



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 81 OF 2013
REPUBLIC.....PROSECUTOR
VERSUS
WILSON KUNGU WANJOHI.....1ST ACCUSED
SAMUEL GICHERU NJOROGE.....2ND ACCUSED

JUDGEMENT

Background

Wilson Kungu Wanjohi, 1st accused, and Samuel Gicheru Njoroje, 2nd accused, are charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the offence state that on 30th June 2013 at Njoro Sub-location, Karuri, within Kiambu County, jointly with others not before the court murdered Samuel Gicheru Kungu. The accused persons are represented by Mr. Ratemo Oira. The case for the prosecution is supported by evidence of thirteen witnesses while that of the defence is supported by evidence of four witnesses who include the two accused persons.

The charge of murder

Murder is defined under section 203 of the Penal Code which reads as follows:

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

The definition presents the ingredients of the offence that must be proved beyond reasonable doubt by the prosecution. The person who caused the death under inquiry must be proved; there must be prove that the person so causing the death possessed malice aforethought (intention); there must be proof that the act of death occurred and that the death was unlawful.

From my careful review of the evidence presented before me, I have no doubt that the deceased died. This fact in my view is not disputed. Consequently, I find that the unlawful death of Samuel Gicheru Kungu occurred on 4th July 2013. From the evidence, the deceased died as a result of the injuries he sustained on 30th June 2013. What is in dispute is the cause of that death and the person or persons who caused that death. Finally this court has also to determine if the person or persons who caused that death had the intention to cause it.

Analysis of evidence and determination

Among the prosecution witnesses, only PW3 Denis Mureithi was at the scene at the time when the deceased is said to have been injured. He was riding a bicycle home on 30th June 2013 around 7.00 pm. His evidence on what happened is captured as follows:

“I recall 30th June 2013 at 7.00pm. I was riding my bicycle from Banana to Ndenderu. It was my personal bicycle. I reached the gate of a coffee factory. I saw someone ahead of me staggering. I was not speeding. I reduced speed to avoid him. The person walked as though drunk towards Banana the same direction I was going. When I reduced speed I saw an oncoming vehicle. The person staggered on my left and I slowed completely avoiding the vehicle. It was downhill and I let of the bike and jumped off. I ran a few steps then returned to the road. I did not fall. On returning I found deceased lying down.”

On cross examination by the defence counsel, young Denis (he was aged 15 years at the time of giving evidence on 13th November 2014) told the court as follows:

“I was riding the bicycle on 30th June 2013 towards Ndenderu. There was an oncoming vehicle. There was a person staggering on the road. I reduced speed and jumped off the bicycle at the lowest speed. I left deceased holding the bike. It was downhill and could not stop the bike. I left deceased holding the bicycle. I did not hit the person....”

That is all the evidence this court obtained from the prosecution side describing what happened at the scene. Pauline Wanjiku (PW1), the wife of the deceased, received information about her husband's injuries afterwards. Her evidence is not clear who first informed her. She told the court she was told by her son Macharia (PW6). She also told the court that she received a telephone call from Peris Wanjiru (PW5) who informed her of her husband's injuries. Macharia and Wanjiru were not at the scene. Nelly Njoki (PW4) had informed Peris Wanjiru about the deceased's injuries and asked Peris to inform Pauline. Nelly was walking home with her daughter around 7.00pm on 30th June 2013 when she found a crowd of people gathered on the road. She approached and saw the deceased lying beside the road. She recognized him as her brother in law and called Peris to ask for Pauline's telephone number. Nelly told Peris to inform Peris about the incident.

By the time Pauline and her sons Macharia and Moses Kamau (PW7) arrived at the scene the deceased had been removed from the road and taken to hospital. He was assisted to hospital by William Njogu (PW2). William is the father of Denis (PW3) the cyclist. Evidence shows that when they arrived at Karuri hospital with the deceased and explained to the nurses what had happened, the nurses asked that they get a P3 form before they could be treated. Denis said he had not been injured and required treatment for a headache.

