



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 59 OF 2013

REPUBLIC.....STATE

Versus

JOSEPH MWENDA KIUNGU.....ACCUSED

JUDGMENT

Offence of murder

[1] The accused, JOSEPH MWENDA KIUNGU was charged with murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are: On the 9th day of March 2013 at Kianda Sub-location in Igembe South District within Meru County he murdered Joseph M'Mariu Mítalakwa. The prosecution called 5 witnesses and their evidence is recorded already.

Defence

[2] After close of the prosecution's case, the accused was placed on his defence on 9th day of October 2018. He gave a sworn statement. In his defence, the accused person denied killing the deceased and stated that on 9th March 2013, the deceased woke him up at 6.00am. They went to collect maize on peoples' shamba- maize that is inadvertently left after harvest. The deceased told him that they should sell the maize they had collected which weighed about 40kg. They went to a lady called Rui- the lady was selling changáa- and asked her to give them brew to drink and in return they will sell her maize. She obliged and gave her each 2 glasses and they consumed. The brew was worth Kshs. 240. They went to another lady called Makena who also sells changáa. They once again asked her for brew and in return they will sell her maize. She obliged and each took 2 glasses of changáa. He stated that they went to three changáa dens and in each place they took brew. He became drunk

[3] He then asked the deceased to go for the maize so that they can take them to the ladies who sold them changáa. The deceased said that he was not drunk. He then ordered more changáa for Kshs. 100. They then left for the place where they had kept the maize- this is where they normally sleep. These were stores on the farm of Ndumba. Upon arrival to the stores, the deceased started to resist sale of the maize. He told the court that the deceased hit him with a panga. He took a stick and hit the deceased on the head because he feared the deceased would cut him with the panga. The deceased fell down and he ran away. He took the panga and went to inform Ndumba that they fought with the deceased and he should therefore go and take him to hospital. He insisted that he was drunk. But, again he gave the panga for changáa and continued to drink until about 3.00pm when he was arrested for allegedly killing the deceased.

[4] He told the court that the deceased was his drinking partner and a good friend. They used to buy each other brew. In cross-examination, he stated that Ndumba had employed him and the deceased. He stated that Gichuru said that he saw him hitting and cutting the deceased. And that he told him that he will inform Ndumba that he had beaten the deceased. In all these things, he claimed that he did not know what he was doing. He confirmed that he told Ndumba that he had beaten the deceased. At that point he said that he could remember what happened except he did not realize what he was doing.

Submissions by prosecution

[5] The prosecution filed written final submissions. They began by stating that from the evidence adduced, the prosecution has proved its case beyond reasonable doubt that the accused committed the crime. According to the prosecution PW1 saw the accused hitting the deceased with a rungu. The deceased begged for forgiveness but his cry fell on deaf ears. PW1 called PW2 and informed him of what was happening in his shamba. PW2 corroborated this. PW2 also testified that the accused went to him and told him he had beaten the deceased and he should therefore go for, and take him to hospital. Investigations as narrated by PW5 corroborated the evidence of prosecution witnesses. The defence confirmed events as narrated by prosecution witnesses. According to the prosecution the ingredients for murder as was stated in the case of **ROBA GALMA WARIO vs. R [2015 eKLR]** were satisfied and they sought conviction accordingly. The defence did not file or make any final submissions despite having been given ample time to do so. Nonetheless, the court will determine case on merit.

ANALYSIS AND DETERMINATION

[6] I should now carefully evaluate the evidence adduced to establish whether the prosecution proved their case beyond any reasonable doubt, to wit:

The accused, of malice aforethought, caused the death of Joseph M'Mariu M'Italakwa by an unlawful act or omission.

Elements of offence of murder

[7] The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms;-

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

[8] Arising from the above definition are four elements of the offence that the prosecution must prove beyond reasonable doubt, to wit:

1. *The fact of the death of the deceased*
2. *The cause of such death*
3. *Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and*
4. *Proof that the said unlawful act or omission was committed with malice aforethought.*

Of fact and cause of death

[9] **PW4, Dr. Njeru Charles** produced the Post-mortem Examination Report on the body of Joseph M'Mariu M'Italakwa, the deceased herein. According to the report, the body of the deceased was identified by PC Joseph Kasango. The doctor examining the body formed the opinion that the deceased died of severe head injury. Accordingly, the prosecution proved the fact of death and cause of death of the deceased. I move to the next hurdle.

