



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 8 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

JARED SOMONI OMBONGI.....ACCUSED

JUDGEMENT

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on 2nd December 2017 at Itena village, Kiangoso Location, Manga Sub-county within Nyamira County he murdered Amos Nyamwenya Moruri.

The accused pleaded not guilty to the charge and the prosecution proceeded to call five witnesses to prove its case. After the close of the prosecution case and upon considering the evidence adduced this court found that the prosecution had established a prima facie case against the accused and put him on his defence whereupon he testified on oath and maintained his innocence. He was the only witness for the defence.

Of the four witnesses called by the prosecution the key witness was Jane Moraa Seko (Pw5) who testified that on 28th November 2017 while on her way home from the shamba she met Somoni (the accused in this case) with two donkeys. She stated that he was holding a stick and that after exchanging greetings she passed him and continued walking. After a distance of about ten metres she heard a thud behind her and when she turned she saw the accused hit a man who was walking behind her with a stick. She stated that the man used to work in the accused's home. She also testified that she saw the accused strike the man on his back and on the back of the head and then walk away. She stated that although she tried to scream for help she could not do so because she had a cold. She nevertheless went to the place the man had fallen and carried him and put him on her laps. She stated that an aunt of the accused went to the scene and called the man by his name but he did not respond. After a while the man got up and went away to his home. She stated that she collected a phone, shoes and twenty shillings the man had dropped at the scene and took them to one Josephine, the accused's niece to take them to him. After that she went to her house. She stated that the wounded man was called Amos and that she learnt of his death on 2nd December 2017. The witness testified that she knew the accused and the deceased because they hailed from the same village. She was categorical that she saw the accused hit the deceased on the back and on the back of the head with a stick.

Idd Salim (Pw3), a police constable then attached to Manga DCI, told the court that the deceased died on 2nd December 2017 at the Jaramogi Oginga Odinga Hospital in Kisumu where he was undergoing treatment. He stated that when the matter was reported to Manga Police Station by the Assistant Chief (Pw1), of the area from which the deceased hailed, he was tasked with the investigations. He stated that it was in the course of the investigation that he learnt of the assault on the deceased along Itena Road on 28th November 2017. He stated that he then made arrangements for a post mortem so as to ascertain the cause of death. The court heard that on 14th December 2017 the body of the deceased was identified by two relatives, one of them who testified as Pw2. Dr. Timothy Mokuia (Pw4) who carried out the post mortem at Gucha Nursing Home where the body was being preserved told this court that upon carrying out the autopsy he came to the conclusion that the cause of death was subdural haemorrhage as a result of a head injury caused by a sharp object. Dr. Timothy Mokuia (Pw5) produced a post mortem report detailing his findings. Assistant Chief Erick Kambala Ombui (Pw1) testified that the accused went into hiding soon after assaulting the deceased and it was not until 16th June 2019 the accused's mother alerted him (Pw1) that he had returned and he went and apprehended him. The Assistant Chief (Pw1) testified that he took the accused to Sengera Police Station where he was charged with this offence. Pw1 also testified that he knew the accused and the deceased well as they were from his locality. He stated that the two were not related but that they used to dispute a lot and reports of those disputes would sometimes reach him.

In his defence, the accused stated that he left his home in the year 2016 and went to Nairobi where he was working as a mason. He stated that on 2nd December he was in Nairobi and that it was not true that he killed the deceased. He also stated that he did not know Jane Moraa Seko, the prosecution's key witness.

In summing up Mr. Bwonwong's Learned Counsel for the accused, submitted that the statements of the prosecution witnesses were recorded two years after the event. He contended that whereas Jane Moraa testified that the deceased was hit with a stick the doctor's evidence was that what was used was a sharp object. Mr. Bwonwong's also contended that some of the witness statements were undated and that some of those witnesses gave hearsay evidence. He took issue with the prosecution's failure to produce the alleged murder weapon and urged this court to find that the charge against the accused was not proved beyond reasonable doubt and hence there is no evidence to convict the accused person.

