



REPUBLIC OF KENYA



KENYA LAW
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**State v Ambet (Criminal Case E003 of 2019)
[2024] KEHC 15336 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E003 OF 2019
RE ABURILI, J
NOVEMBER 27, 2024**

BETWEEN

STATE PROSECUTION

AND

MICKEY OCHIENG AMBET ACCUSED

JUDGMENT

Introduction

1. The accused person Mickey Ochieng Ambet is charged with the of the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 2nd day of January 2019 at Embassy Lounge, Ahero Township, Nyando sub-county murdered one Brian Odhiambo Oiro. The accused person pleaded not guilty to the charge against him and the matter proceeded to full trial.
2. The prosecution called a total of eleven (11) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. PW1 Phineas Odeny Omondi testified that on the 2nd January 2019 at 3am, he was at work about to close business collecting bottles and clearing up when a customer called him to a door, looking for any senior person at the premises to speak to. PW1 testified that he introduced himself as the manager and the customer informed him that one of the bouncers had beaten up somebody and taken him to the toilet.
4. He testified that he proceeded to the counter to confirm if he had any outstanding bill and found none so he proceeded to the toilet where he found Mickey, the bouncer and security, quarrelling and fighting



- with someone. He testified that he inquired from Mickey as to what the customer had done but the customer became rowdy so he left and Mickey followed him.
5. It was PW1's testimony that Mickey informed him that he would tell him what had happened after he hands over the gate collections. PW1 then returned to the toilet where the customer who was beaten up informed him that the bouncer, Mickey, had been beating their people and when he inquired why he was doing so, the bouncer also beat him up. PW1 testified that the customer's clothes were torn but he did not see any injuries on his body.
 6. PW1 testified that before he left the club, Mickey informed him to wait and speak to the Deputy OCS Ahero who arrived with another police officer and went direct to the toilet and when Mickey opened the door to the toilet, the customer therein had blood with torn clothes and blood on his chest. He testified that the police placed the injured customer in their vehicle and left with him.
 7. In cross-examination, PW1 testified that he did not see when any of the persons were being assaulted and further that he did not know what brought about the said injuries.
 8. PW2 Eunice Achieng Obong testified that she worked at a bar. It was her testimony that on the 2nd January 2019 at about 3am, she was at her place of work, Embassy Club in Ahero serving customers. She testified that she proceeded near the toilet where she found the manager and a customer quarrelling so she got her water and returned inside the club where she took some glasses to the tables.
 9. It was her testimony that at the counter, she found Mickey asking for a padlock though she did not know what he wanted it for but that she saw him heading towards the toilet. She testified that she did not know what happened thereafter.
 10. PW3 Jacinta Atieno was declared a hostile witness. She testified that she was a waitress at Embassy Lounge. It was her testimony that on the 2nd January 2019 at about 3am, she was at work when she saw Mickey assaulting a customer named Julius and that Mickey was pushing Julius to the toilet. It was her testimony that she did not know why they were quarrelling. PW3 testified that Mickey was their Bouncer at the club and the accused herein. It was her testimony that she had heard that a customer had been stabbed and when she asked the accused about it, the accused informed her that she was not in charge of security.
 11. In cross-examination, she testified that the customer that Mickey was quarrelling with was Julius but that the one who later died was not Julius. She testified that she only heard some young men talking about the stabbing but did not witness the stabbing. It was her testimony that she did not see Mickey fighting that customer.
 12. PW4 Julius Akeda Okuta testified that on the 1st January 2019 at 9pm, he was at Embassy Club in the company of Dennis Kamau. He testified that at 11pm, he left to go to the toilet when he saw his friend Brian Odhiambo, the deceased, who was in the company of his 3 cousins and so he greeted them. It was his testimony that at 3.30am, he saw those who were seated at the table next to theirs, standing up, looking towards the direction of the table where Brian had been so he also stood up and looked in that direction where he saw Brian being held by the 2 bouncers of the club who were hitting Brian with blows and kicks.
 13. It was his testimony that he tried to stop Mickey from hitting the deceased by holding Mickey's left hand but Mickey pushed him away. He testified that he returned to his table where he told Dennis to keep an eye on their things as he was going to the back of the club where he found the bouncers trying to force Brian to get out as they kicked him and hit him with blows. PW4 testified that the bouncers pulled the deceased up to the Club's second door that was metallic but that the deceased held onto the door with both hands stating that he would not leave until Mickey gave him his drink.



