



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 17 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MAIYORO ASANDE.....ACCUSED

JUDGMENT

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 31st day of August 2020 at Riobati sub-location Kiangosa Location Manga Sub-County within Nyamira County the accused murdered Naftali Aondo Moguche.

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

In brief, the facts of this case as submitted by Mr. Majale in his opening statement and as elaborated in the evidence of the prosecution witnesses is that on 30th August 2020 a group of friends who included Nathaniel Mogude (the deceased) and one Stacy a girlfriend to the accused went to Manga Hills for a picnic. The accused had also hoped to go to Manga Hills with his girlfriend Stacy but he ended up going with some friends only to find Stacy was already there with a group of other men. He demanded to know why she was there yet she had told him that she was going to the salon and would not be available to accompany him to the Hills. A scuffle ensued between the accused and the said Stacy and the group of friends tried to calm the situation but the accused persisted and pursued the said Stacy even when she tried to get away from him. The court heard that a priest in a convent nearby heard the commotion and went out to calm the situation. The accused then went away only to return with a towing truck in which were about five or six men. According to the witnesses the men who were armed with crude weapons attacked the group of friends who had gone there with Stacy causing them to scamper for safety. After some time when they were ready to leave and after they had all gone into their respective cars a lady with mental disability stopped Clinton Sengera (PW2) and using gestures alerted him of a person who had fallen over the cliff at the site. It was Clinton Sengera's (PW2) evidence that he too heard screams at the foot of the cliff. He stated that he quickly did a roll call of the people in his group and discovered the deceased was missing and it was then they discovered that the deceased was the person who had fallen over the cliff. The deceased sustained multiple injuries. He was taken to hospital but the next day he succumbed to the injuries. The matter was then reported to Manga Police Station. On 31st August, 2020 the case was assigned to Salim Idi Salim (PW10), a Police Constable attached to the Directorate of Criminal Investigation (DCI) at Manga Sub-county. PC Salim Idi Salim testified that since the report was made on 30th August, 2020 the first thing he did was to peruse the occurrence book. Thereafter he summoned all those who had been at the picnic site with the deceased including the accused and took their statements. He stated that his investigations established that the incident occurred as a result of the accused going to the picnic site with men who were armed with crude weapons and who attacked anybody on sight causing people to scamper for safety as a result of which the deceased fell off the cliff. PW10 testified that he visited the scene and established that it had a very steep cliff and that the deceased slipped and fell down the cliff as he was running away from the goons due to fear. PW10 further testified that the accused's behaviour was triggered by the fact that his girlfriend Stacy had gone to the picnic site in the company of the group of men of which the deceased was a party. He stated that he detained the accused and subsequently charged him with this offence.

This court heard that on 2nd September, 2020 a post mortem was conducted on the body of the deceased by Dr. Naomi Ariaga (PW4) a pathologist working at Kisii Teaching and Referral Hospital (Kisii Level 5 Hospital.) PW4 told this court that she conducted the autopsy at Kisii Level 5 Hospital at 4 p.m. She stated that externally the body had a back slab (cast which normalises a fracture) on the left lower limb and the right upper limb; that the deceased also had an abrasion on the right infra orbital region measuring 4x2cm and a laceration which was sutured on the frontal scalp measuring 5cm. Internally all systems were normal save on the head where there was a laceration on the frontal scalp measuring 5cms which was also sutured. PW4 testified that there was bilateral parietal brain cratenoid and increased bleeding beneath the covering of the brain and signs of increased intercranial pressure. She also stated that there was a left femur fracture 13cm from the knee – a straight line fracture across the bone with no fragments. The deceased also had a left tibia linear fracture 18cms from the manyola and a right humerus transverse fracture measuring 1 centimetre on the elbow and another 18cms from the elbow. PW4 testified that after the examination she formed the opinion that the cause of the deceased's death was head injury, fractured femur, fractured tibia and fractured

humerus due to blunt force trauma. She stated that the body of the deceased was identified to her by the deceased's kin Timothy Mogushe and Tom Mosigisi.

