



**Republic v Musa (Criminal Case 44 of 2018)
[2024] KEHC 589 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 44 OF 2018**

**A. ONG'INJO, J
JANUARY 26, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MWARUA DANIEL MUSA ACCUSED

JUDGMENT

1. Mwarua Daniel Masa faces a charge of murder contrary to Section 203 as read with Section 204 of the penal code. Particulars are that Mwarua Daniel Masa on the evening of 9th September 2018 at Majimoto village, Mamba location in Lungalunga Sub-County within Kwale County murdered Jackson Musyoka Joseph.
2. The prosecution case was that the accused went to deceased person's home on 9th September 2018 to demand for his debt of 200/= but when he did not get the deceased, he decided to take a table in lieu. That when he was leaving the deceased arrived and held the table and a scuffle ensued. PW1, the wife to the deceased, testified that the accused used a jembe handle to hit the deceased on the head and face. PW1 said the accused had come with the jembe handle when he went to her home to demand for his 200/-.
3. PW1 said she got a motorbike which she used to take the deceased to police station. She said they were referred to hospital but she did not have money and they returned home. That at 3.00 am the deceased started bleeding from the mouth and she called Mama Rizer to help. The following morning when the father of the deceased went to look for a vehicle to take him to hospital he returned and found he had succumbed to the injuries.
4. PW1 identified the jembe handle used by accused to assault the deceased – EX. P1. The body of the deceased was removed to Msambweni Hospital Mortuary where postmortem was conducted by Dr. Karicha of Msambweni Sub-County Hospital. The same was produced by Dr. Genya – PW4. From the



- examination of the body Dr. Kahiha was of the opinion that the deceased suffered blunt head injuries that led to his death. PW1 said the incident happened at 7.00 pm when dusk had just set in. She said the deceased held the table that the accused was carrying away and they engaged in a confrontation.
5. PW2, the father to the deceased, learnt of attack on his son by the accused from mother to PW1 – when he was on his way from his night guarding duties. He rushed home and on confirming what had happened went to nearby market to look for a vehicle to take the son to hospital. When he got a bodaboda rider he was told that the son, could not be carried on a motorbike. He went to Kikoneni to look for a motor vehicle but when he arrived home at 9.00am he found the son had succumbed to his injuries.
 6. PW2 called Mamba Police Station. He also called the Chief and reported the death. Police visited scene took photographs and removed body to Msambweni Sub-County Hospital Mortuary. PW2 said he knew Mwarua whom he was told injured the deceased. PW3 the mother of the deceased was at home on 9/9/2018 at 6.00 pm when she heard noise coming from her son’s house. She said it was her daughter-in law who was screaming.
 7. That she rushed to her son’s house and found the accused beating the deceased with a jembe handle. She said her son had fallen to the ground. That she stood between the accused and the deceased and that is when the accused stopped beating the deceased. She said she snatched the jembe handle from the accused and the accused ran away.
 8. PW3 testified that when PW1 returned home with the deceased, his condition worsened at night and she went and found he was bleeding from the nose & mouth. PW3 said that since the accused had escaped she went and reported to Balozi to call his father. That the accused persons mother came and said she was going to look for a vehicle to take the deceased to hospital but she did not return until the deceased died. PW3 said she made a phone call to Mamba Police Station and reported that her son had died. PW3 said she learnt that accused was demanding for Ksh. 200/- from the deceased.
 9. PW5, P.C. Simion Gulicha, testified that on 10th September 2018 he received a phone call reporting murder incident within Mamba Police Station area. Initially, the wife to the deceased had reported assault on 9/9/2018 but deceased succumbed to the injuries on 10/09/2018. PW5 took over investigations and visited scene with IP Andanyi and IP Magwana and removed body to mortuary after processing scene. He collected the piece of wood that was used to inflict injuries – EXP. 1. PW5 said there was a fight between accused and the deceased but the accused did not sustain any physical injury.
 10. Accused was placed on defence and he gave sworn evidence and said he knew the deceased and they had cordial relationship. He said they used to visit each other and they related like brothers. He confirmed he went to the deceased home to collect Ksh. 200/= which was balance of money he had paid for solar lamp that he returned to the deceased. He said he did not find the deceased and after waiting for long he decided to leave. That as he was leaving, he met the deceased who asked why the accused was talking to his wife. That an exchange of words ensued and they started struggling and fell on a stone. Accused said that Musyoka’s mother separated them and he went and reported to the village elder but he found the village elder was drunk. He said he went back home and told his mother and wife what had happened.
 11. That on 10/09/2018 he went to the village elder’s home and reported and the village elder accompanied him to Musyoka’s home and the deceased father said that before they could sit and resolve anything they should take Musyoka to hospital. That he went to look for a vehicle but before he could get one the village elder called and told him Musyoka had died and he was advised to go back home. He went and waited at the scene until when police arrived and interrogated him and he was arrested and taken to Lungalunga Police Station where he was charged with offence of murder. Accused denied having hit



