



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 5 OF 2020

THE REPUBLIC.....PROSECUTOR

VERSUS

EVANS NICHOLAS MOINDI.....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 April 2020 at Gesore village, Nyamira South Sub-county within Nyamira County the accused murdered Geoffrey Nyambane Moindi.

The accused pleaded not guilty to the charge. In the ensuing trial he was represented by Mr. Kaba Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

As submitted by Mr. Majale in the opening statement the background of this case is that on 2nd April 2020 the deceased who is a son of the accused went to the accused's house seeking to resolve a land issue. He was carrying a panga which he intended to cut down trees the subject of the issue he wished to raise with the accused. However, an altercation which soon degenerated into a fight arose between them. When neighbours and kin went to the homestead to find out what the noise they had heard was about the deceased is said to have broken the security light bulbs with the panga before fleeing into the nearby tea farm only to be subsequently found dead with injuries on his neck.

Peterson Nyaberi (Pw1) testified that on the fateful night he was at home when his wife told him of a call that the accused's wife had made to her informing her that the deceased was at their house and he wanted to beat them. Pw1 immediately went to the accused's house to resolve the dispute. Pw1 told this court that it took him ten minutes to get there and that upon arrival he found the accused and his family outside. When the deceased saw him he ran away and disappeared into the darkness. At this juncture the accused and the members of his family entered the house and he (Pw1) left for his house but immediately he arrived he heard shouts at the accused's house and turned back and returned to the accused's home this time with his son Andrew Nyaberi (Pw3). Pw1 stated that on arrival they found villagers running towards the tea farm in search of the deceased. Pw1 testified that at that juncture he started feeling unwell and so he left for his house.

Samuel Omenta (Pw2), a retired police officer who is closely related to the accused, testified that on that day he too was in his house taking dinner when he heard noise at the home of the accused and went there to find out what was happening. He stated that he was accompanied there by his nephew, one Tom, and that upon arrival they found the deceased standing outside the house. The accused, his wife and daughter-in-law were also present. They were in the dark because the deceased had allegedly damaged the security lights. He stated that he urged the deceased to put on the lights but his response was that he did not know how to. He stated that he then noticed that the deceased was armed with a panga and he told him to go and keep it and he complied and when he returned he (the deceased) told him that he was unhappy that his father (the accused) had said he could not cut down the trees which he himself had planted. Since the accused was talking in a raised voice Pw2 told him to calm down and to lower his voice. Pw2 then inquired from the accused why he was not allowing the deceased to cut down the trees and the accused's response was that he had allowed him to cut two trees. The deceased started raising other issues but when one Thomas Otinga, the Nyumba Kumi chairman, arrived and remarked "***bado hujawacha kelele***" meaning "***you have not stopped making noise***" the deceased ran into his house and came out with the panga. Pw2 stated that he reminded the deceased what he had told him about the panga and the deceased took it back then stood at his door and accused the said Thomas of bringing problems there yet there was peace at his own home. Then the deceased disappeared. Pw2 testified that it was at that juncture that Pw1, his son Andrew (Pw3) and other members of Nyumba Kumi arrived. They stood together and agreed to discuss the issue the next day since the deceased had disappeared and he was drunk. After that they left for their respective homes. Pw2 stated that it did not take long before his (Pw2's) brother called him and requested him to go back to the accused's home. He stated that he decided to look for a "Nyumba Kumi" elder he had been with at the accused's home but that elder told him he had already reached his home. Then at about 4am he heard shouts at the home of the accused and soon learnt that the deceased had been killed. He did not however go to the scene.

