



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NUMBER 13 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

KASIANO MUSIGO LUGIRI.....ACCUSED

J U D G M E N T

1. Upon a postmortem examination on the body of William Nyongesa Juma (**the Deceased**) carried out on 11th July 2013, the examining Doctor formed the opinion that his death was caused by Subarachnoid Hemorrhage from Torn Bridging Veins Secondary to an Assault. It is alleged by the Prosecution that the assault was caused by Kasiano Musigo Lugiri (**the Accused**). The Accused faces the charge of Murder contrary to Section 203 as read with Section 204 of The Penal Code. The particulars of the offence is that on 5th July 2013 at Serekeresi Sub-location, Nangosia Location within Busia County he murdered the Deceased.
2. On 5th July 2013, Getrude Amusugutu (PW1) was in the company of the Deceased as they made their way from a funeral service at Nangina. In a conversation between the two, the Deceased asked Getrude whether she was aware that someone had stolen some clothes from the Deceased neighbour. As they spoke a Daughter of the Accused person confronted the Deceased and insulted him. As they walked past the homestead of the Accused, the Daughter of the Accused person told the Accused person that the Deceased had alleged that the Accused was the thief. This angered the Accused who then attacked the Deceased and started to assault him. The witness says that he saw the Accused person slap the Deceased severally on the face. That this continued notwithstanding that PW1 tried to intervene and that the Deceased asked for forgiveness.
3. As Nicholas Okello Ogaha (PW2) passed by, he heard PW1 urging someone "Please leave him he has begged for forgiveness". PW2 then went to the direction of PW1's voice, when he reached a place outside the house of the Accused he found the Accused holding the Deceased by the shirt and slapping him. Getrude was also at the scene. PW2 joined in urging the Accused person to stop the assault. It was also the evidence of the witness that Caroline, the daughter of the Accused, also begged her father to stop and in fact attempted to restrain him by holding his hand. All these fell to deaf ears as the Accused continued to slap the Deceased.
4. At some point the Deceased fell to ground and started to groan. It seemed to PW1 that the Deceased was in a critical state. At that point Peter Osino Juma (PW3) arrived at the scene and found the Accused was angry and chasing people away. His brother, the Deceased, was on the ground. He was not able to walk. With the help of PW2 and his son Edwin, PW3 carried the Deceased to his home. PW3 explained that he was unable to take the Deceased to hospital immediately because of lack of money.
5. The next day, with the help of the village Elder, PW3 took the Deceased to Nangina Hospital where he died before he could be attended to. That in the company of the Accused, PW3 reported the incident to the police at Funyula Police Station. The Police Officer who received the report

- was PC Micah Yator (PW4). After recording statements of witnesses, the Police Officer formed the opinion that the current charges should be brought against the Accused person.
6. On examining the body of the Deceased in postmortem, Dr. Khadolwa Angira found that the external appearance of the Deceased body was normal and did not have any bruises or grazes. An examination of the internal body revealed that there was Blood Pooling Outside the Confluence of the Sinuses with Features of Thrombosis. The Doctor formed the opinion that the cause of death was Subarachnoid Hemorrhage from Torn Bridging Veins Secondary to Assault. At the hearing Dr. Angira was not available to testify. This is because he had left Busia. For that reason Dr. Rabare Nina (PW5) produced the Medical Report on his behalf. In answer to a question by the Court, PW5 advised that Sinuses are connected to the brain by bridging veins which stiffen with age and that a trauma can cause them to break. In his view slapping can cause such trauma.
 7. At the close of the Prosecution case, and on analysis of the evidence of the witnesses for the Prosecution, I formed the view that the evidence was sufficient to require the Accused person to make a Defence. Upon informing the Accused person of his Rights to Defence provided under Section 306(2) of The Criminal Procedure Code, the Accused person choose not to give any evidence or to make an unsworn statement or to adduce evidence.
 8. In summing up the case for the Prosecution, Mr. Owiti State Counsel submitted that there was direct evidence by PW1 and PW2 narrating how the Accused person assaulted the Deceased. That at one point PW2 tried to separate them. The Court was asked to find the Accused had the intention to assault the Deceased and the assault would eventually lead to his death. Further that the postmortem report confirmed that the cause of the Deceased death could have been the assault.
 9. In response Mr. Jumba for the Accused submitted that no facts were led to show that the assault was vicious and aggressive enough to cause fatal injuries. Counsel argued that the Prosecution did not prove malice aforethought. It was further submitted that from the facts of the case the Court should find that the Deceased provoked the Accused person. On the Doctors findings, it was argued that other conditions other than an assault can cause Thrombosis. The significance being that there was evidence from PW2 that the Deceased was a drunkard who did not pay much attention to his health.
 10. From the evidence of PW1 and PW2 the incident that led to the death of the Deceased happened on 5th July 2013 at about 11.00 a.m. This happened in broad daylight. Both the Deceased and the Accused were well known to the two witnesses. The testimony of PW1 was that she saw the Accused slap the Deceased severally on his face and that the Accused continued to slap the Deceased notwithstanding intervention from PW2 and herself. The evidence of PW2 corroborated that of PW1 to the effect that when PW2 reached the scene he found the Accused assaulting the Deceased. In his testimony PW2 saw the Accused person slap the Deceased three times.
 11. The evidence of these two witnesses was that at one point the Deceased fell to the ground and thereafter the Deceased's brother PW3 arrived at the scene. PW3 confirms that he found the Deceased on the ground and also at the scene was the Accused Person who appeared angry. Together with his son Edwin and PW2, the witness carried the Deceased to his (PW3's) home. It was also the testimony of PW3 that at one point the Deceased told him that the Accused Person had assaulted him.
 12. The three witnesses stood their ground in cross examination. Their evidence was consistent and supported each other. This Court has no doubt in its mind that the Accused assaulted the Deceased by slapping him severally on his face. That assault caused the Deceased to fall. From the evidence of the witnesses the assault left the Deceased badly injured.
 13. This Court then needs to consider whether it is that assault that caused the Deceased to die a day later. Important on this aspect would be the opinion of the Doctor who carried out the postmortem Examination. In his opinion, which bears repetition, the Doctor was of the view that the cause of death was:-

