



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CRIMINAL CASE NO. 42 OF 2018.

REPUBLIC.....PROSECUTOR

VERSUS

OLIVER NYONGESA WANJALA.....ACCUSED

JUDGMENT

The accused OLIVER NYONGESA WANJALA is charged with the offence of Murder contrary to Section 203 of the Penal Code. The particulars of the offence are that; On the 8th day of December, 2018 at Ndengelwa village within Bungoma County jointly with others not before Court murdered MOSES LUBANO MUSABASI.

The case for the Prosecution is that on 8.12.2018 Pw3 Robert Musabasi and the deceased Moses Lubano Musabasi at a funeral when he left with the deceased and went to a home where busaa was being sold. On arrival they ordered for busaa. While waiting to be served, the accused Oliver Nyongesa Wanjala came in company of 3 other people; Ronald, Emmanuel and Robert. The 4 people were armed with pangas and pieces of wood. They started assaulting the deceased. This witness Robert ran to the Police Post and informed Police and his father.

Pw4 No. 54560 P.C. PIUS KORIR attached to Ndengelwa police post was at the Post at 12p.m. when he received information that there were people assaulting another using pangas. He and P.C. Ibrahim rushed to the scene. On arrival at the scene he saw a crowd of people and found the victim with multiple cut wounds. The father of the victim came with a motor vehicle and the victim was taken to Hospital in Bungoma. He arrested the lady who was selling the illicit liquor and took her to the police station. He received information that the victim died. Later accused came to station and made a report of assault. He saw he had injuries on the Right palm.

Pw5 Mercy Nanjala Wanyonyi was at her home selling busaa to Moses the deceased and other customers. She then saw 3 people come to the home, Oliver (accused) Ronald and Emmanuel. Accused was armed with a panga. She then saw them start attacking the deceased by cutting him with panga. She escaped from the scene and returned about 15 minutes later to find the deceased was being taken to hospital. On being cross-examined by Were for the Accused, she confirmed the deceased was attacked while he was in the house.

The accused upon being placed on his defence I gave sworn evidence and did not call any witness. He testified that he knew the deceased as he was his neighbour. On 18.12.2018 he was at a Busaa den drinking busaa where many people were present. The deceased approached accused and asked accused to buy him busaa. Accused told him he had no money to buy him busaa. The deceased went into the house and came back and asked again accused to buy him busaa. He then saw deceased remove a panga he had hid in his trouser. Deceased aimed to cut accused who blocked it with his left hand. He then held the panga and fell down. The deceased then stepped on him. People came and separated them. He was taken to Hospital where he was given first aid. He went to report the incident to Ndegelwa police station where he was arrested and later charged with the present offence.

The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The ingredients of the offence of Murder which the prosecution must establish are;

In **Republic Vs. Joseph Ekai Lomongin [2018] eKLR** this court stated that in an offence of murder the prosecution must establish the three ingredients of the offence;

- 1) The killing or fact of death of the deceased;**
- 2) existence of malice aforethought or mens rea and**
- 3) the unlawful act or omission on the part of the accused the actus reus.**

4) That it is the accused who inflicted the injury.

Pw1 Dr. Harun Ombagi who performed the Post Mortem on body of the deceased testified that on external examination the body had 8 deep cut wounds on the head; deep cut wound on the back, left ear and nose. Upon opening the body he found that the spleen was ruptured, fracture of the lumbar spine and multiple fractures on the head. He formed opinion that the cause of death was shock due to severe head injury. He signed the Post Mortem form which he produced as Exhibit 1. From the evidence of this witness, the prosecution established both the fact of death and also the cause of death.

Did the accused inflict the injuries on the deceased from which the deceased died? This relates to the issue of identification of the accused as the perpetrator of the offence, a crucial ingredients in a charge of Murder, which the prosecution must prove.

Pw2 Robert Musabasi who was with the deceased testified that he together with the deceased went to the home where busaa was being sold. While there the accused and 3 others namely Ronald, Emmanuel and Robert came, while armed with assorted weapons. Accused, and Ronald were each armed with a panga. The accused and his party started assaulting the deceased. The witness ran away and reported to the police station and father of deceased. He testified that he knew the assailants from childhood and offence occurred during daytime.

