REPUBLIC OF KENYA

High Court at Meru

Criminal Case 79 of 2005

REPUBLIC ……………………………………………..PROSECUTOR

VERSUS

CHARLES M'MUGAA M'MAUTA…………..………………ACCUSED

J U D G M E N T

The accused CHARLES M'MUGAA M'MAUTA is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 23rd day of October, 2005 at Athiru Gaiti location in Meru North District within Eastern Province murdered Richard Mwongera.

The prosecution called 5witnesses. The brief facts of the prosecution case are that on the 10th day of October, 2005 at 7.30p.m. PW1 Sampson Mutambi was at his kiosk with the deceased Mwongera and PW2 Joses Thuranira seated outside the kiosk in Gitura market taking tea and miraa when the accused came making noise and quarrelling to himself. The accused was uttering words to the effect that he would kill someone. That when the accused reached where PW1, the deceased and PW2 were he threw a stone that he was holding and hit the deceased at the forehead. The accused then ran away. PW1 and PW2 were able to recognize the accused through his voice and through the aid of moonlight and light from the lamp which was lit from the PW1's kiosk.

PW1 closed his business and with help of PW2 the deceased was taken to his parents and his brother. The deceased was subsequently taken to police station, where a report was made and then to Maua Methodist Hospital, whereby he was admitted. The deceased was discharged from hospital but later re-admitted at the same hospital. The deceased died after re-admission at the hospital.

The accused gave a sworn defence. He called one witness DW2 Peter Bundi Mugaa, his son. The accused denied committing the offence and stated that he knew the deceased Richard Mwongera and he did not know how the deceased died since he was far away. He averred that he was charged with this offence because the deceased brother wanted to deprive him of his miraa. He stated the deceased brother who wanted to deprive him of his miraa is called Ben and he saw him in the court. He stated that before his arrest his son had informed him that police were looking for him as he was said to have had hit the deceased with a stone. That he went to Maua Police Station and OCS told him to go home and return to police station the next day. That on returning the following day, he found the deceased's Brother Ben at the police station talking to the OCS. That the OCS then arrested the accused and told him he would be explained the reason for his arrest.

DW2 Peter Bundi Mugaa stated that the accused is his father and that he knows the offence with which the accused is charged. DW2 stated that on 10.10.2005 the accused was at his farm at a place called Ndira 50Kms away. He averred that he was with the deceased on 11th October, 2005 at Gitura market and noticed that the deceased had a bandage on the forehead and that he saw him also on the day the bandage was removed at his home by a nurse from Maua Methodist Hospital.

DW2 stated that he used to see the deceased before he fell sick and at the hospital. He claimed that he went to see the deceased whilst at the Maua Methodist Hospital and he told him he was told he had malaria. He also stated that the deceased forehead which had been bandaged had healed. That the deceased was discharged from hospital and he fell sick again. That on being returned to the hospital he passed on. DW2 stated that he could not know when the deceased died but he knew it was on a Sunday. DW2 testified that he did not know how the accused came to be connected with the accused death. That he heard rumors from Ben that accused had caused the death of the accused. He informed the accused who proceeded to report to Maua Police Station, whereby the accused and DW2 were given a letter to take to Ben Mwongera.

That the following day the accused on reporting to the police station he was arrested and charged with this offence. DW2 averred that they were asked to raise a bond of Kshs.60,000/= but as they were unable to do so the accused was taken to court and charged with this offence.

I have carefully considered the evidence adduced by both the prosecution and the defendant. The accused was represented by Mr. Kaumbi Kioga learned Advocate while the State was represented by Mr. Jackson Motende, learned State Counsel.

The defence contention was that the accused did not commit the offence as he was far away. The accused relied on alibi defence. Counsel urged that the accused was not identified as the only source of light was from a kiosk’s lamp and that it was dark. That the conditions were not favourable for positive identification of the accused.

The counsel further urged the accused Constitutional rights were violated as he was brought to court after expiry of 14 days from the date of arrest. The Counsel further urged that the prosecution did not prove the essential ingredients of murder in that the prosecution did not prove that the accused had malice aforethought.

