



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 8 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PETER NG'ANG'A KAMAU.....ACCUSED

JUDGMENT

1. On 10th October 2013, George Kiringa Gathoni (hereafter *the deceased*) and Paul Nguiri were apprehended by the public for pilfering scrap metal. They were re-arrested by Administration Police Senior Sergeant John Karumba (PW8). Some of the stolen items belonged to the accused. He told PW8 that the deceased was his nephew and proposed to privately resolve the matter.

2. According to two witnesses (PW1 and PW2), the accused took the deceased to his [accused's] house and tied him to a tree or post. The deceased's grandparents (PW3 and PW5) later saw the accused and three men dragging the deceased into their compound. His head was swollen; his dentures were broken; and, he was bleeding from the mouth. The deceased was taken to Gatundu Hospital and later to Kenyatta National Hospital where he died a few days later.

3. The Republic thus brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.

4. The particulars are that on 19th October 2013 at Mitero village, Gatundu North District, within Kiambu County, jointly with others not before the court, he murdered the deceased.

5. He pleaded *not guilty*. The prosecution lined up nine witnesses. The first was Nelson Chege Ndungu. He was a *boda boda* rider. On 10th October 2013 at about 1:00 p.m., he ferried the accused and another person to the Gatukuyu Administration Police Post. He was also carrying the scrap metal recovered from a dealer's shop at Gatukuyu Market. The dealer was Paul Nguiri who I referred to earlier.

6. When Administration Police officer John Karumba (PW8) released the deceased, PW1 transported the accused and the deceased to the accused's house. Another motor bike operated by Patrick Kamau (PW2) carried another person to the same compound. There is some discrepancy between their evidence on the time or who between them ferried the accused into the compound. I will revisit the matter shortly.

7. According to PW1 and PW2, the accused with the assistance of another person, tied the deceased to a post claiming the deceased had stolen his scrap metal. The accused went into his house and came out wielding a *rungu*. There is a further discrepancy because in the statement to the police, PW2 stated that the accused went into his house and came out with a *rope*. I will return to the matter.

The accused then paid Kshs 200 to PW1 and PW2 for their services and they rode away.

8. The two witnesses said that when they got into the compound, they only found the accused's mother. They assumed she was the one because the accused called out to her and uttered the words: "*Mother, this is the person who stole the metals [sic]*"

9. PW3 and PW5 were Lilian Nduta and Michael Mbia. They are the grandparents of the deceased. On the afternoon of 10th October 2013, they were seated outside their house. PW3 testified as follows:

We were seated outside the house. I then saw 3 people entering our compound. Two were holding the third person and were pulling him along. The three were men. The men holding the third man were Ng'ang'a Kamau [accused] and Michael Mbugua. The third man being pulled was George Kiranga [deceased]. There was a fourth man following them. He was called Njuguna Chege. Ng'ang'a Kamau and Michael Mbugua dropped George Kiranga where I and my husband were. He lay down as and where he was dropped. He had a swollen head and face and had blood on the ankles, knees and wrists. He had blood on his face. His front teeth appeared to have been knocked back into the mouth. He was bleeding from his mouth.

10. The two witnesses knew the accused for many years as they were neighbours. PW3's version of events was corroborated by her husband (PW5). When the latter asked the accused why he had brought the deceased to them in that state, he replied that he saw no need to go to the police as he had already done his work. According to PW3, the reply was: "*I have done enough of my work*".

11. PW3 summoned the mother of the deceased, Lucia Gathoni (PW6). The latter found her son lying unconscious outside her parents' house. She made arrangements to transport the deceased to Gatundu Hospital. He remained there for about six days. His condition worsened and he was transferred to Kenyatta National Hospital where he breathed his last three days later.

12. Anthony Mbia (PW4) is an uncle to the deceased. He, his younger brother and their father (PW5) attended the post mortem examination at Kenyatta Hospital on 29th October 2013. The Post Mortem Report (exhibit 1) was produced by the investigating officer (PW9) by consent and under section 77 of the **Evidence Act**.

