



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 34 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTINE KAGENDO MURIUNGI.....ACCUSED

JUDGEMENT

1. The Accused person, Christine Kagendo was charged with Murder Contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the offence were that; the accused On the 17th April 2013 at Meru Township, Makutano In Imenti North District within Meru County, Murdered Peter Mwaniki.

2. The Prosecution called five (5) witnesses. The defence called 3 witnesses. Their testimonies were recorded verbatim and are part of the record, but will be evaluated accordingly.

Elements of Murder

3. To secure a conviction for murder, the prosecution must prove beyond reasonable doubt the following:-

- 1. The death of the accused and the cause of death;**
- 2. That the accused caused the unlawful act or omission which caused the death; and**
- 3. That the accused had malice aforethought as defined under section 206 of the Penal Code**

The death of the Deceased and cause of death

4. The deceased died on 16th April 2013, 3 days after the day of the offence. According to the post-mortem report prepared by Dr. Benard Midia, a pathologist working at Kenyatta National Hospital, and in the testimony on 26th July 2017 he concluded that the deceased died of complications of 53% total surface area 2nd Degree burns involving the head and neck, the trunk and both upper limbs. Dr Benard Midia produced the Post Mortem report herein marked as Exhibit1. Accordingly the death of the deceased and cause of death has been proved beyond any reasonable doubt.

Was death caused by an unlawful act of omission by the accused?

5. **PW1, Julia Mwendwa, wife to the deceased and Pw5, Grace Kanini, relative to the deceased** testified that they were at the scene of the crime on the Material Day when the events leading to the death of the deceased unfolded. Pw5 specifically testified that she is a business lady, engaged in selling clothes and had taken shelter in a friends shop in Makutano when she received a call from Pw1 and was asked by her to go and see whether there is a person being lynched. After asking around she was informed by a Mr, Kinyua that the act was taking place near an M-pesa Shop. It was then that she approached the M-pesa shop and found a fat lady who was brown and the accused, Christine Kagendo (whom she knew and referred to as Mama Maina). The deceased and a small girl were also inside the Shop.

6. Pw5 was later informed that the deceased had stolen from the M-pesa Shop a sum of Kshs 38,000/=. This fact was to be substantiated later by the evidence of Dw2 who was the M-Pesa attendant at the time. She testified that the deceased had defrauded her of the sum of Kshs. 38,000/= after he made a request that she helps him reverse some money that had been wrongly send to his number. She testified that she obliged in the belief that Safaricom people were calling for help. The deceased give her his phone which showed that he was talking to a representative of Safaricom; Safaricom number was showing in the screen. It is only after the money in her phone became exhausted that she

realised the fraud.

7. Pw5 also testified that she tried to plead with the accused assuring her that the deceased would pay the money but it was all in vain. She also testified that the accused held a stick (jembe pin) and was poking the deceased with it. She also testified that the accused was persistent on the accused paying the money or she will lynch him. She told the court that there was a tyre lying in front of the accused.

8. Pw5 said that the accused was persistent on her claims to the deceased. She pleaded with the accused. She even called the deceased's sister and wife to plead on his behalf. But on realising that her pleas fell on deaf ears, she called the police to alert them of what was happening. She also decided to sneak from the scene and went to the police station but on her way she found the police on their way to the scene.

9. She went back to the scene only to find the deceased had been burnt. She later on talked to the deceased at the hospital who informed her that it was the accused who had burned her.

10. Pw1 testified that she received a call from the accused who had informed her that the deceased had stolen money. She arrived at the scene, Nyanyuki stage where an Mpesa Shop is at Makutano, and found the deceased had been handcuffed. She was informed that the deceased had stolen Kshs. 35,080/=. The deceased was later to be burnt by fuel.

11. On cross examination she testified that she only found two people at the scene and that it is the accused who went to get fuel from a nearby petrol station, she however testified that she neither saw who put the tyre on her husband, nor saw the accused light the fire/match box. She however averred that the accused accosted her when she tried to prevent her from placing the tyre on the neck of the deceased.

12. Pw2 however testified that she knew the deceased since he worked with her husband and when he arrived at the scene she found a mob of about 20 people who had surrounded the deceased who was partially burnt. She however did not know how the deceased was burnt.

13. Pw4, Timothy Muli, the Police Officer investigating the crime testified that when he arrived at the scene he found the deceased had been burnt and had fallen 5 metres from the M-pesa Shop. At the time there was a crowd of 100 people and 2 ladies (Dw2 and the accused) who had been detained by the crowd. The deceased at the time was alive and was rushed to Meru Level 5 Hospital. He also took Dw2 and the accused and remanded them at the Police station. They were to be released by the Officer Commanding Station (OCS) pending investigations. The investigations were however pursued when Pw1 came to report the incident. They were rearrested and Pw1 was charged.

14. The Post-mortem report states that the deceased got serious burn injuries when members of the Public set him on fire. He was rushed to Meru District Hospital on 12/04/2013. He was referred to Kenyatta National Hospital and admitted at I.C.U where he died on 16/4/2013.

