



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 12 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

JUSTUS OMWENGA MAYAKA *alias* BABU.....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 the night of 1st and 2nd June 2020 at Nyamwanga sub-location in Manga sub-county within Nyamira county, murdered Vincent Nyakundi Mauya alias “Giteng’e”.

The accused pleaded not guilty to the charge and the prosecution called eight witnesses to prove its case. At the trial, the accused was represented by Mr. Bwonwong’a Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

Dominic Onyiego Okemwa (Pw1), a cousin to both the accused and the deceased, testified that at about 2am on the night of 1st and 2nd June 2020 he was asleep in his house when the accused knocked on his window and asked him for a torch. The accused was allegedly wearing a blue shirt with white stripes and he was drunk. Pw1 testified that he gave the accused a flashlight and he left only to return at 4am saying that Giteng’e, who was their cousin, had gone to his house with many people and that he had fled by jumping through the window. Pw1 stated that the accused told him that he had borrowed the torch so that he could go back and check on Giteng’e as he seemed to have been cut on the head and was bleeding. Pw1 testified that the accused beseeched him to accompany him back to the house and that they found Giteng’e lying on the floor dead. Pw1 testified that Giteng’e (the deceased) had several cuts on the head and there was blood everywhere including on the walls and that clothes were strewn all over the bedroom and they had blood. Pw1 stated that they used a torch to see. Pw1 stated that upon seeing the state of the accused’s house they left together to inform the accused’s father. Pw1 stated that as the accused was returning his torch he noticed some money was stashed in his hind trouser pocket. Pw1 stated that he also noticed that at some point the accused had changed into a long sleeved shirt and a clean pair of trousers and he no longer had the money. Pw1 testified that he did not see any object or weapon that may have been used to kill the deceased. He stated that earlier that evening he had heard both the deceased and the accused passing by his house on their way home and that they sounded drunk. He stated that he knew their voices as they are both his cousins. On cross-examination, Pw1 stated he did not see the money at close quarters so he did not know if it was soiled. Pw1 further stated that he did not witness the killing of the deceased. In re-examination Pw1 testified that when the accused went to his house the first time his clothes were muddy and were stained with blood.

Stanslas Mayaka (Pw2), the accused’s father, testified that on 2nd June 2020 at 4.30am he was in his

house when the accused called him from a distance. He stated that the accused lives about 800 meters away from his house and that he recognized him from his voice. Thinking that the accused was drunk as usual he refused to respond. According to Pw2, it was common for the accused to be quarrelsome and abusive when he was drunk. He stated that after some time the accused returned with Dominic Okemwa (Pw1) and they told him that people had attacked the deceased and wounded him. They allegedly told him that people had attacked them and injured the deceased. Pw2 stated that he told them to inform the village elder and they left. Pw2 stated that he did not take them seriously because he thought they were drunk. However, when he heard wailing at 6.30am he followed the wails that ended up at the accused's house only to find the deceased's body being removed from the house on a police stretcher. In court Pw2 identified the accused as Omwenga and stated that he is usually violent when drunk. In cross-examination Pw2 conceded that he did not know who killed the deceased.

Cosmas Onyiego Bosire (Pw3), the Assistant Chief for Nyamwanga sub-location, testified that on 2nd June 2020 at about 5.55am he received a call from a village elder called Felix Bosire informing him that the deceased had been murdered and when he went to the scene he found the body of the deceased on the floor of the veranda. He stated that the body had several injuries on the head and the clothes the deceased was wearing were muddy and full of blood. He stated that the deceased also had a cut on the mouth and that blood was splattered on the walls of the accused's house. He stated that the house was mud walled and one could see the walls had been hit with something. Clothes were strewn all over and the house was in disarray. Pw3 confirmed that the dead person was Giteng'e. He testified that there were many people at the scene including Felix, the accused and his father (Pw2) and Dominic Onyiego (Pw1) and that the accused appeared to be in shock as was everybody else. According to Pw3, the accused was wearing two pairs of trousers and two shirts and there was blood on his ears. He stated that the accused was not very forthcoming so they decided to apprehend him as they awaited the police. Pw3 told this court that the accused and the deceased were very close and were almost inseparable. It was his evidence that the accused's closest neighbour's house is about 50 metres away while Dominic's (Pw1) house is equidistance. Pw3 further testified that he did not know the motive behind the killing of the deceased but he knew both the deceased and the accused used to abuse bhang and alcohol and they may have been under the influence and could not resolve their differences. During cross-examination Pw3 testified that Dominic (Pw1) mentioned money which the accused denied. He could not say with certainty who killed the deceased.