13. PW7 was Grace Wanja Kahenja. She is the mother of Paul Nguiri, the other suspect who had been arrested together with the deceased for theft of the scrap metal. When she got to the police post her son told her that he was arrested for holding scrap metal at his shop brought there by the deceased. PW7 admitted that she bribed the police officer (PW8) with Kshs 1,000 to secure his release. I agree with the learned defence counsel that the conduct of PW7 tarnishes her evidence.

14. PW8 was Senior Sergeant John Karumba. Like I stated earlier, he re-arrested the deceased and Paul Nguiri. The stolen scrap metal was recovered from the latter's shop and taken to the Gatukuyu AP Post. Some of the metal belonged to the accused. According to PW8, the accused said he was related to the deceased and requested that the two be allowed to resolve the matter privately. PW8 released the deceased. PW1 and PW2 then ferried the deceased, the accused, another person and the scrap metal into the accused's compound.

15. The last witness was Police Constable Kagiru. He testified that the pathologist, Dr. Owino, could not make it to court. The basis having been laid, and there being no objection by the defence, he produced the Post Mortem Report (exhibit 1) under section 77 of the **Evidence Act**.

16. When the accused was placed on his defence, he denied assaulting the deceased. On 9th October 2013, he and his wife had gone to the market at Gatukuyu. When they returned in the evening, they discovered that some metal windows and seats had been stolen from the compound.

17. On 10th October 2013, the accused made a report at Gatukuyu Administration Police Post. While having a snack at the market, he learnt of the arrest of the deceased and Paul Nguiri over theft of scrap metal. He went to the latter's shop and identified the items stolen from him. The suspects were then led towards the police post and re-arrested by PW8.

18. The accused claimed that he wanted the police to deal with the matter but he was wary of the corruption he witnessed between PW7 and PW8. He thus doubted the fairness of the police to deal with the theft of his scrap metal. The accused said that he left the deceased at the police post. He then tried to get in touch with the accused's grandfather (PW5) but who was disinterested in

resolving the matter. The accused said that as he left PW5's compound, the deceased was ferried into the compound on a motorbike. He went back. He said that PW5 was annoyed and pushed an axe into the deceased's mouth. He said he tried to restrain him but to no avail. He then left the compound.

19. The accused said he learnt that the deceased died a few days later. By that time, he had returned to Kitengela where he worked as a mechanic. Upon cross examination, he said he had opted to resolve the matter after witnessing the corruption at the police post. But he never made a formal complaint about the corruption. In short, the accused flatly denied beating up the accused; and, claimed that it is the deceased's grandfather (PW5) who hit the deceased on the mouth.

20. Learned counsel for the accused, *Ms. Waithira Mwangi*, filed written submissions on 11th March 2022. Reliance was placed on the annexed authority in ***Republic v Bernard Obunga***, Nairobi High Court Criminal case 31 of 2013 [2015] eKLR. In a nutshell, she submitted that the evidence was contradictory and tenuous; and, that the elements of murder were not proved beyond reasonable doubt.

21. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

22. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

23. The death has been proved. Doubt is completely erased by the post mortem report (Exhibit 1). The cause of death is also clear. In the opinion of the pathologist, it resulted from a lower respiratory tract infection and head injury following a blunt force trauma.

24. From that evidence, I find that the death was *unlawful*. The next question then is whether the Republic has proved beyond reasonable doubt that the accused, *of malice aforethought*, killed the deceased.

25. There is no eye-witness account of the accused assaulting the deceased. The prosecution's case is built upon *circumstantial* evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused "*incapable of explanation upon any other reasonable hypothesis than that of his guilt*". ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949). See also ***Sawe v Republic*** [2003] KLR 364, ***Mutua v Republic***, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, ***Republic v Richard Itweka Wahiti***, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.

26. I remain alive that the legal burden of proof lay throughout with the prosecution. ***Woolmington v DPP*** [1935] AC 462, ***Bhatt v Republic*** [1957] E.A. 332.

27. I find that there are a number of *incriminating* pieces of evidence: The first piece of evidence is that the accused is the person who persuaded the police officer (PW8) to release the deceased to him ostensibly to resolve the matter. I did not believe the accused when he claimed that he left the deceased at the police post and that the deceased was later ferried by a motorbike to his grandfather's (PW5's) place.