15. The defence called 3 witnesses, **Dw1 the accused, Dw2 Marion Nkirote, the M-Pesa attendant and sister to the accused and Dw3 Stephen Mugambi a butcher at Makuatano.** Dw1 testified that she kept a fair distance from the scene of the crime and the only time she approached the scene was when she was informed by DW3 that the deceased had stolen money from the shop and that they were resolving the same. She averred that she kept a fair distance from the shop. That she did not see the deceased and is not aware who lynched the deceased.

16. DW 1 also stated that the Pw1 and Pw4 did not mention her in their initial reports i.e. OB No 9/18/4/2013 and OB/61/12/4/2013. She avers that Pw1 and Pw4 stated that the deceased were lynched by a mob in their respective statements.

17. Dw2 confirmed that statement of Dw1. She also testified that when she realised that the deceased had defrauded her she raised an alarm and a mob came. The mob became impatient when the deceased was not cooperating as a result of which the deceased was lynched.

18. Dw3 reaffirmed the statement of Dw1 to the extent that he did not see her leave her grocery shop which was 80 metres away from his butchery and that he did not see her lynch the deceased.

Claim of mob "justice"

19. Incidences of mob justice have become prevalent in the Country. In **Republic v Kelvin Amata Omboto & another [2017] eKLR** the Court was saddened by these state of affairs and stated;

"I note that he (deceased) was clearly a victim of what is often touted as mob justice but what should ideally be "mob injustice"..... Mob justice is a very primitive and barbaric method of meting out justice that should be discouraged and condemned in the strongest terms possible as it has no place in a civilized society that observes the rule of law."

20. It is trite every homicide is unlawful unless it is authorized or excusable by law or committed in execution of reasonable defence of property or self-defence. See **Republic v Stephen SilaWambuaMatheka [2017] eKLR & Sharmpal Singh [1962] EA 13.** The question that bears from the facts of this case is **whether or not the said offence was a mob justice and or an act of homicide by the accused.**

21. From the oral and documentary evidence the deceased was at the shop where Dw2 was working and was allegedly defrauded of Kshs. 38,080/=. Dw2 was in the shop with the accused and the deceased. Although she denied this fact, the testimony of Pw1 and Pw5 places the trio in the M-Pesa shop at the material time. I am convinced to agree with the testimony of Pw1 and Pw5 in these respects; (1) that the accused, DW2 and the deceased were at the scene of the crime; (2) that the accused poked the accused with a jembe pin and made threats of lynching him unless he pays the money stolen; (3) the accused either alone or with others lynched the deceased with a tyre and petrol; and (4) as a result of burns from the lynching, the deceased died. The evidence available does not support the defence that the mob lynched the deceased.

22. One particular matter which is of great importance is that despite denials by the accused and DW2, the M-Pesa shop was owned by the accused but was manned by DW2, her sister at the material time. Dw2 only stated that she was the Mpesa attendant at the shop which the deceased defrauded. But, she could not remember the name of the owner of the shop who she alleged was her employer. The alleged owner was also not called as a witness. What a calculated design of defence? The pain of losing money made the accused take matters into her own hands thereby infringing the law and right to life of the deceased.

23. More evidence came; Pw4 found the accused and DW2 detained by the same mob they claim lynched the deceased and he saved them from them. According to PW4, the mob had accosted the accused and Dw2 due to their actions. The evidence of Pw5 point to the nature of the dispute between the deceased and accused. These pieces of evidence totally negate the defence that the mob lynched the deceased. The evidence by the accused and Dw2 was merely tailored to suit their defence. I find the defence not to hold sway. Her sister, DW2 was trying to cover for her sister's unlawful actions.

24. The statements of Dw2 and Dw3 are also contradictory in placing where the accused person was when the offence was being committed. Whereas Dw2 states that the accused actually came to the M-Pesa shop Dw3 states that the accused never moved away from her shop. The testimonies were skewed to try to save the accused person from what was undoubtedly a heinous act.

25. Also the evidence of Pw5 points to there being a tyre near the shop where DW2 was an Mpesa attendant. The tyre was used on to lynch the deceased. Pw1 testified that she tried to remove the tyre from the neck of the deceased but was kicked by the accused. The facts that the accused went to the petrol station to buy petrol so as to burn the deceased was not uncontroverted.

26. All these factors lead to only one conclusion; the guilt of the accused. The prosecution proved beyond reasonable doubt that the deceased died as a result of unlawful act by the accused.

27. The provision of section 203 of the Penal Code is that one is held to be guilty of murder if he/she causes the death of another person with malice aforethought upon an unlawful act or omission.

28. The facts show that the accused killed the deceased. The evidence by PW1, PW2, PW4 and Pw5 is that deceased was lynched. PW5 stated that the deceased informed her that the accused is the one who burned him. That fact was not denied. This statement can only be taken as a dying declaration. Pw1 and Pw5 confirm that the deceased was tied by the accused at the time they arrived at the scene. PW1 also confirms that the accused is the one who had a match box and actually sought to burn the deceased. The post mortem report confirmed the circumstances that led to the death of the deceased and states that the deceased got serious burns when members of the public set him on fire. See **Republic v Mohammed Wanyoike & another [2017] eKLR** which has similar circumstances as this case where the court made the following analysis;

“The accused have raised the issue of common intention and that the deceased was assaulted by a mob. The 1st accused contends that if it is found that he was at the scene, then his presence was only passive and did not participate in the assault of the deceased. The mere fact that it was alleged by PW4 that the 1st accused was at the scene while holding a whip cannot be sufficient evidence to find him guilty of the offence.

