



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 117 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

LUKE NZIOKA MALONZA.....ACCUSED

JUDGEMENT

Luke Nzioka Malonza alias Luka, hereinafter “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 10th day of September 2013 at Umoja Estate within Nairobi County jointly with another not before the court he murdered Waithaka Macharia, hereinafter “the deceased”. The accused is represented by Mr. Mutitu, advocate.

The prosecution called ten (10) witnesses and closed its case after unsuccessfully failing to secure a further adjournment to call one last witness. According to the evidence of James Thuge Njuguna (PW1), Javis Munoru Kariuki (PW2) and Duncan Muchiri (PW4) the accused and one Anthony Kamau attacked the deceased on Moi Drive in Umoja Phase One Estate. This was on 10th September 2013. Evidence shows that it was claimed the deceased had stolen Anthony Kamau’s phone sometime before this day. There was mention of a third person but the person was not identified. The three witnesses put the time of the attack at 2.30pm. James said the three attackers were kicking the deceased, hitting him with fists and using stones on him. James further said the three also stepped on the deceased’s head. Javis told the court that Anthony Kamau held the deceased by the neck and started punching him while the accused stood by while Duncan said he saw the accused and Anthony Kamau frog marching the deceased and that both were hitting the deceased with fists. James said he saw deceased with injury on the left side of the head and broken jaw and that the deceased could not talk.

Margaret Macharia (PW6) and mother to the deceased told the court that her son went home at 12.00 noon on 10th September 2013 and went straight to his bedroom where he stayed for one minute; that he told her to take him to hospital because he had been beaten by Kamau and Luka; that she did not know who Kamau and Luka were; that she entered deceased’s bedroom and found he was unable to close his mouth; that the deceased told her that Kamau and Luka had been using heads and kicks to assault him and that the deceased’s teeth were loose. She told the court that she took him to Provide International Hospital at Mutindwa where he was x-rayed and found with dislocated jaw. She testified that they were referred to Kenyatta National Hospital; that they went to Kenyatta National Hospital where another x-ray was done on the deceased confirming that his jaw was dislocated; that he was taken to the theatre to have his jaw wired together and they went home.

Margaret testified further that she continued nursing the deceased at home until 25th September 2013 when he started complaining of headache. He was taken to Provide International where he was treated.

On 26th September 2013 the deceased told Margaret that his head was still aching and that he did not have the energy. He was taken to Mama Lucy Hospital who referred him to Kenyatta National Hospital. He died on 27th September 2013 at 3.00am as he was waiting to be taken to the theatre.

Anthony Kamau was arrested first. Evidence of Simon Mokaya (PW9), formerly No. 37885 Police Constable Mokaya, of Buruburu Police Station is that Anthony Kamau was arrested on 10th September 2013 but was released by the police on cash bail. He was never re-arrested and still remains at large.

The accused before the court was arrested by members of public including Martin Ndirangu Njigua (PW3) and Patrick Alembi (PW5) on 17th December 2013 and taken to the deceased's home. He was later taken to Buruburu Police Station and handed over to the police and later charged with this offence. Evidence from the police, CPL Tom Wamalwa (PW7) and PW9 Simon Mokaya is that he accused had been beaten by members of the public after his arrest and had facial injuries. He was treated Jericho Health Centre where he was also certified to be mentally fit to stand trial.

In his unsworn defence, the accused testified that he was with Kamau on 10th September 2013 at Umoja where they met the deceased who was known to them; that he left to go to the shop to look for change of Kshs 200 and on return he found Kamau, who he referred to as Earnest Kamau, holding the deceased by the shirt and demanding his phone from the deceased; that a fight broke out between the deceased and Kamau and the accused tried to separate them but he was hit by the fighting duo; that he managed to separate them and advised Kamau to go to report at Buruburu Police Station and that Kamau started pulling the deceased to go to the Police Station but the deceased resisted. He testified that he was following them from behind; that Kamau started beating Macharia again and the accused stood three metres from them avoiding to get involved lest he be hit again.

The accused further testified that he was assaulted by deceased's friends including Martin Ndirangu (PW3) who claimed that he (the accused) had not assisted the deceased; that he reported the matter at Buruburu Police Station in OB No. 57/9/2013 (defence exhibit 1). He said he was treated at Mama Lucy Hospital and produced treatment notes in Court as defence Exhibit 2. He said he was later accosted by deceased's friends after two weeks who demanded from him that he must produce Kamau; that he told them he had no idea where Kamau was; that they claimed he had taken part in assaulting the deceased and they arrested him and handed him over to the police.

At the close of the defence case, Mr. Mutitu for the accused submitted that Dr. Dorothy Njeru (PW10) testified that the deceased has a torn diaphragm on the left side and there was a tear of the stomach with bleeding in the abdominal cavity measuring 500cc, bleeding in the substance of the brain on the right side and features of increased pressure within the cranium. Mr. Mutitu submitted that these are very serious injuries and that the deceased could not have survived for two weeks with such injuries; that the doctor did not submit deceased's treatment notes to show that the injuries the deceased was treated for by the first doctor contributed to his death.