Andrew Nyaberi (Pw3) confirmed that he went to the accused's house at the behest of his father (Pw1) and that upon arrival he found his father, Samuel Omenta (Pw2) and other villagers already there questioning the accused. He stated that he heard the accused say that his son (the deceased) had broken the security lights and was chasing his sister-in-law away on the allegation she had brought corona. Andrew (Pw3) added that the accused said there was also an issue of trees and a demand by the deceased that his parents move to the permanent house and leave the one they were occupying to him. Pw3 testified that they dispersed after the deceased disappeared into the night and that they were almost getting to their home when they were notified that the deceased had returned to the accused's homestead and there was a fracas. Pw3 stated that they returned to the accused's home where about ten other people had already gathered but the deceased was said to have run away. He (Pw3) stated that he joined people in the tea farm when he heard them saying that the deceased was there. Some people had flash lights and Pw3 saw the deceased on the ground. Pw3 testified that the deceased seemed to have been severely injured; that he had an injury on the head which was bleeding and he was unconscious. Pw3 told this court that the sight of the deceased's condition terrified him and so he left to go and cry elsewhere. He only returned when Robert Apiemi Ogwano (Pw4), a former MCA (Member of County Assembly) arrived at the scene. Pw3 testified that he did not know how the deceased sustained the injuries. He however stated that he heard the accused remarking "go and see how the young man is."

Robert Apiemi Ogwano (Pw4), the former MCA (Member of County Assembly), testified that on the material night at about 8pm he received a call from the deceased that the accused was beating him. Pw4 stated that he ignored the call because according to him, the deceased was just a trouble maker. He nevertheless left his house and went to the accused's tea farm when screams became incessant. He stated that he found the accused and other members of his family standing about ten metres from the scene which was about 200 metres from the accused's homestead. He stated that the deceased was lying there with one leg hanging on the tea bushes and his head pointing downwards; that the deceased had injuries on one ear and on the head as if it had been hit with a "fimbo" (club). Pw4 testified that he moved the deceased and made him lie on the ground properly and that he asked the accused's wife what had happened and she narrated to him how the deceased had gone home and started damaging the electricity cables. He stated that he did not get more information because at that point the accused chased the children from the scene and also told Andrew (Pw3) to go and see how the deceased was doing and he left with Andrew. Pw4 further testified that on seeing the deceased's eyes were dilated and there were ants licking his blood he went home. At about 4am he heard people wailing and saying the deceased had succumbed. The court heard that when the matter was reported to Ekerenyo Police Station a team of officers was dispatched to the scene among them IP Daniel Marucha (Pw6) who is in-charge of Scenes of Crime in Nyamira County. He went and took several photographs (Exhibit 2 (a) (b) (c) and (d)). The body was then removed to Nyamira County Hospital Mortuary. A post mortem was subsequently conducted by Dr. Goga (Pw5) and it determined that the cause of death was haemorrhagic shock following a deep cut wound in the left lateral aspect of the neck leading to a disruption of the left carotid vein. The accused had already been taken in as a suspect. PC Justice Lusiano Okuku (Pw7) testified that this was after he saw that the accused had blood on his trousers. The pair of trousers was subsequently sent to the Government Chemist together with a sample of the deceased's blood drawn during the post mortem. When an analysis was done it turned out that the blood on the accused's trouser belonged to the deceased. The accused was then charged with this offence. Pw7 gave evidence that the accused was among the people who helped them to carry the body of the deceased to the police vehicle and stated that it was possible that that is how the accused's trousers came into contact with the deceased's blood. He however speculated that the accused must have killed the deceased because the deceased had gone home drunk and started disturbing him. This witness also alleged that the deceased admitted to beating the deceased with a stick but denied he cut his (deceased's) neck. He also stated that they found the body of the deceased about 100 metres from the accused's homestead. A witness who according to Pw7 saw the accused beating the deceased was not brought to testify despite the prosecution's spirited efforts to procure his attendance.

When the accused was put on his defence he elected to give evidence on oath and to call one witness. He testified that on the material day at about 9pm he was resting in bed waiting for dinner when he heard his son (the deceased) asking where he was and saying that he wanted to cut some trees near the river to get timber. He stated that he went outside and told the deceased they would discuss the issue in the morning. The deceased however insisted on discussing it there and then and since he was holding a panga the accused went back to the house. The accused stated that this angered the deceased and he started breaking the security lights. This prompted him to call his cousin Samuel Omenta (Pw2), now a retired police officer, who was home for the weekend. His wife also called his cousin Peterson Omenta (Pw1) who was the first to arrive with his son. The accused stated that Peterson (Pw1) persuaded the deceased to keep the panga away and he complied. Then the deceased saw "Nyumba Kumi" members streaming into the homestead and ran away and when people pursued him he jumped over the fence into the neighbours compound and fled. The accused stated that he was advised to stay inside when people went to look for the deceased but after everyone had left the deceased returned and cut the cable that connected the homestead to the electricity grid. His mother started screaming and the people came back and chased him (the deceased) through the tea bushes. He stated that a "Nyumba Kumi" official asked him to accompany him to the tea bushes and he went there with his brother and that is when they found the deceased lying on the ground. He stated that he came to Nyamira Police Station and made a report and police officers accompanied him back to the scene. He also stated that they found insects crawling all over the body. He stated that the officers asked for paraffin and poured it on the body and then used a blanket to carry the body to the vehicle and took the body to the mortuary. The accused testified that he was about to leave the station when he was called back and detained. He stated that the police alleged that he was told he was the cause of his son's death because it was him who called the people that killed him; that if he had not called those people then the deceased would not have died. The accused vehemently denied he killed his son and stated that he loved him dearly as demonstrated by the fact that he had educated him and bought land for him. He contended that by the time he went to the tea farm the deceased was already dead.