Further evidence by Pauline Wanjiku, Moses Kamau, Peris Wanjiru, William Njogu and Denis Mureithi show that while on the hospital bed, the deceased told his wife that he had been beaten by the two accused persons together with three other people. He did not name these other three people. The court was told that the deceased absolved Denis Mureithi of any blame and said that he had not hit him with the bicycle.

The 1st accused was arrested at Rweno Police Post on 10th July 2013. Police Constable Daniel Aroko (PW9) told the court that the 1st accused was identified by three complainants whom he did not name as having taken part in beating the deceased. At the time of his arrest, the 1st accused is said to have been in company of his wife and that they had gone to the Post to follow up on an assault case they had reported earlier. Further evidence shows that the 1st accused had reported an assault on him by family members. The report booked on the Occurrence Book of 27th June 2013 at 22.38pm indicated that the 1st accused had bruises on the neck. The 2nd accused was escorted to Rweno Police Post by members of the public and relatives on allegations that he had murdered the deceased.

On the defence side, both accused persons gave evidence on oath. The 1st accused told the court that he did not assault the deceased and that he received information that his uncle the deceased had been hit by a

bicycle as he walked home from Ndenderu. The 1st accused said that at that time he was at home and did not go to the scene which was near a coffee factory. The 2nd accused told the court that both he and the 1st accused were being framed for the murder of their uncle. He denied having beaten his uncle and said that he received information about the accident involving his uncle.

The defence presented two eye witnesses: Hortensia Wambui Kamau (DW3) and Mary Wanjiku Njoroge (DW4). These two women told the court that on 30th June 2013 they were walking home. At the time they were going uphill. The deceased, who was known to them as their neighbour was ahead of them also going uphill. According to both women the deceased looked drunk and was staggering on the road. They told the court that there was a bicycle coming downhill towards them. They said there was also a motor vehicle going uphill. According to them, the cyclist was speeding downhill and as he tried to evade the vehicle he hit the deceased who fell face up in the middle of the road. They said that other people assisted the deceased by removing him from the road and placing him on the side of the road. They said the deceased was injured on the head after falling down. The two witnesses told the court that they were surprised to learn later that the two accused persons, who were also their neighbours, had been arrested for assaulting the deceased. The two women said they did not see the two accused beating the deceased. They said that they volunteered to record statements with the police but the police did not take their statements.

I have carefully analysed this evidence. As I have stated in this judgement, there was no eyewitness from the prosecution side. Denis who is the only prosecution witness at the scene is not an independent witness. He is the cyclist said to have hit the deceased. I started by quoting part of his evidence verbatim. Although he denied having hit the deceased with his bicycle, it is worth noting that he stated that he jumped from his bicycle and let it go. He said he left the deceased holding the bicycle and after standing up from his fall he saw the deceased had fallen down. He told the court that the people at the scene were hostile towards him and wanted to beat him.

Evidence from Pauline and her sons is contradictory. At one time they said they received information that the deceased had been hit by a cyclist but they chose to believe what they allege the deceased told them when they went to see him in hospital that it was the two accused persons in company of other people who beat him. William Njogu and his son Denis Mureithi told the court that when the deceased heard the voice of his wife (Pauline) and his son (Moses Kamau) he sat up in bed and told them not to blame the cyclist because it was the two accused persons who had beaten him.

Dr. Ndegwa (PW13) told the court that the body of the deceased was dehydrated; that it had a laceration on the occipital scalp; that the intestines were perforated and there was pus in the abdominal cavity. His opinion on the cause of death of the deceased was that the deceased died due to dehydration due to infection in the abdominal cavity due to perforated small bowels due to blunt force trauma. On cross examination the doctor told the court that the deceased was not absorbing water due to the infection of the small and big intestines. According to him the immediate cause of death was dehydration and that the blunt force trauma caused all the problems. He said that a road traffic accident can cause the blunt force trauma leading to perforation of the intestines and such an infection.

