



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 19 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL KAMAU MWANGI.....ACCUSED

RULING

Samuel Kamau Mwangi (*the accused*) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, (*Cap. 63, Laws of Kenya*).

2. The prosecution, through the Director of Public Prosecutions alleged that the accused on 21st day of February 2010 at Kagano Village in Nyandarua District within Central Province, jointly with others not before the court, murdered Francis Mwaura Mburu (*the deceased*).

3. In support of the charges, the prosecution called seven witnesses, and produced one exhibit, the Post-Mortem Report (*PEXh.1*). Though, I took the plea, the evidence of the first four witnesses was taken by Hon. William Ouko J (*as he then was*) (*now Judge of Appeal*). I took the evidence of the 5th and 6th witnesses following directions under Section 203 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) to take over proceedings from where the last judge left.

4. PW1 (*the mother of the deceased*) testified that the accused accompanied by one John Chege, visited her home in the pretext that her son had stolen from some shop, and they wanted to search her house. Following her permission, the accused and the said elder searched her house but did not find anything alleged to have been stolen by him, and my son was also not at home.

5. It was also the testimony of PW1 that later that day, at about 3.30 p.m. she received a report that her son had been killed. She went to Kanyuira Centre where her son was found dead, with injuries on the leg-below the right knee, and that his private parts had been severed. The Police later collected the body.

6. Upon cross-examination by counsel for the accused, PW1 testified that the accused had visited her home twice, firstly with a group of about five people, Wanyoike, Mwangi, Maina and Wanjire (*and the accused – making five*). She sent them to go and call an elder, and the second time, the accused came alone with the elder.

7. PW2, corroborated the evidence of PW1. He learned later that his brother, the deceased, had been arrested, and found him sitting down and was taken next to the accused's shop. A crowd gathered, egged on by the accused that he had caught a thief, and members of the crowd started beating the deceased, one John Gikonyo hit the deceased with a hoe, and that later “they” took him to the Police Station Kiunjuri.

8. Upon cross-examination, PW2 further testified that he saw the accused, Wanyoike Mwangi, and Gikonyo beat the deceased, while he was being taken to Kiunjuri Police Station, he himself did not report the incident to the Police Station as it occurred near the station.

9. PW3, No. 2009031231 APC Marara Mogeni Samuel, stationed at Kamuri AP Post, received a report from the accused that his stolen items had been found at the house of one Alex Gichohi, and that Alex had explained to him that he had bought the goods from one Francis Mwaura (*the deceased*) and two other persons. PW3 and his colleagues, did not find the deceased at his home when they went to look for him.

10. It was PW3's further testimony that it was much later in the day, when they had already returned to the AP Post, that he saw a large crowd of people advancing towards the Post, and upon going out to inquire, he found the deceased who appeared injured, and he suggested that he be taken to hospital but that he died before being taken to hospital. The accused came to the station 20 minutes after the deceased had died.

11. On cross-examination by counsel for the accused, it was PW3's further testimony that he never received a report that the accused beat the deceased or that the accused and others had been to the deceased's home. He merely reported the death of the deceased to the Miragine Police Station.

12. PW4, the deceased's brother identified the deceased's body for purposes of the post-mortem.

13. PW5, Dr. Jackson Macharia carried out the post-mortem on the deceased's body. He found that the deceased had suffered head injury with intra-cranial bleeding, but no fractures to the skull. His urinary system was normal. He put the cause of death to cardio-pulmonary arrest secondary to severe head injury.

14. PW6, the Investigating Officer testified that upon receipt of the information of a killing in Kagumo Centre, he went to the scene, and first reported to the area AP Post, where he received information that the deceased had been subjected to mob justice at the instigation of the accused whose goods (*mostly food items*) had allegedly been stolen by the deceased, and others. He found the body at the scene with PW1, the mother watching over it. They removed the body to the mortuary at Nyahururu District Hospital.

