



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 8 of 2011

REPUBLIC.....PROSECUTION

VERSUS

1. JEVAN MWANJAU

2. JEREMIAH K. HASSAN.....ACCUSED

JUDGMENT

The two accused persons namely **JEVAN MWANJAU** (hereinafter referred to as the ‘1st accused’) and **JEREMIAH KIMIGHO HASSAN** (hereinafter referred to as the ‘2nd accused’) are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. The particulars of the offence are that

“On the 6th day of February 2011 at Bura Ndogo area, Taveta Township in Taita Taveta County within Coast province jointly with another not before court murdered MSHANA JUMA ABDALLA”

The two accuseds who were both represented by **MR. NABWANA** Advocate each entered a plea of ‘not guilty’ to the charge. The state represented by learned state counsel **MR. ONSERIO** called a total of nine (9) witnesses in support of the charge.

PW1 MARTIN JUMA, PW2 ASENGA MWACHIRA and **PW3 PAUL MASAMO** all told the court that on 6th February, 2011 at about 8.00p.m. they were walking home together with the deceased who was their friend, having come from a club where they had been watching a football match. **PW3** separated from the others as he stopped to enter a shop to purchase an item. **PW1, PW2** and deceased walked on. According to the evidence of **PW1** and **PW2** they came across a group of three youths who were armed with stones, a *rungu* and an iron rod. **PW1** greeted the three who immediately set upon them and began to stone and beat them. **PW1** and **PW2** ran for their lives leaving the deceased to his fate.

PW3 told court that as he came out of the shop he met **PW1** and **PW2** running away. He asked them what the problem was. They told him that ‘Juma’ the accused was being beaten. **PW3** rushed to where the deceased was and found him lying on the ground being savagely attacked with kicks and blows by the three youths all of whom **PW3** said he knew and was able to recognize. As a crowd gathered the three youths run away leaving the deceased badly bruised and injured lying on the ground. His friends hired a *boda boda* taxi and took him to Taveta Hospital where he was admitted. The family of the deceased later transferred him to CMC Hospital in Moshi, Tanzania where he sadly lost the fight for his

life. The two accused were later arrested by community policing officers and were taken to the police station. Upon completion of police investigations they were charged with the murder of the deceased.

At the close of the prosecution case the court found both accused had a case to answer and they were placed on their defence. Each accused gave sworn defence in which they denied any and all involvement in the death of the deceased. It is now the duty of this court to determine whether the charge of murder has been proved to the standard required in law.

The offence of murder is defined by Section 203 of the Penal Code thus -

“Any person who malice aforethought causes death of another person by an unlawful act or omissions is guilty of murder”

In any charge of murder the prosecution must prove the following three ingredients beyond a reasonable doubt

- 1) The fact of as well as the cause of the deceased’s death
- 2) That the death of the deceased was the result of an unlawful act or omission committed by the accused (s)
- 3) That said unlawful act or omission was committed with malice aforethought.

The fact of the death of the deceased is not in any doubt. **PW1, PW2** and **PW3** all of whom were with the deceased at the material time confirm the attack on the deceased by persons wielding crude weapons. Both **PW2** and **PW3** visited the deceased in hospital the following day and found him unconscious and in critical condition **PW4 JUDITH SEMBO** who was the mother of the deceased and **PW3 FADHILI SEMBO ABDALLA** a brother to the deceased both told the court that as a family they transferred the deceased to CMC Hospital in Moshi Tanzania where he eventually died. **PW6 MISHIROBO JUMANE** and **PW7 AUGUSTINO JOAKIM**, a cousin and uncle respectively of the deceased both testify that they identified the body of the deceased to the pathologist who conducted the post-mortem at Taveta Hospital. All these witnesses who knew him well identify the deceased as **MSHAWA JUMA ABDALLA**.

PW5 DR. DIANGA HESBORN is a medical officer based at Taveta Hospital who conducted the autopsy on the body of the deceased. He gave a long list of the serious fractures, cuts and bruises which he observed on the body. These included all cuts and fractures on the head area leading to a hole in the skull from which brain tissue was visible as well as multiple bruises on the abdomen and back. The picture that is revealed is that of a young man who was thoroughly and viscously worked over. In his opinion **PW5** found the cause of death to be *‘intra-cranial haemorage with gross brain laceration’*. He filled and signed the post-mortem report which he produced in court as an exhibit **Pexb 5**. Thus provides conclusive proof of the cause of the deceased’s death.

The next crucial question is whether it was the two accused who committed the unlawful act of beating the deceased to death. At the time of the incidence the evidence on record reveals that the deceased was walking home in the company of **PW1, PW2**, and **PW3**. Whilst **PW3** parted with the others briefly to enter a nearby shop **PW1** and **PW2** both state that they were suddenly accosted by a group of three youth. The two witnesses state that one of the youths was armed with a *rungu*, one with an iron rod and the-third was holding large stones in his hands. Without any provocation the three youths began to pelt the deceased and his companions with stones. Both **PW1** and **PW2** ran away to save their lives leaving the deceased in the hands of their attackers. Neither **PW1** nor **PW2** was able to identify the youths who attacked them.