Mr. Jackson Motende for State urged that the prosecution had proved its case and that the accused should be convicted for the offence. He urged that the accused was seen and recognized by PW1 and PW2 when he hit the deceased with a stone on his forehead on the material date and immediately after the commission of the offence the accused ran away from the scene which proved a guilty mind. He urged evidence of PW1 and PW2 was corroborated by PW4 on the cause of death. He urged the accused defence of alibi was not corroborated and same was dislodged with the evidence of PW1 and PW2. He further urged that the element of malice aforesaid were proved as per section 206 of the Penal Code.

The accused is charged with murder contrary to section 203 of the Penal Code. The section provides as follows:-

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

The burden is on the prosecution to prove its case against the accused person beyond any

reasonable doubt. The prosecution must adduce evidence to show that the accused person did an act which caused the deceased the injuries that led to his death. The prosecution must adduce evidence to show that it is the accused person who threw the stone and caused his death. The prosecution must establish that the act leading to death by the accused was motivated by malice aforethought.

Section 206 of the Penal Code gives the circumstances which constitute malice aforethought as follows:-

"206. 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."

The issue in this case is who threw the stone which hit the deceased on the forehead causing severe injury which caused his death after a few days. In this case there was direct eye-witnesses PW1 and PW2. PW1 Sampson Mutembei in his evidence testified as follows:

"As we were there I saw accused making noise as he was walking, he was quarrelling himself. He was saying that he would kill someone. He had not reached my kiosk, he was heading to my kiosk. Yes he reached near the kiosk. When he reached where we were he threw a stone. The stone hit the person seated in the middle i.e. the deceased Mwongera. He was hit on the forehead. The stone was a heavy stone. I saw it when he threw the stone accused was at a distance of 5 meters from us. I was able to identify accused because there was moonlight and there was light from lamp I had lit the lamp was at window of the kiosk. There was bright moonlight. Yes, by then he was quarrelling himself."

PW2 Joses Thuranira on his part testified as follows-

"Accused is also a neighbor(point the accused in dock).

On 10.10.05 between 7-8p.m I was at Mutembei's kiosk. We were seated outide the kiosk. I was in company of Mutembei and deceased. We were chewing miraa. We then heard someone coming shouting saying he would kill someone. That person I recognized him he came where we were. I saw him and I recognized him when he approached where we were seated with others. That was when he was about 5 steps away. That is from here to where here is the end of the bench(3 meters). He stopped 3 meters from us. He then was holding a stone. He threw the stone and hit the deceased with it. At first when I heard, he just ran away. The nature of light was that there was moonlight and there was a lamp in the kiosk."

PW1 and PW2 took the deceased and his parents and his brother and later to Maua Police Station before proceeding to Maua Methodist Hospital.

The evidence of PW1 is that after they took the accused to his parents and brother they suggested that the deceased be taken to the hospital. PW2 evidence is that after the deceased was hit he fell down and later they assisted him to his parents to take him to the hospital. The legal position regarding first and initial report to people in position of authority was well put in the case of **TEREKALI & ANOTHER –V-REPUBLIC(1952) EA** in which it was held:-

"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others…….."

The first issue in regard to evidence of PW1 and PW2 is that of identification or recognition of the accused. The court in the celebrated case of **CLEOPHAS OTIENO WAMNA –V-REPUBLIC(1984) KLR 424,** the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification, especially where conditions are not favouring a correct identification.

The court held:-

'The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ in the well-known case of R. VS.Turnbull 1976(3) ALL E.R. 549 at pg.549 at page 552 where he said:-

"Recognition may be more reliable that identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.:"

The circumstances of recognition are quite clear. The incident took place at 7.30 p.m. at PW1's kiosk. According to PW1 and PW2 they had known the accused as their neighbor for a considerable period of time. They knew his voice and recognized him by voice and even quoted the words he uttered, that is to say ***"he would kill someone"***. They were able to see and recognize the person as the accused when he came to where PW1 and PW2 were through the aid of moonlight and the lamp at the kiosk. PW1 and PW2 described the intensity of the moonlight as bright and the position of the moon as positioned directly on top. The lamp was positioned at the window of the kiosk. The accused was within 3 metres from PW1 and PW2.