15. In cross-examination, PW6 testified that he was informed that the deceased was killed by a mob.

16. PW7, accompanied PW6 to the scene of the killing – Kanjuri Trading Centre. He corroborated PW6's evidence that they first went to the A. P. Post, as they did not know the area well. He also corroborated the evidence of PW6, that the deceased was suspected of stealing, and after being traced he was killed by the mob.

17. When the prosecution closed its case with the evidence of PW7, I allowed the application by counsel for the accused to submit on whether or not the prosecution had established a prima facie case against the accused. Counsel for the accused submitted that the evidence of the seven witnesses did not disclose a case to warrant the accused being put on his defence.

18. Section 306(1) of the Criminal Procedure Code provides that when the evidence for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the Advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

19. The offence of murder is created by Section 203 of the Penal Code. Any person who of malice aforethought kills another person commits the felony termed murder. The ingredients of malice aforethought are set out in Section 206 of the Penal Code, and they are -

- (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 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 grievously 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 or any person who has committed or attempted to commit a felony.*

20. To be able to prove malice aforethought as defined above, we will need to once again re-examine and evaluate the prosecution's evidence as outlined above.

21. PW1, the mother of the deceased merely testified that the accused came twice to her house while looking for the accused, and to search whether any of his stolen goods were in the accused's mother's house. She learnt later that her son had been killed. She did not say by whom he was killed. She never witnessed the incident of mob injustice.

22. On his part PW2 claimed that the deceased died from the unlawful acts of a mob. The alleged stolen items were found with one Alex Gichohi who implicated the deceased as the person from whom he had bought items alleged to have been stolen. PW3 also testified the accused went to the AP Post some twenty-minutes after the incident. PW4 merely identified the body of the accused for purposes of the post-mortem. PW5 carried out the post-mortem. He confirmed that the urinary system was normal. PW1 testified that he accused private parts had been severed, which was not true.

23. The evidence of PW6 and 7, the persons who were supposed to be Investigating Officers, both relied on information from A.P. Officers that the deceased had been delivered to them by a mob, and that he was badly injured, and that he died before he was taken to hospital. The accused was not named as one of those who escorted the deceased to the AP Post at Kiunjuri AP Post.

24. It is a matter of great regret, that the rule of law is yet to take root among our people, that an accused person or a suspect is deemed innocent until otherwise proved guilty, that there are institutions for trial of such suspects and if found guilty, are punished according to law. It is not a question of received law or wisdom. It was always our African common law, we call it wrongly, "*customary law*", that a suspect, whether a cattle thief, an adulterer, or adulteress, a defiler, is taken before an elders tribunal and asked to plead his innocence. It is only thereafter that sentence or punishment is imposed him or his family. The question of mob injustice called mob rule/justice, did not exist, unless it was war, one "*nation*" against another, (*tribe vs tribe*).

25. A perpetrator or perpetrators of mob injustice ought to be punished, no doubt. There has however to be clear evidence against them. In this case, there is no clear evidence against the accused. He was no doubt the primary complainant. He was justifiably aggrieved. He had lost his goods, stolen, some of which were found in one Alex Gichohi's house, and pointed to the deceased as the source of those goods. It is not clear where and how the deceased was found, and mob injustice meted against him. It cannot be said that he was beaten or inflicted with fatal injuries out of the malice aforethought on the part of the accused.

26. In the absence of such evidence, to call upon the accused to defend himself at this point is to allow the prosecution to go on a fishing expedition to fill gaps in their evidence.

27. For all those reasons, I must find and hold that the prosecution has not established a sufficient evidential basis for this court to put the accused on his defence. I therefore, in accordance with the provisions of Section 306(1) of the Criminal Procedure Code, return a verdict of not guilty of the offence

of murder contrary to Section 203 of the Penal Code, and acquit the accused accordingly. I direct that the accused be released forthwith unless otherwise lawfully held. It is so ordered.

Dated, signed and delivered at Nakuru this 10th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE