



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 51 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN GICHERU MWANGI.....ACCUSED

RULING

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

The prosecution alleged that on 30th day of March 2008 at Molo Town in Molo District within Rift Valley Province, with another (*person*) not before the court jointly murdered Stephen Wachania Maina (*the deceased*).

The offence of murder is premised upon the presence or proof the element of “*malice aforethought*” - the guilty mind – the “*mens rea*”. Section 203 says-

“203.Any person who with malice aforethought kills another person commits the offence termed murder.”

Malice aforethought is established under Section 206 of the Penal Code if the following elements are established by evidence -

- (a) ***an intention to cause the death of or to do grievous harm to any person, whether that person is actually the person 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 grievous bodily harm is caused or not, or by a wish that it may not be caused; or***
- (c) ***an intention to commit a felony.***

There is a fourth element aiding a person to escape from lawful custody. This element is not of concern in this case, as no prisoner was helped to escape from lawful custody.

To prove the elements of malice aforethought, the prosecution called five witnesses. Of the five witnesses, the only evidence worthwhile was that of PW1 (*the Bar Attendant*) and that of PW3, the Doctor who tendered evidence on the post-mortem report and produced the Post-Mortem Report by Dr. Ithondeka – who performed the post-mortem on the body of the deceased.

The evidence of PW3 was useful to the extent of ascertaining the injuries the deceased sustained, and which led to his death - *“haemorrhage resulting from multiple cut wounds with head injury.”*

The evidence of PW1 was useful only to the extent that at about 11.00 p.m, Bar closing time, two patrons, one called Wanjiku entered her Bar and ordered for Senator Keg. A little later she was joined by another lady called Njoki who demanded a share of Wanjiku's keg. Wanjiku declined, and a quarrel developed between the two dies. PW1 summoned the watchman who pushed out the two ladies and since it was Bar closing time, she closed the entrance to the Bar.

However as she was letting out one customer who had been completing his drink, she asked the watchman to open the door for him. As she let out the last patron, two men *“with blood stains came inside. They were full of blood in the face and head.”*

PW1 testified that after seeing the men she run behind the bar counter and called a Police contact who directed her to call the Molo Police Station. She received no joy in that call. There was no answer. She returned to the Bar *“but found only the watchman at the door”*. She asked the watchman whether he knew the two bloodied men, who answered that he did not know them. She asked the watchman to close the door and she went to sleep.

When cross-examined by Miss Ateya counsel for the accused, PW1 testified that she did not know who the accused was or who she was to patron Wanjiku who had at first re-entered with him after being pushed out with patron Njoki. She did not know the Wachania said to have been murdered that day. She did not know him and *“never saw his body.”*

PW2 and PW4 identified the body of the deceased at Molo District Mortuary. They knew the deceased as Stephen Ndirangu Gichohi who was also known as Stephen Wachania Maina.

PW3 a Doctor produced the post mortem report prepared by Dr. Ithodeka who had performed the post mortem upon the deceased's body, and made the prognosis that the deceased died of massive haemorrhage resulting from injuries to the head.

PW5 the father of the deceased was informed by telephone by his brother who worked in Mombasa that his son, had been taken to Hospital in Molo. He went and found his son had died, and the body had been removed to the mortuary.

PW5, testified that after seeing his son's body at the mortuary he went to Molo Police Station where he met another man. Duncan Gichungu who informed him that his son, the deceased, had been drinking at a Bar in Molo and that he too had come to the Police Station to have his statement recorded. PW5 had since never seen Duncan Gichungu again.

PW6 a Police Officer received information from an informer that the suspects, a *“Mr. Mwangi”* and a *“Maina”* had gone into hiding. This *“Mwangi”* turned out to be accused, the other person is at large.

ANALYSIS OF THE EVIDENCE

There is absolutely no evidence to satisfy the requirements of malice aforethought, or its ingredients under Section 206 of the Penal Code.

Apart from PW1 who saw two bloodied men who she did not even know, there was no evidence of the watchman who closed the door when *“Wanjiku”* and *“Njoki”* were thrown out from the Bar. He

might have witnessed the fight or seen who caused the injuries upon the deceased from which he died. Clearly there was no serious investigation into this case, and there was little effort to bring to court even those witnesses who testified.

At the end of the prosecution's case, the State Counsel informed the court that the one witness who might have given credible evidence against the accused was said to be deceased. In the event the State closed its case.

As I observed already, there is no evidence of malice aforethought established against the accused. In the circumstances, I find and hold that there is no evidence upon which to put the accused to his defence.

In the absence of any such evidence, and in accordance with the provisions of Section 306(1) of the Criminal Procedure Code, I find the accused not guilty, of murder contrary to Section 203 as read with Section 204 of the Penal Code, and I acquit him of the said offence.

I direct that unless otherwise lawfully held, he be set free forthwith.

Dated, signed and delivered at Nakuru this 1st day of November, 2012

M. J. ANYARA EMUKULE

JUDGE