The defence further submitted that the case was not properly investigated and that there is no proof that the death of the deceased was caused by unlawful act or omission on the part of the accused and that it is probable that the deceased received further injuries that may have contributed to his death since evidence shows that after his initial treatment he went home and continued with normal life. It was further submitted that the prosecution has failed to tender evidence to prove beyond reasonable doubt that the accused murdered the deceased.

On the other hand the prosecution has submitted that it has proved all the ingredients of murder beyond reasonable doubt and urged the court to convict the accused for the offence of murder.

Murder is defined as the causing of death of a human being by another person by unlawful act or omission with malice aforethought. Malice aforethought is defined to include the intention to cause the death to or do grievous harm to another person and knowledge that such an act will probably cause the death or do grievous harm to another person.

I have read all the evidence from both prosecution and the defence, the submissions and the cited authorities **Republic v. Harun Mudavi Adolwa Criminal Case No. 83 of 1997** and **Republic v. Martin Oluoch Okwako & two others Criminal Case No. 1 Of 2015.** I find that death of the deceased has been medically confirmed by the evidence of PW10 to have occurred. As submitted by the defence, there are contestable issues in regard to the injuries sustained by the deceased and the injuries that caused his death according to the evidence of the pathologist.

I have noted from the evidence of James that the deceased could not talk because of injuries to his jaw. I have noted from the evidence of deceased's mother Margaret that the deceased told her that he had been assaulted by Luka and Kamau. Was the deceased able to talk or not? There is also the issue of time. PW1, PW2 and PW4 all put the time of the assault as 2.30pm. Margaret PW6 said her son went home at 12.00 noon and he was injured. Granted that she may not have looked at the time, there is a 2½ hours difference. This difference was not explained by the prosecution.

Further I agree with the defence that the injuries described by the pathologist were grave, yet the deceased lived with these injuries from 10th September 2013 to 27th September 2013 when he died at 3.00am. Is this possible? There is no evidence from the mother or any relative who lived with the deceased that he was complaining of abdominal pains or suffering from headache for the two weeks he was at home. He was not admitted in hospital. Evidence further shows that two x-rays were done on his head and all revealed a dislocated jaw. There is no mention of abdominal pain or injuries to the head, yet the pathologist found massive subdural haematoma on the right temporal parietal region and features of raised intracranial pressure.

The prosecution required further evidence to explain the deceased's injuries. His treatment notes from the first doctor who attended to him to the last doctor to attend to him is crucial to confirm whether the injuries sustained by the accused on 10th September 2013 led or contributed to his death. As submitted by the defence, evidence on the injuries causing the death of the deceased is inconclusive due to the obvious gaps in evidence.

I have also analysed and considered the evidence of the three key witnesses who were present, PW1, PW2 and PW4. It does not agree. PW1 said that both the accused and Kamau assaulted the deceased. Jarvis PW2 said both assaulted deceased but said also that the accused stood by as Kamau was assaulting the deceased. PW4 said that Kamau and accused frog marched the deceased hitting him with fists.

The evidence from both the accused and the defence places the accused at the scene of the assault. The accused has explained his presence at the scene and said that he was trying to intervene to stop the fight between the accused and Kamau. As the evidence stands, it could be that the accused took part in assaulting the deceased or was trying to separate them as he claims. This court believes the evidence of the three witnesses who were present that the accused took part in assaulting the deceased.

Did the accused intent to kill the deceased or to cause him grievous harm? I find this issue not proved beyond reasonable doubt. Evidence shows that Kamau claimed that the deceased had stolen his phone and started punching the deceased. Accused may have joined this fight but his role is not clearly defined by the available evidence. Further, I have issues with the evidence of the injuries sustained on 10th September 2013 and the injuries found by the pathologist on examining the body. Sufficient evidence is lacking to prove beyond reasonable doubt that the injuries sustained by the deceased on 10th September 2013 are the same ones found by the pathologist.

In conclusion therefore, this court cannot conclusively determine whether the injuries suffered by the deceased when he was assaulted on 10th September 2013 are the same injuries found by the pathologist to have caused his death. This doubt goes to the benefit of the accused who is hereby acquitted for lack of prove beyond reasonable doubt that the injuries sustained by the deceased at the time of assault on 10th September 2013 are the same injuries that caused his death on 27th September 2013. I find the offence of murder not proved as required. Consequently, I hereby acquit the accused of the offence of murder and order that the accused, Luke Nzioka Malonza, be set at liberty forthwith unless for any other reason he is

held in custody. It is so ordered.

Dated, signed and delivered this 25th day of January 2017.

S. N. Mutuku

Judge