However **PW3** told the court that when he emerged from the shop he met **PW1** and **PW2** running they told him that their friend (the deceased) was being beaten. **PW3** rushed to the scene where to quote his own words:

“I saw the 3 men beating he deceased with an iron rod and a *rungu*....”

The incident occurred at 8.00p.m. therefore it was night and dark. However **PW3** told the court that he was able to see clearly as there were electric lights from the nearby shops which illuminated the scene. This evidence on lighting at the scene is duly corroborated by **PW1** and **PW2**. Similarly **PW9 CORPORAL DAVID KITHINJI** told the court that he did visit the scene of the incident and under cross-examination **PW9** stated as follows-

“When I visited the scene I found a shop nearby it had electricity....there was a bulb outside the door of the shop I was informed by the witnesses that the lights were on during the incident. I confirmed that the light is normally put on at night....”

From this evidence I am satisfied that though the incident occurred at night the scene was well lit from the electric light outside the shop and the enabled the witnesses to see well.

PW3 told the court that he knew and was able to recognize the three men he found attacking the deceased **PW3** states in his evidence in chief -

“I saw 3 men beating the deceased with an iron rod and a *rungu*. I know all 3 well. I was able to identify them. It was ‘Jey’, Mwanjau and Lovina”

Not only was these witnesses able to see and recognize the assailants – he was able to identify each one by name. **PW3** goes on to state

“Mwanjau was beating the deceased with a *rungu*. Lovina had the iron rod. I saw Mwanjau and Lovina hitting the deceased as he lay on the ground. ‘Jey’ was kicking the deceased. I knew the 3 as fellow villagers”

The fact that **PW3** was able to narrate in detail the role which each accused played in the attack persuades this court that he must have been in a position to clearly witness the events of that night. **PW3** goes to positively identify each accused in the dock. He also identifies the *rungu* which was used to hit the deceased **PExb1**. The testimony of **PW3** provides compelling evidence on identification of the two accused.

As a court I am quite mindful of the fact that great care must be taken in relying on the identification by a single witness. In the case of **MAITIANYI –VS- REPUBLIC [1986] KLR 198** the Court of Appeal held as follows

“Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the great care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult.”

I do hereby warn myself of the dangers of relying on the evidence of a single witness on identification. I have earlier noted that the incident occurred at night. However all witnesses have testified that the area was well illuminated by the electric lights from the nearby shop. I have also noted that the witness was able to identify the role which each accused played in the attack which is evidence that he was able to see them well. Lastly the witness was able to identify each attacker by name again proving that he must have been able to see them well. Defence counsel argues that failure to conduct an identification parade weakens the evidence of **PW3**, but with respect I do not agree. In view of the fact that **PW3** told the court that he knew the 2 accuseds well because they were his neighbours - an identification parade would have been superfluous in those circumstances.

The fact that **PW3** was able to **recognize** the attackers of the accused further serves to solidify his identification of the two. In the case of **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59** it was held that

“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form of other”

This is a case where **PW3** was able to ‘*recognize*’ the two accused he did not rely on more visual identification. There is no evidence of any pre-existing grudge or disagreement between **PW3** and the two accuseds that would lead him to identify them if they were not actually at the scene. **PW3** gave his evidence in a clear and concise manner and he remained unshaken under cross-examination by the defence counsels. It is also pertinent that **PW3** immediately reported to **PW1** and **PW2** that the persons whom he saw were Jey and Mwanjau. He also recognized and identified the third assailant whom he names as ‘*Lovina*’. His identification of the two accuseds was therefore consistent and unwavering. On the whole, I am satisfied that the identification of the two accuseds by **PW3** passes muster. As such I find that it was the two accused who attacked the deceased and savagely beat him causing his death.

The prosecution having proved the *actus reus* of the offence of murder is required to prove the *mens rea* of the offence-being that the unlawful action was done with malice aforethought. Malice aforethought is a concept which is independent of and distinct from motive. Motive refers to the reason or cause why a person may chose to murder another e.g. a grudge, hostility etc. malice aforethought however refers to the actual **intention** under which the unlawful act is perpetrated. **PW9** the investigating officer told the court that investigations revealed that the two accuseds did not specifically target the deceased. They were youths who were out on a rampage and were attacking any person who come their way. Indeed the 2 accused did also attack **PW1** and **PW2** but the two managed to save their lives by running away. Malice aforethought is defined in Section 206 of the penal Code as follows:

“Malice aforethought shall be deemed to be established by evidence proving anyone 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, 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)

(d)”

By attacking the deceased as they did – using crude weapons and bashing in his skull there can be no doubt at all that the two accused knew and probably fully intended to kill or cause grievous harm to the deceased. The potential result of their unlawful action was clearly anticipated. I am satisfied that malice aforethought has been proved to exist.

In their defences the accuseds merely issue blanket denials of any involvement in the incident leading to the death of the deceased. I am not persuaded by their defences and I do dismiss them. On the whole I am satisfied that the prosecution have proved this charge beyond reasonable doubt and I have no hesitation in convicting both accuseds of the offence of murder.

Dated and Delivered in Mombasa this 10th day of April, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Ojode h/b Mr. Nabwana for accuseds

Mr. Tanui for State
Court Clerk Mutisya

Court:

Hearing on 18th April for mitigation

Hearing notice to Mr. Nabwana

M. ODERO
JUDGE