



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 9 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MOSES WANJALA NGAIRA.....ACCUSED

JUDGMENT

1. In the early hours of 24th February 2011 Stephen Toili Macho (hereafter *the deceased*) was found lying on a footpath. He had injuries on the head, left hand and left leg. His clothes were bloodstained. He could barely talk. The scene was approximately fourty metres from the house of a lady known as Beatrice Nafula. There was blood at the scene and in the house of Beatrice. Some maize stalks near the body were burnt. When PW1 arrived at the scene, the deceased told her that he was beaten up by the accused. The deceased succumbed to his injuries a few hours later.

2. The State brought information to the High Court charging the accused with murder contrary to section 203 of the Penal Code. The particulars are that on the night of 23rd February 2011 at 12:00 p.m. at Tairi Mbili Village, Mbangara Sub-Location, Mautuma Location in Lugari District within Western Province, he murdered Stephen Toili Macho. The accused pleaded not guilty. Eight witnesses were called by the prosecution. At the close of their evidence, the court found that the State had established a *prima facie* case against the accused under section 306 (2) of the Criminal Procedure Code. The accused elected to give sworn evidence. He also called one witness.

3. PW1, Rose Otieno Odongo, first testified on 18th January 2012. She was recalled to the stand when I took over the proceedings. She is a village elder. The accused was her neighbor. On the material day she had employed him to do some casual work. She said that on 24th February 2011 the accused told her that he had beaten up a young man called Toili. Toili is the deceased. The accused said he had beaten him because he was a thief. PW1 said that the accused then left her compound. She decided to investigate. She went along a foot path and found the deceased. He was still alive. She asked him who had beaten him. He told her he had been beaten by Moses Wanjala Ngaira Musungu. She also asked him why he had been beaten but he did not answer.

4. The deceased had injuries on the head, left hand and left leg. There was blood on his clothes. The scene was approximately 1½ kilometres from accused's house. The deceased was beaten at night. PW1 alerted the Assistant Chief who advised her to take the deceased to the hospital. The deceased was taken to Lumakanda Hospital. She later learnt that the deceased died. The Assistant Chief called the police from Turbo who arrested the accused at his home.

5. On 7th July 2014, I took over the proceedings. After explaining to the accused his rights under section 200 of the Criminal procedure Code, he elected to recall PW1. PW1 was cross-examined afresh. She said that the accused was employed as a watchman at a nearby school but had come to her homestead to do some casual work. She reiterated that the accused told her that he had beaten up a young man called Toili. She said she found the deceased along the footpath and spoke to him three times at the scene.

6. PW2, Isaac Waswa, is a brother of the deceased. On 24th February 2011, he was called by his sister Roselyne Makhokha. It was at about 7:30 a.m. She told him to go to the scene. He travelled there by motorcycle. He found other people at the scene. He asked the deceased who had beaten him; he replied it was Musungu. He did not tell him anything else. PW2 (his mother Beatrice Khakali) and his sister organized for a vehicle to take the deceased to Lumakanda Hospital. He was pronounced dead on arrival. Upon cross-examination he conceded that Beatrice (he could not remember her other name) was arrested by the police. He said she was arrested because she lived with Toili. Beatrice was not charged.

7. PW5, Roselyn Makhokha, was a sister to the deceased. She also went to the scene. She found other people. On enquiring from the deceased who had beaten him, he answered that it was Musungu. She knew Musungu; she said his full names are Moses Ngaira. She said the deceased had injuries on the head, hand and leg. The deceased was lying approximately fourty metres from Beatrice Nafula's house. She saw blood in the house of Beatrice. There were maize stalks which were burnt. At the place the deceased was lying, there was blood. A fire had been lit at both locations.

8. PW3 was Josphat Busuru. He testified that on 24th February 2011, at approximately 7:30 a.m., he was preparing to go to work. He heard a lot of noise; it was a few metres away. He went to the scene. He found the deceased. The deceased was still breathing. He asked him who had beaten him. He replied it was Musungu. The deceased had a striped shirt and red jacket. The clothes were blood stained. He identified the clothes in court. One of the people at the scene was Beatrice Nafula. He said that the latter was cohabiting with the deceased. He confirmed that Beatrice Nafula was arrested.

9. PW4, David Makhokha, identified the body on 1st March 2011 for postmortem purposes. The postmortem report was produced by PW7, Dr. Hillary Shivachi, on behalf of Dr. Alex Munyendo. The examination was carried out at Webuye District Mortuary. The body had multiple injuries: dislocation of right wrist; defensive bruises on right fore-arm, closed fracture of left ulna upper 1/3rd, compound fracture of the right tibia and fibula lower 1/3rd, a wound approximately 3 cm x 2 cm; closed fracture of left fibula at mid 1/3rd; cut wound on frontal aspect of the head with an inner skull fracture; multiple bruises; and, a stab wound on the dorsal part of the right arm. He formed the opinion that the cause of death was severe head injury from a blunt object. Other injuries to the body suggested the use of a sharp object. He produced the report as exhibit 4.