I have considered the events leading to the attack as narrated by PW1 and PW2. The deceased was seated with PW1 and PW2 on the same form. PW1 and PW2 described the utterances by the accused and that they recognized his voice. He came within 3 metres to where the deceased, and PW1 and PW2 were seated. The attack was not sudden. PW1 and PW2 after witnessing the attack were keen to observe the identity of the attacker.

PW1 and PW2 after the attack opted to assist the deceased and even took him to his parents, and brother and subsequently to police and to the hospital.

I find that PW1 and PW2 had sufficient time to see and recognize the attacker. Given the obvious fact that PW1 and PW2 had heard the accused saying"he would kill someone "as he approached them, the two were keen to observe the identity of the attacker.

I find at the time of the attack the conditions were favourable for recognition of the attackers.

I have considered the evidence of PW1 and PW2 and have found the two prosecution witnesses to be credible.

PW3's evidence regards identifying the deceased body for postmortem to be carried out and he had nothing connecting the accused with the attack.

PW4 Thiakulu Cyprian Mwirabua, a doctor testified that he conducted postmortem on the body of the deceased and formed opinion that the cause of dealt was increased intra cranical pressure. Secondly to epidural hematoma secondly to depressed fracture skull.

PW5, Enfrey Murithi the Investigating Officer testified that on 10th October, 2005 he was at Maua Police station when the deceased Richard Mwongera was escorted to the station by members of public including the relatives. He testified the deceased had a deep wound on forehead which was very fresh. The deceased told PW5 he was hit by the accused and disclosed his name as Charles Ntomugaa using a stone. The report was recorded in the O.B and he ordered the deceased be taken to the hospital for treatment. That the deceased passed on 23/10/2005. That postmortem was carried out on 26th October, 2005 by PW4 in presence of the accused relatives and postmortem report showed the deceased died as a result of injury caused by the accused. PW5 testified that he was present at the time postmortem was carried out with two of the deceased relatives who identified the deceased's body. That on 27th October, 2005 the accused was identified to him and he arrested him. That on 2/11/2005 he escorted accused to Nyambene District hospital for mental assessment by Dr. Mburugu, who filled P3 form and found accused fit to stand trial. That on 5/11/2005 PW5 proceeded to the scene of accident and took a rough sketch plan showing the kiosk belonging to PW1.

The prosecution has demonstrated that the accused was at the scene of crime. The prosecution has also shown beyond any reasonable doubt that it was the accused that had the opportunity and the time to commit the offence. The prosecution has shown the deceased was only hit once on the forehead. The prosecution has also shown that the accused had at the scene of the incident threatened to kill someone. I find that the circumstances point to the accused guilt and cumulating the circumstances from a chain so complete that only conclusion which can be heard is that with all human probability the offence was carried by the accused.

The accused denied the offence and said he was not even near the scene when the incident took place. The prosecution proved that the accused was at the scene of the incident. He was clearly seen and recognized by PW1 and PW2. His defence had been shaken and displaced by the prosecution witnesses. The accused said he was far away but did not disclose where he was. DW2 evidence that the accused was at a place he referred to as Ndira not corroborated. DW2 had not been with the accused at Ndira nor had he been aware were accused was on 10th October, 2005.

DW2 evidence was not only uncorroborated but it was hearsay. The evidence adduced by the prosecution established beyond any reasonable doubt that it was the accused and no one else who

threatened to hit the deceased with a stone. PW1 and PW2gave most incriminating evidence against the accused when at the kiosk where the incident took place and when they witnessed the events they narrated the same to parents and brother to the deceased, PW5 the Investigating Officer and to the court.