Lazarus Menge Mosigisi (Pw4) testified that the deceased is his cousin and that he witnessed the post mortem of the deceased which was conducted at Christa Marianne Hospital in Kisii. He testified that he identified his body with Felix Bosire and that the body had a bruise near the left eye as if the deceased was hit with a blunt object. After the post mortem the doctor told them that the death was as a result of the injury to the head.

Dr. Benjamin Ndibile (Pw5) produced the post mortem report on behalf of Dr. Aoga Naomi. In the said report, the general observations noted were that the deceased's body was dressed in a black and maroon jacket and black trousers which were blood stained; that the deceased was a male African aged about 44 years with good nutritional status and rigour mortis (meaning the limbs were very stiff) had set in. Pw5 testified that there was also accumulation of blood on the deceased's back. He stated that externally there was an injury on the upper lip (a laceration) about 5 x 3cm, abrasions on the right eye about 3 x 5cm, laceration on the ulterior head and multiple abrasions on the ulterior head and temporal region. Internally, it was noted that there was bleeding in the brain, frontal region and parietal (middle) region but other systems were all normal. He stated that the opinion was that the cause of death was head injury due to blunt trauma. Upon cross-examination, Pw5 confirmed that only a blunt object could have caused the injuries and that the body had stayed in the morgue for 48 hours.

Thomas Ochengo Mayaka (Pw6), a brother of the accused, led evidence to the effect that on 2nd June 2020 he arrived home at Nyamwanga from Kisii Town at 11am. He had spent the night at his sister's home in Kisii having left home on 1st June 2020. He stated that when he went home to the house which he shared with the accused there was disarray and his clothes which were strewn everywhere had blood. He identified some of those clothes in court. He however stated that he did not know what transpired in that house on the material night.

IP Joseph Mugo (Pw7) testified that he was the arresting officer; that on 2nd June 2020 at 0630hrs he was called by the OCS Sengera Police Station who informed him that a man had been killed at Nyamwanga village in Manga Sub-county. Pw7 stated that he mobilized a team of officers and together with Samuel Mauya of DCI they proceeded to the scene where they found a crowd of people among them the accused who was identified to them by the Chief and Assistant Chief of the area. Pw7 testified that the deceased was lying in a corner of the first room of the accused's house; that the deceased had deep cuts on the head and blood stained clothes were strewn all over the room. Pw7 stated that close to the body of the deceased there was a panga which was suspected to have been used to kill the deceased. Pw7 further testified that they entered the second room where there were two beds and found that the beddings and clothes which were strewn everywhere were all soaked in blood. The scene was photographed and documented by the investigating officer. Pw7 stated that while at the scene they were informed that one Dominic (Pw1) who was the accused's cousin had contact with the accused so they arrested him. They also arrested the accused before taking the body of the deceased to Christa Marianne Hospital Mortuary. They thereafter charged the accused with this offence. Pw7 conceded that he was not the investigating officer in this case but stated that he was one of the first officers to have arrived at the scene. In cross-examination Pw7 stated that he was not told about a bundle of money or informed about a robbery in that house. In re-examination, Pw7 testified that when they went to the scene Dominic's (Pw1) house was pointed out to them by the Assistant Chief and that the information they got was that the accused lived alone.