This court did not benefit from thorough investigations into this matter. The Investigating Officer is IP Peter Kiilu (PW11). He testified that he received information from the relatives of the deceased and from Denis Mureithi about what had happened. IP Kiilu did not record the statement of Denis Mureithi the cyclist. He told the court that members of the public insisted that Denis had hit the deceased. He said he did not talk to the deceased before he died. He said he was not aware that the 1st accused had reported an assault case at Rweno Police Post and that he could not say whether the bicycle was involved in hitting the deceased. It is obvious from the evidence, especially that of the Investigating Officer, that the investigations, if any, were shallow. Even the most obvious information like the OB report of the report of the alleged assault to the 1st accused was not within the PW13's knowledge. He told the court that members of the public were insisting that the deceased had been hit by a bicycle but he did not follow up the matter to find out why this was the case. He did not disclose whose these members of public were.

My careful analysis of this case shows that the members of this family were involved in disputes running deep even before this matter came up. It may be recalled that Pauline testified that the 2nd accused had insulted the deceased on 29th June 2013. Pauline told the court that the 2nd accused had also threatened her and her husband with a knife which she managed to snatch from him. Her son John Macharia complicated matters further when he stated that in addition to the insults to their father by tge 2nd accused on 29th June 2013, the 2nd accused also hit the deceased on the ribs with a piece of timber. Pauline did not mention anything to do with the 2nd accused assaulting her husband with a piece of timber on that day. Macharia on his part did not mention anything to do with the alleged threats with a knife by the 2nd accused. It should not be lost that the 1st accused is said to have reported an assault case at Rweno Police Police. The assault is said to have been by his relatives.

I get a feeling that this family had some disputes that played themselves in this case. I am unable to understand what made Pauline and her sons claim that the two accused had beaten the deceased causing him injuries from which he died. Nelly told the court that she did not see the two accused at the scene when she arrived there. Denis or his father did not mention seeing the two accused at the scene. Hortensia and Mary, DW3 and DW4 respectively, did not mention seeing the two accused at the scene. They were categorical that the deceased was hit by the bicycle ridden by Denis. I have no reason to disbelief these two women. It is unfortunate that the police did not find it fit to take down their statements!

The deceased died as a result of dehydration caused by lack of absorption of water into the system due to infected intestines as a result of blunt trauma force. These injuries could result from a road traffic accident like the one being described by witnesses. These injuries could also result from an assault. What is lacking in this case is evidence of such an assault.

In my considered view, the evidence presented in court by both sides proves beyond reasonable doubt that the deceased died as a result of injuries he sustained on 30th June 2013. These injuries in my view were as a result of a blunt force trauma. This could have been caused by anything including a fall as a result of being hit by a bicycle. The doctor did not rule this out. In my view it is far-fetched to implicate the two accused persons in this matter without any evidence in support. I find no evidence to prove that the two accused were involved in beating the deceased. In actual fact there is no evidence showing any beating took place. In my considered view, the accused persons were not involved in causing any injuries on the deceased and therefore the death of the deceased cannot be attributed to them.

Consequently, the accused persons, either individually or together or even jointly with others not before the court, are not guilty of the murder of the deceased. The prosecution failed in adducing evidence to connect the two accused or any of them with causing the injuries that led to the death of the deceased. I find that crucial witnesses were left out and even if DW3 and DW4 had testified for the prosecution I do not see any different outcome than the one reached by this court. The accused persons are innocent as far as the evidence shows. I find them not guilty of the murder of Samuel Gicheru Kungu and acquit each of them forthwith. As a result this court orders that Wilson Kungu Wanjohi and Samuel Gicheru Njoroge, the 1st and 2nd accused persons respectively are free to go home since they have been out on bond. I make orders accordingly.

Dated, signed and delivered in open court this 14th day of October 2015.

S.N.MUTUKU

JUDGE

In the presence of:

Ms Florence Ikol, prosecution counsel

Mrs Nyamongo, holding brief for Mr. Ratemo Oira for the accused persons

Mr. Wilso Kungu Wanjohi, 1st accused person

Mr. Samuel Gicheru Njoroge, 2nd accused person

Mr. Daniel Ngumbi, Court Clerk