



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 8 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KISAKA.....ACCUSED

JUDGEMENT

Background

Thomas Kisaka is charged with the murder of Paul Talusi Mugoya contrary to section 203 read with section 204 of the Penal Code. It is alleged that on 8th of December 2012 at Kawangware in Dagoretti District within Nairobi County jointly with others not before the court murdered Paul Talusi Mugoya. The accused denied this charge leading to full hearing of this case. He is represented by Mr. Solomon Wamwayi, advocate. The prosecution case was conducted by various prosecution counsels but towards the conclusion of these proceedings Ms Macharia, prosecution counsel, handled the prosecution for the State.

I took over these proceedings following the transfer to another station of Honourable Lady Justice Florence Muchemi. She had taken evidence of two witnesses. I took evidence of six prosecution witnesses and that of the accused person.

Evidence

The deceased was killed in the early hours of 9th December 2012. The scene of murder was at Kawangware. Before he met his death he had been drinking at Ikolomani Bar also in Kawangware. From the testimony of Africana Kushi Busieka, PW1 and Julius Shitsama, PW3, both the deceased and the accused were in Ikolomani Bar on the evening of 8th December 2012. They were seated at different tables. Evidence is not clear where PW3 sat but according to PW1, PW3 sat on the same table with PW1 and the deceased.

Prosecution evidence is that the accused and his friend were taking alcoholic drinks. The deceased and PW1 were also drinking alcohol. Evidence is not clear whether PW3 was drinking or was taking stock in the bar which he said he owned. In the course of the evening, according to PW1, the accused stood up and walked to the counter where he quarreled with the bar attendant. PW3 intervened and the accused returned to his table.

The evidence of PW1 is that around 1.00 am the accused left the bar with his friend. PW1, PW3 and the deceased also left the bar. They found the accused standing outside. The accused started insulting the deceased calling him a thief at which the deceased attempted to arrest him and his friend but the accused

ran away. The deceased followed him and when he took time to return PW1 and PW3 followed him. They found the deceased had caught up with the accused inside a residential area and had handcuffed him. The accused pleaded with the deceased to remove the handcuffs from the accused without success. A group of young men pleaded with deceased to remove the cuffs and he complied. On being released the accused is said to have hit the deceased with his head knocking him down. Someone whom PW1 said was accused's brother whose name was given as Bonny together with the accused started assaulting the deceased. The said Bonny is said to have cut PW1 on his finger with a slasher injuring him on his small left finger. PW1 decided to run away to escape. By this time PW3 had escaped. PW1 stood at a distance from where he said he could hear the deceased pleading for his life. PW1 said he stayed at this place until PW3 returned to the scene with police officers from Kawangware Chief's Camp. He joined them to return to the scene where they found the deceased had died and the body had been dragged from where the deceased had been attacked to another spot.

According to PW3 the deceased had attempted to handcuff the accused while inside the bar but PW3 intervened and told them to leave the bar. They left and PW3 also left. He found the deceased and the accused quarrelling outside the bar after the accused and his friend called the deceased a thief. That the deceased chased them with a view to arresting them but the accused entered a residential plot at Kabiru area. PW3 followed to know what was happening. He found deceased having handcuffed the accused. He tried to persuade the deceased to remove the cuffs but he refused. That the commotion attracted many people from the residential houses who demanded to know what was happening. PW3 sensed danger and he left after the crowd demanded that they identify themselves. He said he intended to look for police to help. When he returned with police they found deceased dead. They found PW1 injured on the hand which was bleeding.

Senior Sergeant Benson Simiyu Makokha, PW4, from Kawangware District Officer's Officer confirmed receiving the report on the attack of the deceased from Julius, PW3 around 3.00am on 9th December 2012. In company of Corporal George Macharia, PW5 and Police Constable Mutai (not a witness) PW4 visited the scene. They found the scene deserted and the deceased dead. The matter was reported to the Dagoretti Criminal Investigation Office prompting Corporal Henry Njuguna, PW6 and scenes of crime unit into action. They visited the scene.

Police Constable Joseph Gathecha, PW6, took the photos of the scene after which the body was collected and moved to the City Mortuary for preservation. The post mortem was conducted by Dr. Joel Mungai on 11th December 2012. The doctor confirmed extensive injuries on the head and defensive injuries on the hands. He formed the opinion that the deceased died as a result of head injury due to blunt trauma associated with assault.

The accused was arrested on 9th January 2013 one month after the incident and charged with this offence.

In his defence given under oath, the accused testified that on 8th December 2012 he went to Ikolomani Bar in Kawangware at 9.00pm to meet his friend who he later identified as Joram. They started taking their alcoholic drinks until 11.00 pm when the bar attendant told them to pay their bill which they did. The bar was closed but they remained inside to finish the drinks already ordered. He said that on a different table were PW1, one Engoi and a stranger he did not know; that the stranger and PW1 went to where the accused and his friend sat and told them they were making noise which was not true. The stranger, who is the deceased as it emerged from the evidence, told them to pay a bill of Kshs 1,500. The two said they had already paid their bill to the bar attendant but the deceased insisted they had to pay. He handcuffed them together with the help of PW1. He said he gave the deceased Kshs 2,000 but did not get change.