PC Chanton Onyango (Pw8) of Sengera Police Station – Crime Branch, testified that on 2nd June 2020 at 6am in the morning he received a phone call informing him that someone had been murdered. He proceeded to the scene in the compound of Justus Omwenga Mayaka the accused mud walled grass thatched house with two rooms. Like Pw7, Pw8 testified that the sitting room was full of clothes which had blood. Pw8 confirmed that they took away the accused along with Dominic Mayaka (Pw1) and Stanslus Mayaka (Pw2) for interrogation and the body of the deceased to Christa Marianne Hospital Mortuary. Pw8 stated that he later prepared an exhibit memo form and took the exhibits to the government chemist for purposes of DNA analysis. A blood sample of the deceased was taken from the body at the time of post mortem and was forwarded to the government chemist together with the other exhibits. Pw8 later got a report dated 12th November 2020 and the conclusion was that the items produced as Exhibit 2 to 21 (panga, clothes and blood sample) matched the DNA of the deceased. Pw8 stated that the stains on the shirt worn by the accused when they arrested him was found to match the DNA of the deceased. The machete which they suspected to be the murder weapon when examined was also found to have DNA which matched that of the deceased. Pw8 produced the report as Exhibit P23. Pw8 further stated that he interrogated witnesses and concluded that the death was caused with a sharp instrument and decided to charge the accused with murder because according to him firstly the accused had decided to conceal the offence by wearing another shirt on top of the blood stained one and secondly because the accused did not account for the time between when he left Dominic's (Pw1) house for a torch to the time he went back to return it and thirdly because initially when he went to Dominic's house his clothes only had mud but when he went back they had blood and lastly because he had no visible injuries although he claimed to have been attacked. He had also changed his trousers. In cross-examination, Pw8 conceded that he did not know the motive of this murder and in re-examination he stated that cuts are not captured in the post mortem report but the report mentions a sharp object; that the accused told him that they were attacked but that the accused had no visible injury to prove they were attacked. Pw1 contended that there was nothing to show that an attack/robbery had occurred in the house.

When this court put the accused on his defence he made an unsworn statement in which he vehemently denied killing the deceased and stated that on the material night he was at home where he had been the entire day. He stated that while he was sleeping at around 3.08 am he was awakened by the deceased, Vincent Nyakundi who asked him if he had medicine (Amoxyline) and when he told him that he did not have it, the deceased asked for Panadol. It was his testimony that when he opened the door to give the medicine to the deceased he saw 4 to 5 torches trained in his face and so he retreated and closed the door and fearing for his life he retreated to the bedroom but the people started knocking on the door and that is when he ran out through the window only to stumble on another person who was lying in wait behind the house. He stated that the person chased him for about 100 metres into a maize farm where he stayed for 10 minutes before heading back home. The accused testified that while he was in the maize field, he saw

a torch being flashed around his house and then saw people with torches leaving his compound. It was the accused's evidence that he stealthily walked towards his house until he got there and found all was quiet. He stated that he was unclothed save for his underwear. He also stated that he did not go into his house immediately because it was dark but that he first went to his cousin/neighbor Dominic (Pw1) and borrowed a torch. The accused stated that when he returned to his house he saw the deceased leaning on some bags of cement and when he moved closer he saw that the deceased was bleeding on the head. He asked the deceased what had happened and who those people were but he did not respond. The accused stated that he went to the bedroom and found clothes strewn all over and that his brother's boxes had been opened and things removed. He stated that he took a pair of trousers and sweater and went outside with them. He then noticed that they had blood so he removed them. Thereafter he went back to Dominic's house and told him to help him assist the deceased. He stated that when they both went to his house he wore other clothes and afterwards they went to tell his father what had happened. The accused told this court that when they returned to his house after leaving his father's house the deceased was still breathing and that he succumbed when people arrived. The accused stated that the blood found in his house belonged to the deceased but not to himself. He stated that the evidence given in court more particularly by Dominic that he had stayed for two hours before returning after borrowing the torch was false as he stayed for about twenty minutes only. He further disputed that he was wearing two shirts and stated that he did not have a stash of cash as alleged by Pw1. He contended that he was naked when he left his house but only dressed up when he went back. The accused further stated that no weapon was found near the accused person and that the panga was not recovered inside his house.