On his part, Mr. Majale asserted that he wished to rely on the evidence adduced.

The points for determination in this case are: -

- (a) The death of the deceased and the cause of that death.**
- (b) Whether the death was by an unlawful act of the accused person and**
- (c) Whether it was of malice aforethought.**

The death of the deceased is not disputed and neither is it in doubt. The prosecution called Abraham Mandela (Pw2) an uncle of the deceased who confirmed his death by stating that it was he together with the deceased's father that identified the body of the deceased to the doctor who performed the post mortem. Their area Assistant Chief who testified as Pw1 also confirmed the fact of death.

On the cause of death this court heard that the deceased died at the Jaramogi Oginga Odinga Teaching & Referral Hospital in Kisumu where he was undergoing treatment following an assault on 28th November 2017. Although no medical report or treatment notes were produced this court heard testimony from a direct eye witness to the assault (Pw5). The witness narrated to this court how she saw the deceased being hit on the back and on the back of the head and how when he fell she rushed to the scene and picked him and held him on her laps. She stated that after a while he got up and left. This court believed this witness. She struck me as a very honest and objective witness who had no reason to lie. The court also heard evidence that the Assistant Chief (Pw1) upon learning that the deceased had died at the said hospital reported the matter to the police who requested that a post mortem be undertaken. That post mortem revealed that death was as a result of an injury on the back of the head. This expert opinion which I find no reason to disbelieve corroborates the eye witness account by Jane Moraa (Pw5) that the deceased was hit on the back of the head. I am therefore satisfied beyond reasonable doubt that the death was by a human hand.

I do also find it a fact from the evidence that the death was as a result of an unlawful act the reason being that it was unprovoked. Jane Moraa (Pw5) testified that the deceased was walking behind her while the accused was walking from the opposite direction; that as they passed each other they exchanged pleasantries only for her to hear a thud behind. She stated that she had barely walked a distance of ten metres when she heard the thud and that she immediately looked behind and saw the deceased being assaulted by the accused. It is my finding that had the attack been provoked she would have heard a commotion or scuffle between the two men. From her testimony the attack was as sudden as it was unexpected – leading me to the conclusion that it was unprovoked and hence unlawful.

I am further satisfied that the unlawful act was perpetrated by the accused person. Jane Moraa (Pw5) did not inform this court what time of the day it was reason being she was not asked. Be that as it may I am satisfied that she positively identified the accused person because firstly, she knew him well, even though he denied knowing her, as they were village mates. Secondly they had just passed each other and exchanged greetings before she heard the thud behind her only to turn and see him hitting the deceased. Thirdly, the incident happened barely ten metres from where she was which was within a reasonable distance for her to see what was happening clearly.

Whereas the case against the accused person revolves around the evidence of Jane Moraa (Pw5), a single identifying witness, I have as I should, tested that evidence with the greatest care and I have no doubt in my mind that she positively identified/recognized the accused as the person who assaulted the deceased. I am convinced that given the circumstances of this case there was no possibility of a mistaken identity. The evidence of Jane Moraa (Pw5) that she saw the accused hit the deceased on the back of the head, was as I have stated elsewhere, corroborated by the post mortem finding that what killed the deceased was an injury to the back of the head. It is immaterial that the injury seemed to the doctor to have been caused by a sharp object as opposed to the blunt instrument that the identifying witness saw. I also do not consider it fatal that the murder weapon was not recovered and produced as an exhibit. The evidence of Jane Moraa (Pw5) coupled with the accused's conduct of fleeing the area for close to two years and the findings of the doctor who conducted the post mortem leaves no doubt in my mind that the accused killed the deceased. He inflicted a deep cut wound on the deceased's head and he must have intended or must have known that hitting him on the head could either kill or cause him grievous harm, both of which are circumstances that establish malice aforethought.

In the premises I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered electronically at Nyamira this 28th day of January 2021.

E. N. MAINA

JUDGE