The accused further testified that PW3 told all of them to leave the bar and as he was going away he was followed by the deceased, PW1 and Engoi who caught up with him at a residential area. They beat him up and the deceased handcuffed him; that the commotion attracted the tenants who came out of their houses harmed with pangas and planks of wood; that PW1, PW3 and Engoi left on seeing the crowd; that the crowd demanded that the accused and the deceased identify themselves; that he identified himself but the deceased failed to identify himself as a police officer; that they removed handcuffs from him and released

him. He testified that the deceased was attacked by the crowd after he failed to identify himself to them. He denied taking part in assaulting the deceased and told the court that he did not know how the deceased met his death. He said he did not know anyone at the residential plot where the deceased was killed.

Charge of murder

Murder is an offence under section 203 of the Penal Code. It is committed when a person with malice aforethought causes the death of another by an unlawful act or omission. It is a crime against the public through the State. The Office of the Director of Public Prosecutions is mandated by law to prosecute the offender on behalf of the Republic. The standard of proof is high, that of beyond reasonable doubt. To lead to a conviction the prosecution must meet this threshold. The ingredients to be proved are the act of death of the victim, the identity of the person who caused that death and the intention (malice aforethought) to cause that death.

Section 206 of the Penal Code defines malice aforethought to include intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not and 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.

Analysis and determination

There is no contention that the deceased and the accused met at Ikolomani Bar in Kawangware on 8th December 2012. There is no dispute that each sat at separate tables with their respective friend(s). There is no dispute that both drank alcoholic beverages and that both stayed there to early hours of 9th December 2012. Evidence also shows that the deceased had a pair of handcuffs. He was an administration police officer but was not supposed to carry handcuffs while not on duty. He was on his private frolics. The accused may or may not have been making noise at the bar but evidence shows that at one time he argued with the bar attendant before PW3 intervened. The deceased, prompted by alleged noise by the accused and his friend or out of a different motive, attempted to handcuff the accused inside the bar. This was improper conduct not becoming of a responsible police officer. Evidence shows that he did not identify himself to the accused as a police officer. However, the deceased is not on trial. Had he been alive, his behaviour at the bar would perhaps be subject to disciplinary action. The accused is the one on trial for the murder of the deceased and the latter's behaviour, though wrong and unjustified, cannot be used to justify the crime of murder.

On the issue of deceased's death I find that I have no doubt in my mind that it occurred. All the police witnesses (PW4, PW5, PW6 and PW7) testified to finding the body of the deceased at the scene. PW6 took photographs of the scene. They show the scene of crime and deceased's body, lifeless, lying there. Evidence from the police officers is that the deceased had been dragged five metres, as testified by PW7, from the scene where he was assaulted (inside the residential plot) to the road. The scene where he was assaulted is shown on the photographs with bloodstains on the ground, on the walls of the nearest iron sheet house and the curtain on that house. This area is shown with stone blocks the size of building blocks and pieces of wood planks stained with blood. This is not where the body was found. The photographs show the body lying some distance from the original place. The injuries on the head and on the hands (described by the doctor as defence injuries) are gruesome. They are evidence of the cruel death the deceased met. The act of death was confirmed by PW8 Dr. Joel Mungai. The doctor confirmed injuries on the head and blood, which he referred to as extensive blood, surrounding the heart. With this evidence I find that I am convinced beyond reasonable doubt that death of the deceased occurred and it was unlawful.

When I observe the scene as captured in the photographs (the bundle of photographs was produced as exhibit 1B) and note the various crude instruments used to assault the deceased and also consider the evidence of PW1 and PW3, it is obvious that more than one person took part in assaulting the deceased. The blocks of stones were heavy as shown by the block produced in court as exhibit 3. There were also

planks of timber and a piece of plastic pipe among other 'weapons' used. The issue then becomes whether the accused was one of the many people who took part in assaulting the deceased.

On this issue I have examined the evidence of PW1 and PW3 with care. These are the only witnesses who were present. Both told the court that there was no electricity lighting at the scene but there was moonlight. PW3 said he left the scene when the crowd of people became aggressive asking them to identify themselves. He said he went away to look for police officers to help because he was scared of the situation. Since PW3 said he was not present when the deceased was assaulted this court is left with the sole evidence of PW1.