In his closing arguments, Mr. Bwonwong'a, Learned Advocate for the accused, submitted that it was the duty of the prosecution to prove the case against the accused beyond reasonable doubt but it had failed to do so. Counsel submitted that whereas the investigating officer (Pw8) stated that a sharp object was used to commit the murder the doctor (Pw5) who performed the post mortem stated that a blunt object was used. Mr. Bwonwong'a submitted that it is clear that the accused and Dominic (Pw1) were attacked on that night but that the investigating officer failed to investigate the said attack. Mr. Bwonwong'a further submitted that no one saw the accused murder the deceased and therefore the evidence adduced is circumstantial and was not sufficiently corroborated.

In his closing arguments Mr. Majale, Learned Senior Prosecution Counsel, submitted that the murder of the deceased by the accused person has been proved beyond reasonable doubt and urged that the accused be convicted in accordance with the law. In regard to the fact of death, Mr. Majale submitted that there is no doubt that the accused person was present at the scene of the crime and that the testimony of Pw1 and Pw2 was not challenged in cross-examination. He contended that the death of the deceased had also been confirmed by all the witnesses. On the cause of death, Mr. Majale submitted that Pw5 produced a post mortem report which indicated that the cause of death was head injury due to sharp force trauma. He stated that this was consistent with the injuries sustained by the deceased after the attack and with the evidence of the witnesses who visited the scene and saw the injuries on the body of the deceased and the Government Analyst's report and further that in totality the evidence points to the accused person as the perpetrator. On malice aforethought, Mr. Majale submitted that on the fateful night Pw1 overheard the accused and the deceased talking while walking home from their drinking spree and that therefore the accused person must have deliberately and maliciously injured the deceased person. Lastly, Mr. Majale submitted that the defence of *alibi* was not raised at the earliest opportunity and it therefore follows that it was an afterthought which was dislodged by the overwhelming evidence adduced by the prosecution. For that proposition, Mr. Majale relied on the Court of Appeal case of **Ali Mlako Mwero v Republic [2011] eKLR**.

An accused person is presumed innocent until proved guilty and the burden of proof in criminal cases invariably lies upon the prosecution the standard of proof being beyond reasonable doubt as was stated in the case of **Mwaura & Another v R [1980] KLR 127**: -

“The burden of proof remains on the State throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that defence beyond reasonable doubt and the accused assumes no onus in respect of any such

defence.”

Having said that, the offence of murder is committed when a person, of malice aforethought, causes the death of another by an unlawful act or omission (**See Section 203 of the Penal Code**). In the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR** the Court of Appeal enunciated the ingredients of the offence of murder to be: -

- 1. The death of deceased.**
- 2. That there was an unlawful act or omission which caused the death of the deceased.**
- 3. That the accused committed the unlawful act which caused the death of deceased.**
- 4. That the accused had malice aforethought.**

In the instant case there is no dispute that the deceased died. This fact was confirmed by all the prosecution witnesses and by the accused himself.

With regard to the cause of death, Pw5 produced a post mortem report filled by Dr. Aoga Riaga Naomi who performed the autopsy on the body of the deceased on 8th June 2020. It was Dr. Aoga's finding that the deceased had abrasions on the upper lip, multiple abrasions on the head and bleeding into the brain. After the examination she formed the opinion that the cause of death was blunt head trauma. It is this court's finding therefore that the prosecution has proved beyond reasonable doubt that the cause of the deceased's death was blunt head trauma caused by a blunt object which the prosecution established was a panga and that the death was by a human hand hence by an unlawful act.