“Subarachnoid Hemorrhage from torn bridging veins secondary to assault”

PW5 who produced that report was of the further opinion that the injury could be caused by slapping. He explained that sinuses are connected to the brain by bridging veins which stiffen with age and that a trauma can cause them to break. The Deceased, from the Medical report was in his late fifties (50's). This Court reaches a Decision that from the Medical evidence, the death of

the Deceased was caused by injuries he sustained upon being assaulted by the Accused. Although it may be true as submitted by the Defence that the Prosecution did not lead evidence on the intensity of the assault, the Medical evidence is that the assault was sufficient enough to cause the death of the Deceased.

14. What this Court must grapple with is whether the Prosecution established the important ingredient of malice aforethought. Malice aforethought is in terms of section 206 of the Penal Code established by evidence proving 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.**

Recently the Court of Appeal in **Racho Kuno Hameso –vs- Republic** [2014] eKLR said this of the provisions of Section 206 of The Penal Code,

“From the above content, the law recognizes express, implied and constructive malice. It also appears that express malice is proved when it is shown that an accused person intended to kill, while implied malice is established when it is shown that he intended to cause grievous bodily harm. However when it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery); or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.”

15. From the Evidence before Court and for purposes of these proceedings constructive malice would not be present. In respect to Express or implied malice, The Court of Appeal in **Nzuki –vs- Republic** [1993] KLR 171 at page 175 emphasized:-

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

- I. **The intention to cause death;**
- II. **The intention to cause grievous bodily harm;**
- III. **Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and in the intention were aimed at a potential victim other than the one who succumbed.**

Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of *Hyam v Director of Public Prosecution*, [1975] AC 55.”

The Court then went on to hold,

“No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a

proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the Prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt.”

Drawing inspiration from this passage I now turn to consider whether the Prosecution sufficiently proved malice aforethought.

16. There was no evidence that the Accused person intended to cause the Death of the Deceased. And so Express Malice is ruled out. But what about an intention to cause grievous bodily harm? The evidence is that the Accused person slapped the Deceased severally and would not stop even on being asked by PW1, PW2 and his own daughter. On the other hand, the Accused neither punched nor used a weapon to attack and assault the Deceased. The Accused person used his bare hands. The victim was neither a child nor a very elder man as there is evidence that he was in his fifties (50s). And when the Deceased fell to the ground, the Accused person did not continue to assault him. He stopped. Is this a person who intended to maim, endanger the life or cause serious or permanent injury or disfigurement to his victim? I am not certain at all. For that reason I am in doubt whether, on the evidence, the intent was proved. The Accused person will benefit from that doubt.

17. Next, this Court must decide whether the Defence of provocation is available to the Accused person as suggested by the Defence counsel. Section 208 of the Penal Code provides:

1. **The term “provocation” means and includes except as herein after stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stems in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**
2. **When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relations as aforesaid, the former is said to give to the latter provocation for an assault.**
3. **A lawful act is not provocation to any person for an assault.**
4. **An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby furnish an excuse for committing an assault is not provocation to that other person for an assault.**
5. **An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.**

The Defence of Provocation is not viable if the ingredients set out by Section 208 of the Penal Code are not satisfied.

18. There is evidence by PW1 who testified on how the assault begun. That the Accused person was angered by a supposed allegation by the Deceased that the Accused person was a thief. There might be some truth in the testimony of PW1 that the Deceased had alleged that Accused person was a thief because when the Accused was assaulting the Deceased, the Deceased begged for forgiveness. He was doing so presumably for having called the Accused person a thief. That insult or insinuation could have provoked the violent reaction of the Accused person. But that alone was not enough to establish the Defence of provocation. The insult needed to be of such nature as to be likely when directed at an ordinary person to deprive him of the power of self-control and to induce him to commit the assault of the kind he committed upon the Deceased. At the close of the Prosecution case, the Accused person chose not to give any evidence. The Accused person did not therefore explain whether or not the insult directed at him was so offensive that it deprived him of

the power of self-control. I find that the Deceased person did not establish the Defence of provocation.
19. The Prosecution has proved beyond reasonable doubt that Accused person killed the Deceased but in the absence of malice aforethought that killing only amounted to Manslaughter. For this reason I hereby find him guilty of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 10TH DAY OF MARCH 2015.

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

JUMBA.....FOR ACCUSED

OWITL.....FOR PROSECUTOR