The accused was known to PW1 prior to 8th December 2012. They used to meet in bars and clubs where alcoholic drinks are served. The accused had been in Ikolomani Bar from 9.00pm. PW1 was also present. PW1 witnessed the deceased intervening when the accused argued with the bar attendant. PW1 witnessed the deceased attempting to handcuff the accused in the bar. He witnessed the deceased chasing the accused into the residential plot and handcuffing him. All this was also witnessed by PW3 who corroborates the evidence of PW1 up to the point where PW3 said he escaped the wrath of the crowd that gathered at the scene. PW1 said after pleas from members of the public who had gathered the deceased removed handcuffs from the accused. He said that when the cuffs were removed from the accused he stood up and hit the deceased with his head flooring him. He then started beating him with other members of public. PW1 said one Bonny whom he identified as brother to accused joined the accused in assaulting the deceased. He said that other members of the public joined them. I find no other mention of this Bonny said to be accused's brother in regard to where he came from. PW1 said that he did not know Bonny before.

I have subjected this evidence to serious scrutiny. I bear in mind that both PW1 and PW3 in company of the deceased followed the accused to the scene where he was handcuffed which turned to be the scene of this murder. Although there was no sufficient light I have no doubt in my mind that PW1 and PW3 were not mistaken about what they observed. I have considered that the evidence that the accused hit the deceased with his head knocking him down and took part in assaulting him is evidence of a single witness. I am alive to the fact that a fact can be proved by evidence of a single witness. There is however need to treat such evidence, especially on identification, with great care to avoid miscarriage of justice. When this evidence is considered together with the circumstances surrounding this case: that the accused had been rowdy at the bar at least in confronting the bar attendant and an attempt had been made to handcuff him at the bar; that the accused was chased and handcuffed by the deceased at the scene of the murder and that it took pleas from the public to have him unhandcuffed it would not be far-fetched for this court to conclude that the accused must have been very angry. It is a fact that the accused had taken alcoholic drinks and may not have been sober at the time. I find that I am persuaded to believe the evidence of PW1 that the accused hit the deceased using his head, knocked him down and took part in assaulting him. He did not seem to have done anything to stop the crowd from assaulting the deceased to make this court doubt his involvement in the assault.

I have carefully considered his defence. I have noted that the defence counsel did not cross examine PW1 and PW3 on the allegation that the deceased asked the accused to pay a bill of Kshs 1,500. The accused said he had paid for his bills to the bar attendant before she left. Evidence shows PW3 was present at the bar. He is the manager of the Ikolomani and accused did not find it fit to complain to him that the deceased was asking him to pay for a bill he (accused) knew nothing about. PW1 and PW3 did not mention this in their testimony. They only mentioned the argument by the accused and the bar attendant. I find it rather strange that the accused could pay Kshs 2,000 to the deceased who was not connected with the bar, not ask for his change of Kshs 500 and decide to leave the bar without raising a complaint to PW3. The accused has no duty to prove his innocence but I find I am not able to believe his defence.

After careful analysis of the evidence touching on accused's involvement in assaulting the deceased I find that I have no reason to doubt that he took part. I find therefore that he was properly identified by PW1 hitting the deceased and knocking him down and in taking part with other members of the public in assaulting him.

The final issue to consider is whether the accused has formed the intention to kill or to cause grievous harm to the deceased. I have stated in this judgement that the people who gathered on hearing the commotion caused by the deceased handcuffing the accused participated in assaulting the deceased in what is commonly referred to in this country as 'mob justice'. The scene of the crime was littered with many crude items, blocks of stones, planks of timber and others. It is obvious many people attacked the deceased. I have found that the accused started it all by hitting and knocking the deceased down. I have considered the circumstances leading to the assault of the deceased that resulted in his death and I am convinced that the accused may not have formed the intention to kill or to cause grievous harm to the deceased. I find that I harbour reasonable doubts on this issue because there were other people who took part in assaulting the deceased and what seemed like a small matter degenerated into a serious crime of murder as the situation got out of control.

Conclusion

Although I find that the act of the unlawful death of the deceased and the involvement of the accused in causing that death have been proved, it is my finding as stated above in this judgement that the necessary intention was not proved beyond reasonable doubt. It is for the reason of these doubts that this court finds that the charge of murder contrary to section 203 read with section 204 of the Penal Code has not been proved. Consequently, I hereby acquit the accused of murder. Under the provisions of section 179 (2) of the Criminal Procedure Code I find that the facts proved in this case prove the offence of manslaughter which I find proved beyond reasonable doubt. I hereby find the accused guilty of manslaughter although he was not charged with that offence because I do not have proof of malice aforethought as defined under section 206 of the Penal Code. Consequently, I convict the accused of the offence of manslaughter. It is so ordered.

Dated, signed and delivered this 15th day of July 2015.

S. N. MUTUKU

JUDGE

In the presence of:

Miss Macharia, counsel for the prosecution

Mr. Wamwayi, counsel for the accused

Mr. Thomas Kisaka, accused

Mr. Daniel Ngumbi, Court Clerk