Pw2 Mercy Nanjala Wanyonyi who was selling the busaa in her home testified that on 8.12.2018 she was selling busaa when accused together with Ronald and Emmanuel came. The accused was armed with a panga. They started assaulting Moses the deceased. She escaped from the scene and came back 15 minutes later to find accused and the others had escaped. She found the deceased was being carried to a vehicle to be taken to Hospital. She testified that incident took place in the house and she was able to see the accused and party assaulting deceased.

The accused in his defence testified that indeed on the material day he was at home of Mercy the busaa seller. He testified that while there, deceased came and demanded accused to buy him busaa. The accused told him he did not have money but deceased insisted. When accused further refused to buy him busaa the deceased removed a panga and aimed to but him. He blocked it with his hand and was cut on the left hand. Accused then held the panga and fell down. Deceased held him and stepped on him but people separated them. He was taken to hospital and later went to report the incident to the police station where he was arrested.

Mr. Were for the accused submitted that the Prosecution witness evidence on whether it is accused who inflicted the injuries was contradictory. He further submitted that from the evidence, the deceased was killed by more than one person and it is not possible to pin point who did what as the prosecution witnesses contradicted themselves as to how the incident occurred and the role played by each of the assailants.

The prosecution established from the evidence, that the accused was at the scene. Indeed even the accused in his evidence admits that he was at the scene with the deceased. Indeed he stated that it is deceased who started to assault him with a panga and accused sustained injuries on the arm. He concurs with the evidence of Pw2 and Pw5 that indeed there was a confrontation between accused and the deceased and a panga was involved. This is the weapon that occasioned the 8 cut wounds on the head, deep cut wounds on back, left ear and nose. From the evidence of the prosecution witnesses and the accused's own defence, I am satisfied that it is the accused who inflicted the injuries on the deceased.

The third ingredient of the offence which the prosecution must prove is the existence of Malice aforethought. Section 206 of the Penal Code provides that Malice aforethought is deemed to be established by evidence proving;

- 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 death or grievous harm to some person whether their person is the person killed or not accompanied by indifference whether death or grievous injury occurs or not by a wish that it may not be caused.*
- c) *An intention 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 felony.*

Where the prosecution has established any or all of the circumstances provided in Section 206, then they have discharged their burden of establishing malice aforethought. The court of Appeal for Eastern Africa In **Republic -Vs- Tebere s/o Ocha** [1945] 12.EA 63. In giving flesh to Section 206 stated that the court can also infer malice aforethought from circumstances of the offence. The court stated that malice aforethought can be inferred from;

- a) ***The nature of the weapon used.***
- b) ***The part of the body targeted whether vulnerable or not.***
- c) ***The manner in which the weapon is used (whether repeatedly or not)***
- d) ***The conduct of the accused before, during and after the attack.***

The evidence from both the Pw2 and Pw5 and the defence of the accused, the weapon used to inflict the injury was a panga; a lethal weapon. The deceased sustained 8 deep cut wounds on the head, and cut wounds on back, ear and nose. In total there were more than 10 cut wounds

observed by the doctor. This goes to show the viciousness of the attack, and that the injuries were concentrated on the head which is a vulnerable part of the body. From observation of the injuries inflicted, they were not aimed at enabling the accused to escape but to cause grievous harm or death of deceased. From the circumstances, I am satisfied that the accused did intend to cause grievous harm or death by the injuries inflicted on the deceased. I am satisfied that malice aforethought an ingredient of the offence of murder has been established by the Prosecution.

The accused's defence is that though he had a confrontation with the deceased, over his persistent asking to be bought busaa by accused, and the deceased attacked him, the accused did not attack the deceased. He contends in his evidence that he does not know who inflicted injuries on deceased. This is not true. Indeed he knew what he had done and that prompted him to make a report to the police station that he had been assaulted as a coverup.

Considering all the evidence I am satisfied that prosecution has established that accused Oliver Nyongesa Wanjala, murdered the deceased Moses Lubano Musabasi. I find accused guilty of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code and Convict him accordingly.

Dated at Bungoma this 20th day of January 2021

S.N. RIECHI

JUDGE