Section 20 of the Penal Code provides for parties to an offence as well as principle offenders. A principle offender includes the one who commits the offence, the one who aides or abets another person to commit the offence and the one who procures the other person who commit the offence. Section 21 of the Penal Code provides as follows:-

“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.”

Section 10 of the Evidence Act (Chapter 80 Laws of Kenya) states follows: -

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

The investigating officer testified that the deceased could have been killed by mob justice. Counsels for the accused reiterate that there were many people at the scene and it is difficult to determine who committed the offence. From the evidence on record, it is established that the deceased was assaulted during the day. PW2 was categorical that the mob did not attack the deceased. PW4 tried to assist the deceased but was threatened by the killers. That is the evidence on record. However, assuming that the deceased was assaulted by a mob of people and subsequently died out of those injuries, can it be said that the mob was justified in attacking the deceased. The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. There is no principal of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court. Administering kicks and blows to the suspect in the pretext of mob justice does not make those acts lawful. The mob becomes the investigator, the trial court and the administer of the sentence. What is the extent of the punishment administered by the mob" One year, two years, life imprisonment or the death penalty. Such actions cannot be allowed in a country based on democracy and the rule of law. Every person within the mob who assaults the victim is individually liable for his/her criminal acts.

Common intention does not need to be foreplanned. It can be inferred from the acts of the perpetrators of the offence. In the case

of *NJOGU V REPULIC* [2007] 2 KLR, 123, it was held inter alia that:

“Under section 21 of the Penal Code (Cap 63), 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.”

In the case of *LININGUSHU & OTHERS V REPUBLIC* [2005] 1 E.A. 229, the deceased’s wife organized for the killing of her husband. Her defence was that she did not participate in the killing. The trial court summarized her role as follows: -

“She was the mastermind of the operation to eliminate her husband. She procured the killers and agreed to pay for their services. At the scene, she directed the operations although she did not strike the fatal blow. She paid part of the agreed price after the work was done. She was a principal offender and therefore guilty as charged.”

The Court of Appeal in the case of LININGUSHI & OTHERS (supra) agreed with the above findings and dismissed her appeal. In the current case, the 1st accused testified that his premises were broken into and his phone and money was stolen. It is clear from the evidence that he must have informed his friends about the incident. The 1st accused was told that the deceased was the one who broke into his premises. The 2nd accused managed to trace the deceased and according to PW2 called the 1st accused. They cornered the deceased and assaulted him. The 1st accused had a whip and inflicted injuries on the deceased. It does not matter whether the deceased died of the head injuries or the injuries inflicted by the whip. The 1st accused is a principle offender.

29. It has been proved that the accused had the intention to cause death or grievous harm to the deceased. Borrowing from the decision in Republic v Mohammed Wanyoike & another [2017] eKLR and the circumstances of this case it follows that the accused was a principal offender and therefore the ingredient that the accused did cause the unlawful act or omission which caused the death of the deceased has been proved beyond reasonable doubt.

Did she do it with Malice aforethought?

30. In the offence of murder, malice aforethought is taken to be the mental element or *mens rea* of the offence; ordinarily, it takes the form of an intention to unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is the implied malice. Instances of malice aforethought are stated in Section 206 of the penal Code as follows

206 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 of any person who has committed or attempted to commit a felony

31. In Republic v Stephen SilaWambuaMatheka [2017] eKLR it was held;

The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic 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. In the Ogelo v Republic [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit themurder.

See also Republic v Martin Kinyua Nancy [2016] eKLR

32. The accused may have been unforgiving to the deceased and even failed to be remorseful to the prayers of Pw1 and Pw5. The same was provoked by the fact that the deceased had stolen from the Dw2 (her sister). This however did not give him justifiable reasons to instigate the punishment that befell the deceased. As has been held in Republic v Mohammed Wanyoike & another [2017] eKLR she turned to be the investigator, the trial Court and the executioner. She charged the deceased, bought petrol, placed a tyre on the neck of the deceased and lit the match box. She anticipated that he will die or be inflicted with grievous bodily harm. He died of the burns. Therefore she had the necessary malice aforethought to kill the deceased.

33. In view of the foregoing, the ingredients of malice aforethought and indeed the offence of murder have been proved beyond reasonable doubt.

34. I hereby find the accused person guilty of the offence of murder contrary to section 203 of the Penal Code of Kenya. And accordingly convict her for the murder of PETER MAINA MWANIKI under section 322 of the CPC. It is hereby so ordered. Right of appeal explained.

Dated, signed and delivered in open court at Meru this 11th day of December, 2018

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F. GIKONYO

JUDGE

In presence of

Muriuki for Murithi for accused

Namiti for state

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F. GIKONYO

JUDGE