Samson Omenta Gekonge (Dw1) testified that on the material night he went to the accused's homestead after hearing noise. He stated that he was with his nephew and that they found the homestead in darkness and when he inquired what had happened the accused told him that his son (the deceased) had disconnected the electricity cable. Dw2 stated that his son reconnected the electricity and it was then that he (Dw2) went to look for the other people. He stated that it was then that he met the accused who told him "**wamemumaliza**" meaning "**they have finished him.**" Dw2 stated that he understood this to mean that the vigilantes had killed the deceased. He also stated that vigilantes had killed several people in that area and that he was not aware if they had come on their own motion or if they had been invited by the accused.

In his submissions after the close of the prosecution case and in closing, Mr. Kaba, Learned Advocate for the accused submitted that the prosecution failed to link the accused to the death of the deceased and urged this court to find that the charge had not been proved beyond reasonable doubt and acquit him.

The offence of murder is proved by evidence that the accused person of malice aforethought caused the death of the deceased by an unlawful act or omission (**Section 203 of the Penal Code**). The standard of proof as in all criminal cases is beyond reasonable doubt.

From the totality of the evidence adduced in this case the fact of death of the deceased is not disputed as the accused himself attested to that death. There is also no doubt that the death arose from an unlawful act and that whoever perpetrated that death acted of malice aforethought. My finding that the death of the deceased was by an unlawful act stems from evidence by both sides that the deceased was killed in a tea plantation where he had escaped to when their neighbours came to his father's home after hearing noise. This court heard that the deceased had gone to his father's (accused's) house and raised a storm for what he alleged was the latter's refusal to permit him to cut down trees which he (the deceased) had planted. The court also heard that the deceased disappeared but after the people left he went back and started threatening his father again. When the villagers returned the deceased made his escape into the tea farm with the villagers in hot pursuit. It was on this second occasion that he was found lying in the tea farm with his throat slit. The cause of his death was determined to be haemorrhagic shock secondary to deep cut wound of the lateral aspect of the left side of the neck and disruption of the left carotid vein. The doctor (Pw5) who performed the post mortem confirmed that the deceased had a deep cut wound on the lateral aspect of the left side of the neck approximately 7cm in length. He also confirmed that there were multiple cut wounds on the left temporal, occipital and frontal regions of the head and that the left ear had been chopped off. All the above injuries point to a deliberate and calculated act intended at maiming or killing the deceased. Our law does not permit lynching or extrajudicial killing and where it happens it must be condemned for what it is "an unlawful act." There is no evidence that as at the moment the accused was killed he posed danger to anyone. Pw2 testified that he had exhorted the deceased to return a panga he had back to the house and he had complied. Indeed, the court heard that the deceased made good his escape when members of community policing returned to the accused's homestead upon learning that he had gone back to his father's homestead. He no longer posed any danger to anyone and the most that should have been done was to apprehend him and take him to the police for creating the disturbance at his father's home. Killing him was unlawful and all the evidence in this case therefore points to the killing of the deceased by an unlawful act. This court is also satisfied that malice aforethought was established by the very nature of the injuries afflicted.

The only issue for determination therefore is whether the accused was the perpetrator of this heinous crime.

It is trite that an offence can be proved either by direct evidence or by circumstantial evidence. This was so held in the case of **Mwangi v Republic [1983] KLR 523** where the court stated: -

"An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed."