14. PW4 testified that Mickey who was in a brown jacket reached into the pocket on the right side of the jacket, removed a knife and stabbed the deceased on the left side of the chest forcing the deceased to scream and let go of the door and got out. He testified that he asked Brian if he should take him to hospital, but that the deceased declined. It was his testimony that they started walking towards home but after only about 5 steps, he noticed that Brian was bleeding a lot so they returned to the club where they found Mickey and Okoth standing there with all the people who had by that time been removed from inside the club.
15. PW4 testified that he told Mickey that Mickey had injured Brian and that Mickey should take Brian to hospital where he would explain to the doctor why he had stabbed him, at which point, Mickey and Okoth held PW4 and started beating him whilst leading him into the Club. He testified that Mickey hit him with an object on his head where he suffered a cut on his head and it bled. It was his testimony that Mickey and Okoth carried him and took him into the ladies' toilet where they locked him inside and padlocked it from outside.
16. PW4 testified that the door to that toilet where Mickey had locked him up was opened after about 10 minutes by the Club Manager who asked him if PW4 was one of those beaten by the bouncers and PW4 confirmed so, the manager informed him that he, the manager would return to sort out the issue and locked him inside the toilet again for another 30 minutes. It was his testimony that when the door was next opened, he found the Officer Commanding Police Station-OCS of Ahero Police Station together with other police officers.
17. PW4 testified that the OCS asked him if he was caught up in the fight at the Embassy Club which he confirmed after which the OCS asked him where Brian was but he did not know. It was his testimony that the OCS left him with the other officers as he, the OCS went into the Gents' toilet and ordered that it be opened and when the toilet was opened, there was someone inside. He testified that when he got to that toilet, he found that it was Brian who was removed and placed in a vehicle by the OCS and taken to the hospital as he, PW4 and Mickey were ordered to board motorbikes and to follow Brian to the hospital.
18. PW4 testified that at the hospital, he found that Brian was already receiving medical attention but that at 1pm, he got information whilst at the Police Station that Brian had died. It was his testimony that there was electricity at the place where Brian was stabbed by Mickey and he could see clearly. He testified that he had known Mickey for about one year prior to the incident. He further identified Mickey as the accused in court.
19. PW5 Cornel Oiro Akello the deceased's father testified that on the 7th October 2019 at about 10am, he was at Ahero County Hospital Mortuary where he identified the deceased's body to the doctor prior to post-mortem. He testified that the doctor informed him that his son was stabbed and that PW5 saw the stab wound on the chest.
20. PW6 Dr. Ombok Lucy testified and with leave of court, produced the post-mortem report prepared by Dr. Eddy Owuor who had since proceeded for studies in Tanzania whom she had worked with and was familiar with his handwriting and signature. She testified that the post-mortem report for the deceased was done on the 7th January 2019 at Ahero Sub-County Hospital at 9.00am.
21. PW6 testified that the body was that of an African male aged 25 years, masculine and well nourished. It was her testimony that externally, the body had a scar stitched wound, at the left side of the chest while internally, the respiratory system had a penetrating wound on the left side of the chest, piercing the 4th rib with massive bleeding in the left lung. It was her testimony that on the heart, there was a penetrating wound cutting the vessels of the heart and forming blood clot.