Death as a result of unlawful act of the accused

[10] The prosecution must also prove beyond any reasonable doubt that the deceased met his death as a result of unlawful act or omission of the accused. **PW1, John Gichuru**, told the court that on the material time, at about 11.00am he had gone to Kianda to buy miraa for his business. Upon reaching the shamba of Ndumba where he was to buy the miraa, he saw a person lying on the ground and wailing. He called but immediately he noticed that he was being beaten. He was being beaten by the accused using a rungu. The person was begging for forgiveness from the accused. He asked the accused to stop beating the deceased but he did not heed. He was just 30 meters from the scene. Suddenly, the person became mum. But the accused continued to ask the deceased to wake up and carry the maize. There was no reply from the victim. The accused then left. PW1 entered the gate to the scene and found the deceased was not talking. He also left and notified the owner of the land on phone that his employee had been beaten and was not talking. The owner of the land told him that he was just nearby and so PW1 went to see him. PW1 stated that he knew the accused and the deceased well. He also saw a sack of maize at the scene. He identified a photograph of the maize by the police.

[11] PW1's evidence was not shaken in cross-examination as he proved that he saw the accused beating the deceased with a rungu. He asked the accused to stop beating the deceased but he did not heed. The accused left the rungu on the body of the deceased. He also confirmed that the deceased received injuries on the head, hands and legs.

[12] **PW2, JAMES NDUMBA** was the owner of the land where the incident took place. His evidence corroborates the evidence of PW1. He was categorical that on the material day, he had asked PW1 to go to his shamba and check on the miraa for purposes of selling miraa to him. PW1 went to the shamba and on arrival he called him back informing him that there were people fighting in his land. He set out for his place of work after which he intended to go to the scene. Barely ten minutes after the accused went to his place of work with two pangas and informed him that he had beaten his employee and that he should go and take him to hospital. After that information, he hurriedly left for the shamba together with PW1. He found the gate to his shamba open. He found the deceased had been beaten on the head, hands and legs. His hands and legs had been broken. He tried to lift him but he realized that he had been broken into pieces. He could not speak or walk. The deceased had also been burnt on the back with a hot object.

[13] PW2 also saw the maize at the scene; some had poured down on the ground, and others were in the sack. He also saw a rungu. The rungu was resting on top of the body of the deceased. It was over a metre long and of big diameter. He identified the rungu and the maize in the photograph shown to him by prosecution.

[14] PW2 then called Chief Gathiru Mwika on the matter and the chief called the police. The police came and arrested the accused. He said that he knows Mwiti very well as he used to live with the deceased in his shamba. He also knew the deceased as he was his employee. He identified Mwiti to be the accused and in the dock. He said he has no quarrel with the accused.

[15] The evidence of was subjected to cross-examination, but he was consistent that the accused came to his place of work and informed him that he had beaten the deceased. He stated that if this fact was not recorded in the statement, that must have been an oversight by the police. He insisted that he was telling the truth and he was giving evidence on what he saw. He described the scene which was in his shamba and stated that he had reserved an open area around his house and you could easily see the scene from the gate. He said that there is no plantation which could prevent you from seeing the scene from the gate.

[16] The evidence of PW2 was uncontroverted that the accused told him that he had beaten the deceased. His evidence corroborates the one by PW1.

[17] **PW3, M'Kaumu M'Itarakwa**, told the court that on the material day he set out for his shamba at 8.00am. On the way he met people who informed him that his brother had been killed by Mwiti, the accused. He also told the court that PW1 who is also called Nguri is the one who told him that his brother had been killed by the accused. Mwiti, the accused was running away and so he decided to pursue him. He entered a small house where he ordered for brew. He sat on a form. PW3 took a stone and aimed at the accused but the accused ran into the house and locked himself in. He insisted that he will not leave the house unless in the hands of the police. PW3 called the police camp and an inspector came and arrested the accused.

