Subject to a duel. The evidence was also clear that the two juveniles intended to engage in a fist fight; "kupimana nguvu" as PW3 said. It is unclear who first whipped up the piece of wood which was ultimately used to hit the Deceased and cause injury. However, there is no evidence to show that in the heat of the moment, the Subject used so much more violence or force that an inference could be drawn that he had intended to cause grievous harm to the Deceased beyond the puerile fight they were engaged in. Indeed, the post-incident conduct of the Subject proves the opposite: he immediately panicked; started resuscitating the Deceased – and even rushed out for milk in the vain hope that it would help as an emergency first aid measure. This is not the conduct of a person who had the intention to kill the Deceased or cause him grievous bodily harm.

28. To sustain a murder charge, the Prosecution would have had to prove beyond reasonable doubt that at the point at which the Subject hit the Deceased with the wooden pole, the Subject had the requisite malice aforethought. In my view, this was not proved.

29. What was proved was that the Subject and the Deceased were involved in a violent (and childish) physical duel provoked by the Deceased. The act of hitting the Deceased was committed in the midst of this physical duel and in the absence of premeditation or contemporaneous commission of another felony. It was also committed in the act of self-defence since the Subject was under attack by the Deceased. Indeed, Rodgers (PW3) testified that the Subject was on the losing side of the fight.

30. However, while the circumstances of this case forestall the finding of the crucial element of malice aforethought, the same circumstances point to the absence for justification for the Subject to have responded with deadly force. There is no evidence at all that the Subject faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Subject held an honest even if mistaken belief that it was only by repelling the Deceased by using deadly force that he would have preserved his life.

31. Consequently, it was unjustifiable for the Subject to respond with deadly force here. The Defence of self-defence, though suggested by the circumstances, is "imperfect" in this case since the Subject did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

32. Consequently, my conclusion is that the Prosecution has not proved the third necessary element to establish the offence of murder against the Subject: malice aforethought. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

Dated and delivered at Nakuru this 18th day of October, 2018

JOEL NGUGI

JUDGE