On whether the accused was the perpetrator of the unlawful act that caused the death of the deceased, this court agrees with Mr. Bwonwong'a that there is no direct evidence that it is the accused who killed the deceased. What is before this court is circumstantial evidence. In the case of **Abanga alias Onyango v Rep Cr. A No.32 of 1990(UR)** cited in the case of **Republic v Hillary Kathyaka Kyalo [2021] eKLR** the court stated thus: -

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,***
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.***

Similarly, in the case of **Sawe v Republic [2003] KLR 364** the Court of Appeal held that: -

“1. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden

always remains with the prosecution and never shifts to the accused.”

Further, in the case of **Neema Mwandoro Nduzya v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court in considering such evidence stated that: -

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

Earlier in the case of **Mwangi and Another v Republic [2004] 2 KLR 32** the Court of Appeal had ruled that: -

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

The inculpatory facts in this case are that the deceased’s lifeless body was found in the accused’s house; that the body had multiple injuries likely to have been inflicted with a machete found at the scene; that the next morning the accused wore two sets of clothes with the inner set having blood which when put to forensic examination matched that of the deceased; that the accused’s house had the deceased’s blood splattered all over including on clothes that were strewn in the room and lastly that the accused could not account for the time between when he went to Pw1’s house for a flashlight and the time he went back to Pw1 to return the torch.

The accused did not dispute any of the above facts. However, in his evidence he alluded to other facts which when weighed with those of the prosecution seem to be probable. His evidence was that the deceased went to his (accused’s) house with a group of four or five people and asked for medicine and when he opened the door those people suddenly entered and trained torches in his face; that he retreated to an inner room but they followed him and started banging on the door and that fearing for his life he fled through the window and only narrowly managed to flee from one other person who was lying in wait behind the house. He stated that he fled to Pw1’s house to borrow a torch and when he went back to his house he found the deceased seated on the floor leaning against some cement bags. Pw1 gave testimony which confirmed that the accused went to his house that night. Listening to the accused’s statement this court started to question whether one person could have caused the kind of disarray that was described by the prosecution to have been found in the house of the accused and the court believes that perhaps there were more than two people at the scene. The police did not investigate the accused’s account even though he had narrated it to his cousin Pw1 and his father Pw2. It is my finding therefore that the inculpatory facts are capable of explanation upon other reasonable hypothesis other than the guilt of the accused person. Firstly, the presence of the deceased in his house can be explained on the fact that they were great friends as indeed Pw1 stated that he had earlier that evening heard them chatting on their way home. The deceased’s blood on his clothes could also be explained on the fact that the deceased’s blood was splattered all over the house including the mosquito net on the bed, the beddings and the clothes in the house. It is instructive that even though the forensic examination determined that the machete had DNA matching that of the deceased it did not determine the same for the accused. With the deceased having been found lifeless and bleeding in the house of the accused and with the accused disputing that he had anything to do with the deceased’s death, **the issue that needed to be investigated was whether it was the accused who used the panga to inflict the injuries found on the body of the deceased.** This could have been proved through a forensic examination of the machete to see if it had the accused’s finger prints or DNA. To examine it for confirmation that it had DNA matching that of the deceased when in fact it was obvious that it had been used to assault the deceased was in my view superfluous. Save for proving beyond a shadow of doubt that the machete was the murder weapon the prosecution failed miserably to prove that the accused had come into contact with or used the panga. In my

considered opinion therefore while there may be very strong suspicion that the accused caused the unlawful act which culminated in the death of the deceased there is no cogent evidence, direct or circumstantial that he was the perpetrator of this offence. Suspicion however strong cannot provide a basis for inferring guilt (**see the case of Sawe v Republic [2003] KLR 364**) and for that reason I am left with no alternative but to find the accused 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.

JUDGEMENT SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA ON THIS 29TH DAY OF JULY 2021.

E. N. MAINA

JUDGE