22. PW6 testified that the rest of the systems were essentially normal and that as a result of examination, the doctor established the cause of death to be massive hemorrhage secondary to penetrating chest injury. Dr. Ombok produced the Postmortem Report as P. Exhibit 1.
23. PW7 Nicholas Ochieng testified that on the 1st January 2019, he went to relax at Embassy Club. He testified that he sat down at 1am and three people who were known to him came and sat on his right but left at 2am saying they were to go charge their phones. He testified that when the 2 people who left reached the gate, he saw the bouncer, Mickey slapping them, holding them and walked out of the club holding them and leading them behind the club. He testified that he saw Mickey 'box' one of them badly.
24. PW7 testified that one person came and told PW7 to tell Mickey to release his relative and that when he told Mickey this, Mickey told him off. He testified that Mickey had pushed the 2 people he had arrested into the toilet. It was his testimony that he decided to go home at about 3am and left the two people still locked up in the toilet. He testified that he had known Mickey for a long time and related with him often. He identified Mickey as the accused in court. In cross-examination, PW7 testified that all he witnessed was 2 people being locked up in the toilet.
25. PW8 No. 110208 PC Michael Ochieng testified that in 2019, he was stationed at Ahero Police Station. He testified that on 1st January 2019, he was on day shift and at 11pm, he went to the club and that at around 3am, while still at the Embassy Lodge Club, while he was seated at the lounge, he moved into a compartment at the counter. It was his testimony that he met a bouncer holding a male in his 20's taking him to the washrooms area.
26. PW8 testified that he saw a commotion so he asked the bouncer what the problem was but the bouncer did not answer so PW8 continued taking his drinks. It was his testimony that after about 30 minutes, his boss IP Kwando called him telling him that he had received information that there was a commotion in the Embassy club but that PW8 responded telling his boss that there was none because he thought the bouncer was doing his work.
27. PW8 testified that after 30 minutes, Inspector Kwendo and Sergeant Kyuma came to the club, proceeded to the toilets and came back carrying what looked like a person in a blanket, bleeding profusely. He testified that the person was placed in the G.K Vehicle and they took him to Ahero Sub-County Hospital where on arrival, he was pronounced dead. PW8 testified that he knew the bouncer as Mickey because he, PW8 frequented the club where Mickey worked.
28. In cross-examination, PW8 testified that there was a commotion involving several people and that he did not inquire as to why there was a commotion. He testified that he did not witness anything outside the club.
29. PW9 No. 236621 Chief Inspector Kwendo Amatsivi Wyclife testified that in 2019, he was Deputy OCS of Ahero Police Station. It was his testimony that on the 2nd January 2019, he was on patrol in Ahero Township when he got information that there was a problem at Mexico Bar in Ahero market. He testified that they rushed there and found nothing significant but while there, Mickey came and told him that he had locked up some 2 people in two toilets at Embassy Bar because they were causing disturbance.
30. PW9 testified that PC Ochieng had also called and informed him of some commotion so he went to the club straight to the toilets area and found one Julius Okuta whom he rescued from the toilet. It was his testimony that Mickey informed him that the other person was in another toilet so he told Mickey to open the door which he did and on peeping inside, PW9 saw a person sitting with spots of blood.



He testified that he felt his chest on the left side and realized there was a wound inches from the nipple so he asked people around to help put the injured person in the vehicle and they took him to Ahero Sub-County Hospital.