In the present case no evidence directly pointing to the accused as the deceased's killer was adduced as none of the witnesses alleged to have witnessed him or indeed anyone else inflicting the injuries that culminated in the deceased's death. The only evidence against the accused was circumstantial. That evidence was firstly that the altercation between him and the deceased was the genesis of what befell the deceased; that he was among the people who pursued the deceased into the tea farm and was indeed among the people who were found at the scene; that the deceased made a dying declaration to Robert Apiemi (Pw4) to the effect that he was being beaten by the accused and lastly evidence that blood belonging to the deceased was found on the trousers that the accused was wearing on the material night.

In the case of **Mwangi v Republic (supra)** the Court of Appeal held: -

"1."

2. In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference....."

The mere fact that the accused had quarreled with the deceased shortly before he was killed is not in itself evidence that he was the killer. Neither does the fact that the altercation is what led to the events that culminated in the death of the deceased. As was held in the aforesaid case the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any other hypothesis than that of guilt. This court heard that the accused's intention by calling the elders was to settle the dispute with his son. Indeed, Pw1, Pw2 and Pw3 testified that when the deceased agreed to return the panga to his house and then left the scene they too left for their homes and that they only returned to that home when they heard noises again and heard the deceased had gone back to the accused's homestead and they were fighting. Pw1 and Pw2 testified that even then they did not find anybody at the home and that they learnt people including the accused had gone into the tea bushes to look for the deceased where he fled. On his part Andrew Nyaberi (Pw3) testified that he went into the tea farm. He stated that it was dark but that he found about ten people who he did not identify. It was his evidence that at that point he did not know the whereabouts of the accused person. Pw3 stated that thereafter he heard the accused saying **"go and see how the young man is."** This was confirmed by Pw4 who alleged to have heard the accused uttering the same words. Uttering those words perse does not prove the accused's participation in the killing. The accused stated that when he went into the tea farm and saw the state of his son he immediately went to the police station to make a report. The investigating officer (Pw7) confirmed that the matter was reported to the police by the accused person. It is my finding that this offers a plausible explanation for Pw3 not finding him at the scene. Moreover, even had he been at the scene when Pw3 arrived that would not be proof that he participated in killing the deceased as there is no evidence at all that he did. According to Pw3 there were ten other people when he got there and the injuries had been inflicted and the deceased was already dead. The evidence that the accused was among the people who were at the scene is not sufficient to prove the guilt of the accused.

The only evidence that tended to the accused's guilt was evidence by Robert Apiemi Ogwano (Pw4) that the deceased called him and told him he was being beaten by the accused and also evidence that the deceased's trousers were stained with blood belonging to the deceased. However, a closer scrutiny of that evidence taken together with the other evidence and the defence pokes holes in the prosecution's case. Evidence of the **"dying declaration"** tendered by Pw4 was discredited by his own testimony that he did not mention it to the police. According to the investigating officer what the witness told the police was that he saw five or ten people making motions as if they were striking something. He is alleged to have witnessed this from a fence as he made his way to the scene. It is my finding that the evidence of this witness that the deceased told him he was being beaten by the accused may therefore have been an afterthought because were it true then he should have disclosed that to the police in the first instance. Indeed, his claim to the police that he saw five or ten people beating

something gives credence to the evidence of Samson Omenta Gekong'a (Dw2) that the deceased was lynched by vigilantes and that the accused had no part in it. The offence was committed in the dark and this witness (Pw4) did not identify the people he claims to have observed making striking motions. It could very well have been people other than the accused person.

As for the deceased's blood being on the accused's trouser the investigating officer testified that the accused was among the people who helped to carry the deceased's body from the scene to the police van. The accused did not therefore require to give any other explanation as to how the deceased's blood stained his trousers. In the upshot I find that the circumstantial evidence adduced in this case does not sufficiently prove the guilt of the deceased. The deceased and his witness mounted a strong defence which rebutted the evidence adduced by the prosecution and my finding is that the charge against him was not proved beyond reasonable doubt. Accordingly, I find him not guilty of the offence of murder and acquit him. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered at Nyamira this 24th day of June 2021.

E. N. MAINA

JUDGE