the deceased. He said the deceased liked making jokes and it is only when drunk that he turned violent. Accused said it was the 1st time he was being charged in court.

12. The accused person advocate file written submissions on 8th December 2023 and urged the court to acquit the accused as the prosecution had not proved that he committed either the offence of murder or manslaughter as accused denied having been in possession of wooden club and none was recovered from him. It was submitted that in fact it is the deceased who attacked the accused while the deceased was drunk and that accused used reasonable force to defend himself.
13. The defence also submitted that the accused went to collect his money from the deceased persons home as instructed by the deceased. That he had no ill intentions and didn't know the deceased was going to attack him. That after the incident he went to report and the following day early in the morning went to the deceased persons home in company of the Chief. It was submitted that the prosecution had not proved the charge of murder against the accused person and the court is urged to acquit the accused person.

Analysis and Determination

14. Having considered the evidence on record for the prosecution and defence as well as the submissions, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
15. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
16. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -
 - i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

17. There is no dispute as to the death of the deceased.
Whether death was caused by an unlawful act or omission committed by the accused
18. According to PW1, a scuffle ensued between the accused and the deceased when the deceased held the table that the accused person was taking away in lieu of his Kshs. 200. That the accused picked a jembe handle to hit the deceased on the head and the face. The mother of the deceased also said that when PW1 raised alarm, she ran to her son's house and found the accused beating the deceased with a jembe and the deceased had fallen down on the ground. That she stood in between the accused and the deceased and snatched the jembe handle from the accused and that is when the accused ran away. The accused confirmed that the deceased person's mother separated them. Although he says that



they fell on a stone and the deceased suffered injuries, there is evidence that he inflicted injuries on the deceased using a jembe handle. The Postmortem Report indicates that the deceased died as a result of multiple blunt head injuries. One fall on a stone as alleged by the accused could not have caused multiple injuries on the deceased's head. It is therefore true as presented by the prosecution witnesses that the accused person inflicted the injuries on the deceased. It is no doubt therefore that the cause of death was through an unlawful act.

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

20. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held: -

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

21. In this matter, the accused had gone to demand for his money and when he did not find the deceased, he decided to take a table in lieu thereof. However, as he was leaving with the table, the deceased arrived and held onto the table and they started struggling whereupon the accused picked a jembe handle and used it to assault the deceased until they were separated by the mother of the deceased, PW3. It is therefore apparent that when the accused person went to the deceased's home, he had not planned to go and pick a fight with the deceased but to demand for his Kshs. 200. If the deceased had not held on to the table and started to struggle with him, the fight could not have ensued. This court therefore finds that the accused did not have the intention to assault the deceased and inflict grievous bodily harm and even to cause his death.

22. The element of malice aforethought has therefore not been proved and the accused person is acquitted of the offence of murder but found guilty for the offence of manslaughter. He is therefore convicted for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 26TH DAY OF JANUARY 2024

HON. LADY JUSTICE A. ONG'INJO



JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Ms. Kerubo Advocate H/B for Mr. Bosire Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: We do not have previous records

Ms. Kerubo Advocate: In light of the judgment, the accused is remorseful. He is a young man with a family. He prays for leniency.

Order: Mention on 15.2.2024 for Victim Impact Statement and sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

26.1.2024