PW1 and PW2 had no grudge against the accused and no such suggestions were put to any of them. PW1 and PW2 were credible witnesses and who impressed court as one whose interest was to tell the truth. I was satisfied that they were consistent, and corroborated one another and worthy of belief.

The accused alleged that the deceased brother one Ben Muithani framed him with the offence because he wanted to deprive him of his miraa. He said this was in 1961 and that the miraa is still on his land. Significantly Ben Muithani gave evidence as PW3. He did not give evidence on commission of the offence but on the identification of the body of the deceased for postmortem.

That if PW3 wanted to frame the accused he could have given evidence of what happened on 10.10.2005 but he did not. The Counsel for the accused did not even in cross examination suggest that there was a grudge between the accused and PW3. That if there was such a grudge that could have been put to the witness to respond. I find the accused suggestion that he was being framed by Pw3 to be an afterthought.

The prosecution has proved that the cause of death was injuries that were inflicted by the stone used by the accused to hit the deceased on the forehead but not by malaria as suggested by defence. The deceased head had a fracture depressed with sharp edges 3cm x3 ½ cm large epidural haematoma which depressed the right lobe frontal creating a creation of 8cm x 6cm on coreburm. The gyri were flattened

The cause of death was due to increased intra cranial pressure secondary to epidural haematoma secondly to depressed fracture skull and not malaria as suggested by the defence and at any rate no evidence was adduced by defence to disapprove the cause of death as suggested and proved by the prosecution

The prosecution has proved that the stone which caused death was thrown by the accused. The motive for the attack is not clear however the motive need not be proved for the offence to be proved. Malice aforethought was however established. The accused used a heavy stone to hit the deceased on the forehead from a close range. Forehead is a very sensitive area to hit with a heavy stone. The accused action was both calculated and deliberate. It is clear the accused had formed an intention to cause death to someone or to do grievous harm to any person, whether that person was the person actually killed or not.

The ingredients for the offence of murder and in particular the circumstances that constitute malice aforethought as provided under section 206(a) of the Penal Code were fully and firmly established.

Before concluding this matter the defence counsel raised a Constitutional issue to the effect that the accused had a Constitutional right to be brought to court within 14 days of his arrest. He urged that the accused was arraigned in court almost 40 days after his arrest and that he was asked for kshs.60,000/= to buy his freedom and having failed to raise the amount the police then laid the present charged against the accused. I have in my judgment found that the accused was not framed with the offence herein and that no suggestion was put forward that the charge was framed after accused failed to give Kshs.60,000/- to buy his freedom. DW2 clearly stated Kshs.60,000/- was to enable the accused to be released on bond but not to buy his freedom. The accused in his evidence did not mention being asked

to buy his freedom by paying any money. On the accused's Constitutional rights being breached or violated for staying in police custody for more than 14 days as per the repealed constitution, the law did not allow for an accused person to be detained in police cells for a period exceeding 14 days. If the accused was detained for a period longer than what was by then allowed by the Constitution he is entitled to institute a civil claim for appropriate remedy. I have said so much on this point I will leave it at that.

Having carefully examined the entire evidence in this case, I have come to the conclusion that the prosecution has proved its case against the accused beyond any reasonable doubt. I accordingly find no merit in the accused defence and reject the same, I find the accused guilty and convict him accordingly.

The court has considered that the accused is a first offender. I have considered his mitigation that he is of upper mid age. I have also considered the circumstances of the offence. That the accused was the aggressor and the attack was not provoked by the deceased and was high handed and malicious. That the deceased was enjoying his evening with friends whom accused from blues took a heavy stone and hit the deceased on the forehead resulting to severe injuries which caused the deceased death after a few days.

I find that the accused should be given the mandatory death sentence. I therefore sentence the accused to death as by law prescribed.

Right of appeal explained.

DATED, DELIVERED AND SIGNED AT MERU THIS 19TH DAY OF DECEMBER, 2012.

J. MAKAU

JUDGE

Delivered in open court in presence of:

1. **Mr.Motende for State**

2. **Mr. Kaumbi for accused**

3. **Accused - present**

J. MAKAU

JUDGE

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