



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 13 OF 2014 (MURDER)

REPUBLIC.....PROSECUTION

VERSUS

PETER RUTERE MUTHONI..... ACCUSED

J U D G M E N T

1. The accused faces a charge of murder contrary to Section 203 as read with 204 of the Penal Code.
2. It is alleged that on the night of 27th and 28th April 2014, at Kathangariri market within Embu county, he murdered one Martin Munene Muriithi. He pleaded not guilty to the charge.
3. Briefly the facts of the case are that in the evening of 27th April, 2014 the deceased and other people including some of the prosecution witnesses (PW1, PW2, PW5 and PW6) were in Merile Bar at Kathunguriri market in Embu County enjoying drinks and each other company. The accused popularly known and “Njonga” came to the bar at around 10.30 pm when it was about to be closed.
4. He picked a quarrel with the deceased who was PW6’s husband and ordered him to go out of the bar so that he could teach him a lesson. PW1 and PW6 followed them outside where a fight broke up. The accused who was armed with a stick hit the deceased with it on the back of the head.
5. The accused followed the deceased and his wife and assaulted the deceased again as he was walking home with PW6. PW6 escaped from the scene for she was also targeted by the accused. The deceased was found dead the following morning about 500 meters from the bar.
6. The accused was arrested and the sticks he used to hit the deceased were recovered.
7. The accused in his defence denied the offence. He said he was a Marile bar on the material evening where there were about 15 customers. He said that the deceased and his wife were present. The accused said his uncle one Kithinji was hit by the deceased and PW6 and (the accused) tried to shield him from the duo.
8. In the process, a fracas arose inside the bar and it escalated into a fight. People used beer bottles, stones as well as other weapons to fight. The accused could not tell who hit Munene in the process. According to him, the fracas took place at around 5.00 am in the morning.
9. The defence submitted that the prosecution failed to prove that the accused caused the death of the deceased. It was argued that after the accused allegedly hit the deceased once, it was not clear whether there was a further assault by another person which may have led to the death of the deceased.
10. It was further submitted that although the doctor formed the opinion that the deceased died of head injuries caused by a blunt object, the injuries may have been caused by some other force unrelated to assault.
11. The defence cast doubt on the allegation that the stick produced in evidence could have made the impact of a blunt object. It was also contended that there was contradiction on whether the weapon was a stick or a rungu.
12. It was the defence’s submission that the prosecution failed to prove malice aforethought which is an integral ingredient in the offence of murder.
13. In this case there is evidence of eye witnesses to the incident being PW1, PW5 and PW6. The evidence of PW1 who was in the bar at the material time in the company of the deceased and his wife PW6, testified that the accused whom he did not know before the incident came to the bar. He asked the deceased to go out of the bar with him for he wanted to teach him a lesson. PW1 and PW6 followed the deceased and the accused as they walked out. Outside the bar the witnesses said they were aided by the light from the bar to see he saw the accused hit the

deceased on the back of the head using a stick.

14. PW5 testified that he was also drinking in a bar called Nderiri bar and went outside to buy cigarettes at around 10.00 pm where he met the accused person. He saw him hit the deceased with a stick and he fell down and bled from the ear.

15. PW6 was with the deceased and PW1 in the bar at the material time. They witnessed exchanged of harsh words with one Kithinji an uncle to the accused.

16. PW1 hit the said Kithinji. When the bar closed at 11.00 pm, PW6, PW1 and others went outside where the accused followed them. He hit the deceased on the neck and head using the stick. PW6 escaped and took a motor bike home. She was followed by the accused who assaulted her and threatened to kill her.

17. He told her to call her husband to come and help her. The deceased was found dead the following day not far from the bar.

18. The evidence of PW3 was that he carried PW6 in his boda boda on the material night around 11.30 pm and dropped her a friend's house where he saw the accused at the gate. The accused pursued PW6. It was PW6's evidence that she was assaulted by the accused even as someone tried to intervene.

19. PW11 Dr. Maingi conducted the postmortem and formed the opinion that the cause of death was massive subdural hemorrhage due to blunt force trauma to the head.

20. The deceased had injuries on the occipital scalp. He had extensive subdural hemorrhage on the frontal lobe and the temporal region. The injuries were caused by a blunt object. The fact that the deceased had injuries on three sides of the head i.e. back, side and front rules out the theory of the defence that the injuries could have been caused by other force other than assault.

21. PW1, PW5 and PW6 saw the accused who was with them in the bar assault the deceased using a stick. He hit the deceased on the back of the head the first time. Later he assaulted him and hit him severally using the same weapon on the neck and head.

22. The argument of the defence that there is no evidence of what happened during the 2nd round of assault. PW6 witnessed the 2nd round of assault before she escaped for her safety.

23. The accused admits being at the scene of crime but states that it was a fracas that involved about 15 people inside the bar. The evidence of PW1, PW5 and PW6 dislodges this defence in that their evidence which was well corroborated establishes that the assault took place outside the bar.

24. According to the witnesses, it was a confrontation between PW1 and one Kithinji an uncle of the accused. The accused seems to have been infuriated by that confrontation and thus ordered the deceased to go with him outside the bar where he assaulted him.

25. The accused went further to states that the fracas in the bar occurred at 5.00 am. This cannot possibly be true because the bar closed at 11.00 pm as per the testimony of the bar attendant PW2 and that of PW1, PW5 and PW6.

26. I found the defence of the accused untruthful and not plausible.

27. The accused was examined by PW10 Dr. Thuo and found to be of sound mind and was fit to plead.

28. It is my considered opinion that the evidence of the prosecution in support of the unlawful act attributed to the accused is sufficient to hold the accused responsible. The totality of the evidence especially that of the eye witnesses has not been challenged by the defence.

29. I find that the *actus reas* has been established.

30. Malice aforethought is defined under Section 206 of the Penal Code. It is deemed to be established by evidence proving only one of the four (4) circumstances listed in the provision.

31. The evidence before the court is that the accused assaulted the deceased the first round by hitting him on the back of the head with a stick. On the 2nd round, the beating was more intense by hitting the deceased several times the neck and head. The deceased died of head injuries.

32. In the case of **OGETO VS REPUBLIC, KLR [2004] 14** the court held: -

By Section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm.

33. The assault was preceded by a brawl in the bar between two people, PW1 and one Kithinji an uncle of the accused. It is not very clear why the anger of the accused who was defending his uncle was vented on the deceased and his wife PW6. The accused seems to have gone wild that night. After beating the deceased and leaving him for the dead, he followed PW6 and assaulted her threatening to kill her.

34. In the **Ogeto** case the Court of Appeal upheld the conviction of the offence of murder whereas the appellant had stabbed the deceased

with a knife on the chest. It was held that the act was intended to cause grievous harm as described in Section 206(a) of the Penal Code and thus constituted malice aforethought.

35. I am of the considered view that the persistent hitting of the deceased with a stick on the head during the two rounds of assault was intended to cause death or grievous harm. The deceased suffered very severe injuries on the head which included a fractured skull.

36. The court observed the exhibit which was produced in court. It was a blunt object which was consistent with the doctors finding on the cause of the injuries. He found that the injuries were caused by a blunt object.

37. It is my finding that the prosecution have proved malice aforethought on the part of the accused.

38. Consequently, I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I accordingly convict him of the offence.

39. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 1ST DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Wachira for Njiru for accused

Ms. Mate for the State