

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CRIMINAL CASE NO. 41 OF 2014

REPUBLIC.....ODPP

-VERSUS-

JOSEPH NJOROGE MWANGI.....ACCUSED

JUDGMENT

- 1. Joseph Njoroge Mwangi**, the Accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. Particulars of the offence were that on the 5th day of November, 2013 at about 9.45pm at Karatu village within Gatundu South Sub-County in Kiambu County, murdered Julius Mungai (Deceased).
- To prove the case the prosecution availed 9 witnesses. Among them, PW1 Loice Njoki Mwangi and PW2 Zachariah Chege Njoroge testified that they saw the Accused and the Deceased engage in a fight where the Deceased was injured.
- PW3 Leon Mbugua Thiong'o** testified to have heard voices he identified as those of the Accused and Deceased and he also heard dogs barking and could tell there was some altercation hence he sent his sister Susan Wambui Mungai a text message to that effect. Their mother sent them to go find out what was happening and on going to the scene he saw the police who instructed them to take the

deceased who was bleeding from the ear and nose to hospital. They did so but at the health centre they were referred to Gatundu Hospital.

4. PW4 Philip Njuguna Wausu the brother of the deceased went to Gatundu Hospital the following day and found the deceased bleeding from the mouth and ear and he was not talking. And, following his passing he identified the body to the doctor who conducted the postmortem.

5. PW5 Lucy Wanja Kimenju the wife of the deceased went to the scene to find him already injured and she accompanied people who rushed him to hospital where he was treated and died two(2) days later. She also witnessed the postmortem.

6. PW6 No. 69316 Corporal Samson Mulwa was on patrol when together with PC Roba when he heard screams and on reaching the scene he found members of public and the deceased was lying on the ground with a deep cut on the mouth and head. He accompanied people who took the deceased to the health centre and were referred to Gatundu Hospital. Thereafter a report of his passing was made and the DCI took over the case.

7. PW7 PC Dan Olunzi who then served at Kiserian Police Station, was assigned duties of arresting the Accused on 23.04.2014 at 9:00pm, some 5 months after the act. He was found at the Slaughter House and later escorted to Gatundu Police Station.

8. PW9 Dr. Francis Ngugi conducted the autopsy on the body of the deceased and concluded that the cause of death was internal bleeding in the cranial cavity, intramuscular and intrathoracic cavities due to assault (blunt trauma).

9. Upon being placed on his defence the Accused explained that on the material date, 14th November, 2013, he went to his brother's place and drunk tea. Later he left with his friend Ndung'u for Gatundu Town where they drunk some alcohol at. He then escorted Ndung'u to Matuu. That on reaching Thika they drunk some alcohol. They never found the person who was to sell to them a motorcycle, hence they slept at Matuu. He came the following morning but they did not take the motorcycle that they were to purchase, therefore they continued drinking alcohol. They travelled back to Thika where they drunk some more alcohol. They travelled and arrived at Gatundu at 6.00pm. They drunk alcohol until 10.00pm. That they proceeded to Karatina where they entered Murito Bar and asked for Kenya Cane wine which he could not take. His home being ½ km away he decided to walk and on reaching PCEA Church a person hit him with a fist and they fought physically.

10. That his sister Njoki whom he left at the pub appeared and separated them. That it was at 11.30pm hence he did not identify the person, and he woke up in the morning to find himself in the coffee plantation. Later his mother called

to tell him that the person he fought had died; it turned out to be his uncle Julius Mungai.

11. Further, he stated that he disagreed with the deceased and his sister in-law. The assault case was reported to the police, he was arrested, charged, convicted and sentenced to serve eighteen (18) months imprisonment in the case of the sister in-law while he was acquitted in the case of the deceased. And, upon release from prison on August, 2013 he returned home. He denied having planned to assault the deceased and referred to it as bad luck.

12. On cross - examination the Accused admitted that the death of the deceased resulted because he assaulted him. However, he denied having insulted him and having been the aggressor.

13. The defence submits that the encounter between the Accused and deceased was not premeditated and the Accused was not armed. That the Accused's reasoning was impaired by intoxication.

14. I have considered evidence adduced and submissions filed.

15. **Section 203 of the Penal Code** outlines and defines murder as follows;

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

16. Elements of murder as derived from the penal law were also defined in **Antony Ndegwa Ngari v Republic [2014] KECA 424 (KLR)** where the Court of Appeal stated that elements of murder are;

“(a)the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.”

17. It is acknowledged by the defence that as stated by the prosecution the victim suffered fatally from the assault. A postmortem was conducted by PW9 Dr. Francis Ngugi who confirmed that the deceased died following internal bleeding in the cranial cavity, intra muscular and intrathoracic cavities due to assault/blunt trauma. This was proof of the fact of death.

18. It is admitted that the death in issue was caused by the Accused herein. What should be determined is whether he acted with malice aforethought.

19. Section 206 of the Penal Code defines malice aforethought as follows;

Malice aforethought shall be deemed to be established by evidence proving any one 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;

(b) 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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

20. In **Nzuki v Republic [1993]** the Court of Appeal stated that;

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55."

21. At the defence stage the Accused argues that malice aforethought was non-existent since he was intoxicated.

22. Section 13 of the Penal Code provides thus;

(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or

otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.

23. In **Rex v Retief [1940 - 1943] EA 71**, it was held that;

"The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes note of the cause of insanity infact supervenes as the result of alcohol, excesses it finishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful his act would be excusable on the ground of insanity and the verdict should be as laid down in Section 159 of the Criminal Procedure Code."

24. The scenario given by the Accused was of a person who was intoxicated to an extent that the alcohol impaired his thinking state of mind. Probably this was voluntary intoxication.

25. PW1 Loice was at Wamuntho bar when she saw the Accused, her brother enter the bar at 8.30pm and he left her at the bar. She continued drinking until 11.00pm when she left. She

used a shortcut route that was more direct and the Accused caught up with her. And as they walked on, they saw a person approaching and the Accused asked her whether it was the deceased, to quote her, he said “is that Gathara” but she could not tell. The Accused dashed towards the person and on Loice reaching them they were fighting.

26. She heard the Accused say “hii mbwa ataniona” referring to Gathara. They fought. The Accused overpowered the deceased. He knocked him down then ran away. She used a torch to illuminate and saw the deceased was injured.

27. The deceased had not been at the bar hence she could comprehend what was happening. She stated that the Accused was assaulting the deceased and the deceased did not assault the Accused on the material day.

28. It was not alleged that the Accused entered the bar at 10.00pm as alleged in his defence or had been elsewhere.

29. To state that “this dog will see me” definitely implied he had a motive to injure. From evidence adduced, they had a history of litigation.

30. The Accused had assaulted the deceased and his sister in-law. The case filed by the sister in-law resulted into a conviction and sentence of 18 months imprisonment while he was acquitted of the case where the complaint was lodged by the deceased.

31. He saw the deceased some meters away and recognized him then ran towards him hurling an insult at him. He issued a

threat that he would see. He was the aggressor and he did cause him grievous harm which subsequently resulted into death.

32. Its not argued that the phrase threat was some innocent remark. The statement made proved he had a pre-meditated intent. The Accused was not intoxicated to an extent that he would not understand what he was doing. His *mens rea* was not negated. No insanity was induced by his state of mind. Therefore, I find that he acted with malice aforethought.

33. For that reason, I find the Prosecution having proved the case against him to the required standard, he is guilty and accordingly convicted as charged.

34. It is so ordered.

Dated, signed and delivered virtually this 16th day of April, 2026.

.....
L.N. MUTENDE
JUDGE