31. It was his testimony that the person was not dead so he took him for medical attention and left the person in hospital with his father and returned to the police station. He testified that at 8am, the medical officer called him saying the person he had taken to hospital at Ahero had died. It was his testimony that he went to the morgue with Inspector Kirenya and saw the body of Brian Odhiambo Oiro, the person he had taken to hospital. PW8 testified that he spoke to Julius who told him that there was a fight between Mickey and the deceased and the deceased overpowered Mickey and the deceased's friend intervened.
32. PW10 Dennis Kamau Okumu testified that in 2019, he was a resident of Kisumu and that on the 2nd day of January 2019 at around 3am, he was at Embassy Lodge, Ahero with Julius taking alcohol as they ushered in the new year. He testified that he saw Brian and that he saw Mickey assaulting Brian and that when Julius went to intervene, Mickey beat up Julius. He testified that he got out and sought help and found a man with whom they returned to the bar but could not see Mickey and Brian.
33. PW10 testified that he heard the sound of Julius asking for help, followed by the sound and voice which led PW10 to a toilet outside, locked, using a padlock but that Mickey refused to open stating that there were breakages which the 2 people must pay for.
34. PW10 testified that he then saw Kwendo, the Deputy OCS Ahero Police Station, whom they directed to the toilet from where they carried Brian who was bleeding from the chest area. It was his testimony that the police took Brian to hospital where Brian was admitted for treatment so PW10 returned home but the following morning when he returned to hospital at 8am, the doctor told him that Brian was in the mortuary. PW10 identified Mickey as the accused in court and stated that he had known him for long as 'Bouncer' of the Embassy club. In cross-examination PW10 reiterated that he saw Mickey assaulting Brian and that when Julius tried to intervene, Mickey started beating Julius.
35. PW11 No. 237005 CIP David Kirinya Mugambi testified that on the 2nd day of January 2019, he was stationed at Nyando DCIO's office when at around 9am, while he was in office, he received some information from IP Wycliffe Kwendo of Ahero Police Station that one, Brian Odhiambo Oiro, the deceased had been collected from a toilet in Embassy lodge within Ahero with a deep wound on the left side of the chest and that IP Kwendo had taken the said Brian to Ahero Sub-County Hospital but that he had succumbed to the injuries.
36. It was his testimony that he went with IP Kwendo and OCS Ahero to Ahero Mortuary where the body of the deceased was. He further testified that he received the information that the accused locked up the deceased and his friend Akede in the toilet on allegations that he was creating disturbance at the club. PW11 testified that they went to the Embassy club and saw a CCTV footage in which the accused was struggling with the deceased and another at the club. PW11 testified that on the 3rd January 2019, the accused was arrested and taken to Ahero Police station and charged after investigations were completed. In cross-examination, PW11 testified that he could not recall how many security personnel were on duty at the club, but the accused was one of them.

The Defence Case

37. Placed on his defence, the accused person gave a sworn testimony in which he denied stabbing the deceased. He testified that on the material date, while at work at the Embassy club, the deceased and Julius were fighting so he separated them. He testified that he had not known them before and that



when he separated them, he did not notice any injury on any one of them but that they were drunk and had broken bottles so he had to detain them in the two rooms near the washrooms.

38. He testified that he later called IP Kwendo with whom he went to retrieve the two customers whom he had detained and found one of them injured but on inquiry, the customer said that he was drunk and not injured. He testified that the following day, he received information that the customer had died and that he was subsequently arrested.
39. In cross-examination, the accused testified that he had worked at the lounge for 2 years and had never experienced such an incident. He testified that during the fight, bottles had broken on the floor and that the bills were around Kshs. 4,500.

Analysis and Determination

40. I have carefully considered the evidence adduced in this case for the prosecution and the defence case. The issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt to warrant a conviction. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

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

41. To sustain a charge of murder, the prosecution has to adduce evidence to establish that there was death, the cause of that death, that the death was caused by an unlawful act or omission, that the unlawful killing of the deceased was by the accused person and finally, that the accused had malice aforethought when he unlawfully killed the deceased.
42. As to whether there was proof of death, PW5 the deceased’s father testified that he identified the deceased’s body to the doctor who carried out the autopsy who told him that the deceased died due to a stab on the chest. PW8 also testified that the deceased died upon arrival at the hospital where they had taken him to receive treatment following his injuries. The fact of the deceased’s death and its cause was proved beyond doubt by the production of the post-mortem by PW6, Dr. Ombok Lucy wherein the doctor who performed an autopsy on the body of the deceased found that the cause of death was massive hemorrhage secondary to penetrating chest injury.
43. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of *the Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as au or other written law. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the Court stated:

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

44. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained on the chest as was detailed in the post mortem report produced as PEX 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or were accidental or that they were justified in any way under the law. Further evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.