10. PW6, Beatrice Khakhali, was the mother of the deceased. On 24th February 2011 she was told by PW1 that the deceased had been beaten. She went to the scene. She called out to her son; he only raised his eyes. He had serious injuries. He had been cut on the head, on the left hand and the thighs. He said Musungu wa Ngaira had beaten him. She testified that Beatrice Nafula tried to flee from the scene but was restrained by the public. She said the accused was married to Beatrice's daughter. The deceased was thus cohabiting with the accused's mother-in-law. She said they had stayed together for six years. PW6 was opposed to the union because Beatrice was older than her son; and, the son had abandoned his first wife and ten children.

11. PW8, Sgt Albanus Kimongo, was the investigating officer. On 24th February 2011 at around 11.00 a.m., he received a telephone call from an anonymous person that Stephen Tiolo Macho had been severely beaten. He was told the deceased was lying at his home in Taili Mbili village at Mugunga Sub-Location within Turbo Police Station Area. He informed Chief Inspector Adamson Furaha. The two and Police Constable Peter Ngunje went to the scene. They found that the deceased had been taken to Lumakanda District Hospital. They later found him lying in the hospital. He was dead. They arranged to take the body to the mortuary in Webuye. He then interviewed witnesses and took statements. The next day, he arrested the accused person. He recovered an iron bar that the accused had in his hands (exhibit

5). He gathered information that the accused always carried an iron bar. The bar was not taken to the Government Chemist for analysis. The clothes were taken for analysis. No report was produced. PW8 also produced a P3 form showing accused was an adult, and a mental assessment report from Moi Teaching and Referral Hospital. He charged the accused with murder. He said the assault took place in the early morning hours but it was dark. He said Beatrice Nafula Simiyu could not testify because she was at large.

12. The accused gave sworn testimony. He denied committing the offence. He said that before the incident he was staying at Tairi Mbili. He is a watchman at Bims Primary School. On 23rd February 2011 he said he went to work at the school at 6.30 p.m. He left the next morning at 6.00 a.m. The place the deceased died is two kilometres from the school. He said the body of the deceased was found in a neighbour's house half a kilometre from his home. On 24th February 2011 he went to back to his home. Police officers came and arrested him. They told him he would know the reasons later.

13. He knew PW1 as a village elder. On the morning of 24th February 2011 he was working at her farm. He was to carry manure to the *shamba*. He claimed he was with PW1 when she was informed by a neighbour (Masinde) that the deceased had died. Masinde did not testify in this case. Beatrice Nafula Simiyu is the person in whose compound the deceased was found. She did not testify. The accused testified that when PW1 reached where the deceased was, he was still alive. He said he could not have killed the deceased because he was at work at the material time. He said he had no disagreements with the deceased. He testified that Beatrice Nafula was over 50 years old and that he had no relationship with her. Upon cross-examination he denied that he was known as "Musungu".

14. The defendant called one witness Patrick Simiyu Wanjala (DW2). He is an administrator at Bims Academy School. He confirmed that the accused was a watchman at the school earning Kshs 2,500 per month. He said that on 23rd February 2011 the accused was at work at 6.00 pm in the evening. He was supposed to leave the next morning. He testified that the accused would report to him at the beginning of his work to pick a *rungu*, arrows, torch and a coat. On 24th February 2011, he returned the above items to the store. DW2 was never interviewed by the police. Upon cross-examination, he said the accused was employed in January 2011. In 1999 the Headmaster/Director was Wycliffe Mukasa. DW2 did not have any document to show he was employed at the school. He also conceded that he was not aware of the movements of the accused on the night of 23rd February 2011. He however said the accused was working alone at night.

15. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. In Republic v Andrew Mueche Omwenga [2009] eKLR, Maraga J. (as he then was) succinctly dealt with the subject-

"What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea—"the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle."

16. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. In Ndungu v Republic [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493 as follows:-

"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a

post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”

17. Malice aforethought on the other hand is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it 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.”

18. Malice aforethought can take various forms. It can be express, constructive, implied or inferred from a set of circumstances. Where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. See Raphael Mbuvi Kimasi v Republic Court of Appeal at Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR. Generally, there are three main tests: the first is the intention to cause *death*; secondly, the intention to cause *grievous bodily harm*; and, thirdly if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. See Nzuki v Republic, [1993] KLR 171, Republic v Andrew Mueche Omwenga [2009] eKLR. While the *motive* can strengthen the prosecution’s case, it is not obliged to prove it. See generally Republic v Sharmal Singh s/o Pritam Singh [1962] EA 13 at page 17.