28. There is clear-cut evidence from PW1, PW2 and PW8 that the accused requested the police (PW8) to allow him and the deceased to resolve the matter. The accused was transported together with the deceased and another person to his (accused's) compound by PW1 and PW2.

29. Secondly, when PW1 and PW2 ferried the accused, the deceased and the other person into the compound, they only found the accused's mother. The accused then jumped off the bike, entered his house and came out with either a *rungu* or a *rope*. PW1 and PW2 were emphatic that the accused with assistance of another person tied the deceased to a tree or post.

30. Like I stated earlier, there were discrepancies between the evidence of PW1 and PW2 on the time, who between then carried the accused and when the accused came out of his house with the rope or the *rungu*. But I find that the incongruities were minor and immaterial. They are bound to arise in any trial. See ***Joseph Maina Mwangi v Republic***, Court of Appeal, Criminal Appeal No. 73 of 1993, ***Richard Munene v Republic***, Court of Appeal, Nyeri, Criminal Appeal No. 74 of 2016 [2018] eKLR.

31. Thirdly, the accused and three other men later took the deceased to his grandparent's (PW3's and PW5's) house. By that time, the deceased had been beaten unconscious. He had a swollen head and face and bloodied ankles, knees and wrists. His front teeth appeared to have been knocked back into the mouth and he was bleeding from his mouth.

32. Fourthly, I studied the demeanor of the accused very closely. He was lying when he said he never assaulted the deceased or when he claimed that it is the deceased's grandfather who hit the deceased in the mouth. He was also lying when he said that he left the deceased at the police station or that the deceased was transported later by a motorbike straight to PW5's house. It was simply fictitious. I am fortified because the issue never arose in the cross-examination of the grandparents (PW3 and PW5). The evidence of those two witnesses was consistent that the accused and another man dragged the bloodied deceased into the compound.

33. I find that line of defence unbelievable and a red herring. I also find that when the police released the deceased into the hands of the accused, he had not suffered the injuries that his grandparents witnessed. The accused had custody of the deceased throughout that intervening period. Like I stated, he and another person had earlier tied the deceased to a tree or post. He was seen by PW1 or PW2 getting into his house and coming out with a *rungu*. The chain is complete and the accused and his accomplice or accomplices are the ones who inflicted those injuries on the deceased.

34. Fifthly, the identification of the accused was never in doubt. He was identified by PW8 as the person who sought to resolve the matter out of court. He was identified by the two *boda boda* riders (PW1 and PW2) who took him, the deceased and an unnamed person to the accused's house. He was also well known to PW3 and PW5 who later saw him in the company of three other men dragging the deceased into their compound. I thus readily find that the accused was *positively identified*.

35. Sixth, the accused had a clear motive. I am alive that the Republic was *not* obligated to prove motive. The deceased had stolen the accused's valued scrap metal. When asked by the deceased's grandfather (PW5) why he had brought the deceased to them in that state, he replied that he saw no need to go to the police as he had already done his work. According to PW3, the reply was: "*I have done enough of my work*". Therein lies the *motive* and clear *mens rea* for the offence.

36. Seventh, the beatings received by the deceased were vicious and led to his death. He was treated at Gatundu Hospital for about six days. His condition deteriorated and he was transferred to the intensive care unit at Kenyatta National Hospital where he died days later. According to the Post Mortem Form, the deceased died from a lower respiratory tract infection and head injury following a blunt force trauma.

37. For all those reasons, I find that the conduct of the accused is inconsistent with his plea of innocence. By tethering the deceased to a post and beating him into a pulp, he and his accomplices *knew or ought to have known* that it was likely to cause grievous harm or death. The accused was enraged by the theft of his valued scrap metal and decided to teach the deceased a lesson. He thus had *malice aforethought* as defined in section 206 (b) of the **Penal Code**. The deceased died as a *direct consequence* of his conduct.

38. The entire corpus of circumstantial evidence points *irresistibly* and *exclusively* to the guilt of the accused. I find *no* defence or hypothesis that exonerates him.

39. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. The accused, *of malice aforethought* caused the death of the deceased by an *unlawful* act. I accordingly enter a finding of *guilty*. The accused is hereby *convicted*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL ,2022

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

The accused.

Ms. Otieno for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Susan Waiganjo, Court Assistant.



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