[18] PW3 stated that he had seen the body of his deceased brother at Maua police station and was able to sight injuries on him; he had been hit on the head, all his legs and hands had been broken and had panga burns on the back. He stated that Mwiti was his next door neighbour and he knows him well. Mwiti was the person in the dock. That was the accused. His evidence was not shaken in cross-examination.

[19] **PW4, Dr. Njeru Charles**, produced a post-mortem report on the deceased and stated that the deceased died of severe head injuries. The left temporal bone of the head was fractured. Other injuries sustained by the deceased are; fracture of right leg, deep cut on left scalp, humerus was injured, internal injuries of the nervous system were also noted. These injuries are consistent with the accounts given by the prosecution witnesses.

[20] The accused admitted that he beat up the accused and informed PW2 of that fact. He also stated that he asked him to go and take him to hospital. Except, he claimed that he was drunk and that he could not remember what he was doing. I will evaluate this defence more closely under malice aforethought.

[21] The foregoing notwithstanding, I am acutely aware that the onus of proof lies on the prosecution. The evidence adduced is strong and coherent that the accused caused the death of the deceased through his unlawful acts of beating him with a rungu. The accounts by PW1 and PW2 are of first-hand knowledge. PW1 saw the accused beating the deceased with a rungu until the deceased could not speak. The manner in which the assault was delivered was described in fine details by PW1. The injuries sustained thereof were confirmed by PW4 and are consistent with the narration by PW1, PW2 and PW3. Accordingly, I find that the accused caused the death of the deceased by his unlawful acts. Was this done with malice aforethought?

Of malice aforethought

[22] Now I should find out whether there is proof that the said unlawful act or omission was committed with malice aforethought. The circumstances which constitute malice aforethought are set out under 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 from custody of any person who has committed or attempted to commit a felony.”***

[23] The accused in his defence claimed that he was drunk that he did not remember what he did. I do not think the accused was setting up a defence of insanity by reason of intoxication. In my critical estimation, the accused is merely stating that by reason of intoxication, he was incapable of forming the specific intention required to constitute the offence of murder. In that case, the prosecution bears the onus of proving beyond any reasonable doubt that the accused possessed the necessary *mens rea* to commit the offence. See the case of **KONGORO S/O MRISHO vs. R. (1956) E.A.C.A. 532**. I will so proceed.

[24] PW1 saw the accused hitting the deceased several times with a rungu. The rungu was described by PW2 to be over 1 metre and of a huge diameter. PW1 told the court that the accused hit the deceased until he went mum. PW1, PW2 and PW3 described the state of the deceased when they saw him to be that his hands and legs had been completely broken. The head was also severely injured. PW4 affirmed that the post-mortem report confirmed that the injuries suffered were multiple and severe. They were fractures. The injuries were numeral, massive and severe; and were inflicted with a rungu; this portends brutal force was applied hence intention to cause grievous bodily harm and death of the deceased was present. The evidence shows that the accused intended the natural consequence of his actions- death of the deceased. His claim of drunkenness was an attempt to suggest that by reason of intoxication he did not know what he did. Surprisingly, he referred the deceased as his friend; which makes me wonder of his way of expressing friendship or treating a friend; quite debauchery or sadistic. See the case of **DANIEL MUTHEE vs. REP. CA NO. 218 OF 2005 (UR)**, where the Court of Appeal stated thus;

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of

Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

[25] See also the Court of Appeal in the case of Joseph Mwongera Rukaria v Republic [2013] eKLR where the court stated;

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

[26] Accordingly, I find that the accused of malice aforethought caused the death of Joseph M’Mariu M’Italakwa, the deceased herein. I find the accused, Joseph Mwenda Kiungu guilty of the murder of Joseph M’Mariu M’Italakwa, and convict him accordingly under Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Right of appeal explained- 14 days. It is so ordered.

Dated, signed and delivered in open court at Meru this

11th day of December, 2018

F. GIKONYO

JUDGE.

In presence of

Namiti for state

Accused - present

M/s Nelima for accused

F. GIKONYO

JUDGE