19. Applying those principles to the evidence in this case, I find as follows. There was *no* eye witness to the assault that led the death of the deceased. The court can only convict on strong circumstantial evidence that *must point irresistibly* to the accused. The test in a matter of this nature was well stated in R v Kipkering arap Koske & another 16 EACA 135 where the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

20. In this case, I find there is very strong circumstantial evidence. The initial evidence of PW1; and, her subsequent testimony when she was recalled to the stand, was *consistent* and clear. Her evidence is material in *two* respects: first, on 24th February 2011 she was at her home. The accused told her that he had beaten up a young man called Toili. Toili is the deceased. The accused said he had beaten him because he was a thief. Secondly, she received a *dying declaration* from the deceased. The deceased told her *three times* that he had been beaten by Moses Wanjala Ngaira *Musungu*. She also asked him why he had been beaten but he did not answer. The deceased had serious injuries on the head, left hand and left leg.

21. PW2, PW3 and PW5 all arrived at the scene when the deceased was still alive. The deceased told *all* of them that Moses Ngaira *Musungu* had beaten him. I find that with respect to the *dying declaration* made to PW1, it was *corroborated* by PW2, PW3 and PW5. PW1 knew the accused. She was the village elder. On the morning of 24th February 2011, she had employed him to ferry manure on her farm. The

accused was known as Moses Ngaira. All these witnesses gave a combination of the names *Moses Ngaira Musungu*. Although the accused said he is not known as *Musungu*, I find he was identified by those witnesses and in the dying declaration as Moses Ngaira alias Musungu. He was known in the area as *Musungu*. He is the same and only one. Doubt is removed completely because the accused told PW1 earlier that he had beaten up somebody called *Toili* that morning.

22. The accused testified that he is a watchman at Bims Primary School. On 23rd February 2011 he said he went to work at the school at 6.30 p.m. He left the next morning at 6.00 a.m. The scene of crime was about two kilometres from the school and one and a half kilometres from his home. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The accused had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. The *alibi* was supported by DW2, the administrator at the school. He testified the accused reported to work, took some equipment and returned it the next morning. The accused was working alone that night.

23. The *alibi* was weak and unbelievable. For starters, DW2 conceded he could *not* account for the movements of the accused that night. The accused had a clear *opportunity* to leave the school that night and commit the offence. Secondly, none else than the accused *told* PW1 he had beaten up someone called *Toili* that morning. *Toili* is the deceased. Thirdly, the *deceased* told PW1, PW2, PW3 and PW5 that it is the *accused* that beat him up. I find that the *alibi* was completely discounted by the overwhelming evidence of those witnesses.

24. The injuries to the deceased amounted to *grievous harm*. Doubt is removed by the pathologist's report. He found that the body had multiple injuries: dislocation of right wrist; defensive bruises on right fore-arm, closed fracture of left ulna upper 1/3rd, compound fracture of the right tibia and fibula lower 1/3rd, a wound approximately 3 cm x 2 cm; closed fracture of left fibula at mid 1/3rd; cut wound on frontal aspect of the head with an inner skull fracture; multiple bruises; and, a stab wound on the dorsal part of the right arm. He formed the opinion that the cause of death was severe head injury from a blunt object. Other injuries to the body suggested the use of a sharp object.

25. Malice aforethought is defined by section 206 of the Penal Code as *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; or 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*. See also *Nzuki v Republic*, [1993] KLR 171, *Republic v Andrew Mueche Omwenga* [2009] eKLR.

26. I am satisfied that in this case the accused *intended* to cause the death or grievous harm to the deceased. A key element of malice aforethought is thus present. Subject to section 111 of the Evidence Act, the legal burden of proof rested throughout with the prosecution. There is no room for presumptions in a criminal trial. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

27. In this case, the accused was found mentally fit; he beat up the deceased with the *intention* to cause death or grievous harm; his *alibi* was discounted by the dying declaration and the overwhelming evidence from the prosecution. His identity was not in doubt. Although the accused said he had beaten the deceased because he was a *thief*, there was no evidence to support the allegation. There was also no evidence that the accused acted in self-defence. In a synopsis, there was no justification.

28. In the end I am satisfied that the prosecution *proved* beyond reasonable doubt that the accused, *of malice aforethought caused the death of Stephen Toili Macho by an unlawful act or omission*. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 14th day of July 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The accused.

Mr. Kibii for Mr. Koros for the accused.

Mr. Ngumbi for Ms. Karanja for the State.

Mr. Kemboi, Court Clerk.