As to whether it was the accused person herein who unlawfully caused the deceased person's death, PW4, Julius, the deceased's friend testified that he saw the accused attack the deceased and when he tried to intervene, the accused turned and attacked him too. PW4 testified that he saw the accused stab the deceased on the chest and when he sought help from the accused to take the deceased to hospital, the accused instead locked PW4 up in a toilet. PW4 was very thorough in his description of the accused and how he was dressed when he stabbed the deceased. He also stated that there was electricity at the place where Brian was stabbed by Mickey. That the lighting was very bright so that everything could be seen clearly and that he had known Mickey for about one year prior to the incident.

45. The nature of injuries described by PW4 was corroborated by the post-mortem report produced by Dr. Ombok as P Exhibit 1. PW7 further testified that he saw the accused slap the deceased and PW4 and pushing them towards the back of the club.
46. The accused person's colleagues PW1, PW2 and PW3 testified that they were present at the Club where the accused worked that night and on the part of PW1 the club manager of the said club, he testified that he found the accused quarrelling and fighting with a customer who was locked up in a washroom. PW2 testified that she saw the accused looking for a padlock though she did not know what he wanted to do with it but that the accused headed towards the toilet with it. PW3 a waiter from the club testified that she saw the accused assaulting a customer named Julius and pushing him to the toilet and further that she had heard other customers say that a customer had been stabbed but on inquiring the same from the accused, the accused scolded her telling her that she was not the security.
47. Juxtaposed against this was the testimony of the accused who denied committing the offence and instead testified that the deceased and PW4 were fighting when he separated them and proceeded to lock them up in rooms next to the washroom.
48. The accused further denied that the deceased and Julius were not locked up in toilets but rooms next to it. The accused person was under no duty to give evidence to exonerate or incriminate himself. However, his testimony of denial in the involvement of the offence with which he is charged, as against the evidence adduced by all the prosecution witnesses who testified that the deceased and Julius were found in the toilets, I find that the prosecution witnesses were credible and firm in their testimonies and that there was absolutely no reason for their giving false testimony against the accused person. I find that the defence proffered by the accused person was not believable and it amounted to a mere denial.
49. In the circumstances, I am satisfied that the prosecution has proved that it was the accused person herein who committed the unlawful act which caused the deceased's death and that there was no mistaken identity as the incident took place in a well illuminated place as described by PW4 and that the witnesses who saw the accused assault the deceased all knew him as the club's bouncer.
50. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, from the provisions of section 206 (a-e) of the Penal Code, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the locus classicus case of Republic v Tubere S/O Ochen [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
51. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly, not only to cause grievous harm, but to eliminate him. The post-mortem report presented by Dr. Ombok showed that the deceased had sustained a stab wound to the left side of the chest with



penetrating wound on the left side of the chest, piercing the 4th rib with massive bleeding in the left lung. Further, that that on the heart, there was a penetrating wound cutting the vessels of the heart and forming blood clot. Any attack on the heart and chest or head of another human being using such a lethal weapon as a knife can only have one purpose, to kill. The weapon use din the brutal murder of the deceased person in this case was not recovered but non recovery or non-production of a murder weapon is not fatal to the prosecution's case. Furthermore, the accused person in this case had ample opportunity to dispose of the said weapon.

52. I thus find that the prosecution proved malice aforethought against the accused person beyond reasonable doubt
53. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
54. Accordingly, I find the accused person Mickey Ochieng Ambet guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.
55. Sentence shall be pronounced after records and mitigation.
56. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