When this court put the accused on his defence, he elected to give a sworn evidence. He stated that he is a businessman engaged in towing business and that on 31st August 2020 he had planned to go to Manga Hills for a picnic with his girlfriend Stacy Kerubo but she first asked him for money to go to the salon and promised to call him once she was done. He stated that when Stacy later called to say she would not make it he hired a car and went to Manga with his friends Davis and Mercy. He stated that they arrived at Manga between 3pm and 4pm and that he met Boniface Ontonu Aboki (PW1) and another lady called Carol. He told the court that Carol informed him that Stacy was there and took him to a car where he found Stacy taking alcohol with Wycliff Moranga (PW9). He stated that he confronted Stacy and demanded to know why she had lied to him. He stated that Wycliff Moranga (PW9) intervened and said that Stacy was his girlfriend. It was the accused's evidence that one of the people who had gone there with Stacy shoved him but Tom Mosigiri (PW7) and Boniface Ontonu (PW1) intervened and calmed him down and convinced him to let the issue go. He stated that he however said he was not going to leave without Stacy and an argument broke out between them and a priest came out to speak to them. The accused stated that after the priest calmed the situation down he called his driver, Robert, to pick him up and the driver came with a towing truck registration KPT 907 Land Rover. He stated that the driver was in the company of two men Felix and Tom. The accused testified that he told his driver to get Stacy from Wycliff's (PW9) car but he did not manage to remove her from the car. It was the accused's evidence that Robert, Felix and Tom then headed to a tree and cut some sticks and when people saw that they scampered for safety. He stated however that PW1 and PW9 did not flee and that they spoke to him and it was agreed that Stacy would leave on a motor cycle and he would leave in Wycliff's (PW9) car. He stated that the towing truck left and he was left with Wycliff (PW9). The accused told this court that as they were leaving with PW9 a girl stopped PW1's car and told him that a person had fallen off the cliff. He stated that he did not know the deceased and that he had seen him in passing and for the first time on that day. He denied that anything untoward occurred between him and the deceased and vehemently denied that he killed him.

Mr. Mainga, learned advocate for the accused made his closing arguments by way of written submissions. He submitted that the prosecution was required to prove the three ingredients of the offence of murder namely the death of the deceased, that the death was by an unlawful act, that the accused was the perpetrator of the unlawful act and that it was with malice aforethought beyond reasonable doubt. He cited the case of **REPUBLIC v JOSEPH MAUTI [2019] eKLR** to support this submission. On the **death of the deceased and the cause of that death**, Mr. Mainga submitted that the death of the deceased was not in dispute and contended that the cause of death was the injuries the deceased suffered as a result of falling off the cliff but not injuries occasioned by the accused. Mr. Mainga submitted that none of the prosecution witnesses claimed to have seen the accused chase or push the deceased off the cliff and further that the accused only had an issue with Wycliff (PW9) but not the others. That therefore the prosecution did not prove that the accused committed an unlawful act.

With regard to malice aforethought counsel relied on the case of **REPUBLIC v PAUL OMONDI ODONGO [2019] eKLR** where the court listed the elements to be considered in determining whether malice aforethought had been established such as: the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted and the conduct of the accused before, during and after the incident and submitted that the prosecution did not establish a nexus between the deceased's falling off the cliff and the accused as the two did not have any interaction or confrontation. Mr. Mainga contended that the accused's conduct before, during and after the incident showed that he had no intention of causing death or grievous harm to the deceased and he only learnt of the deceased's presence at the picnic site when they were alerted that someone had fallen off the cliff. Mr. Mainga further contended that it was the accused who as a matter of fact went to the bottom of the Cliff to get the deceased with PW1 and took him to hospital. Counsel submitted therefore that the prosecution had failed to prove the case against the accused person beyond reasonable doubt. He urged this court to dismiss the case and acquit the accused person.

Determination

The offence of murder is provided for in **Section 203 of the Penal Code** which states: -

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

In this case the death of the deceased and the cause of that death are not disputed. The defence concurred with the prosecution that the deceased died as a result of the injuries he sustained when he fell off the cliff at Manga Hills picnic site on 30th August, 2020. This was established by Dr. Naomi Ariaga (PW4) when she performed a post-mortem on his body. The only issues for determination therefore are **whether the death of the deceased was the result of an unlawful act, whether the accused was the perpetrator of that unlawful act and if he was, whether he committed the act with malice aforethought.**

Evidence from the witnesses called by the prosecution and the accused established that the deceased was at the scene; that the accused had an argument with one Stacy who was in the same group as the deceased; that the accused left the scene for some time before going back with a number of men who were armed with sticks and who caused those who were present to scamper for safety. This evidence was largely corroborated by the accused himself when he stated that when he called his driver to pick him, the driver went with a towing truck which had three other men and that he sent one of them to get Stacy from Wycliff's (PW9) vehicle but she would not budge. He also stated that the men who arrived with his driver cut some branches from a tree and that on seeing this the people present scampered for safety. Although it was the accused's evidence that the men were taken there by his driver, it is my finding that it was him who brought them. There was evidence which I find credible that after the priest's intervention the accused left the scene in a black vehicle only to go back in the towing truck and in the company of five or six men. It is my finding that the reason the accused brought the men to the scene was to teach the men who had gone to the site with his girlfriend a lesson. It is also my finding that there was a direct correlation between the conduct of the men the accused brought to the scene and the act of the deceased falling from the cliff. It is my finding that had the accused not brought the men and had the men not initiated an attack on those who were present the deceased would not have run away and would not have fallen off the cliff to his death.

The phrase **“causing death”** is defined in Section 213 of the Penal Code and subsection (c) thereof is material to this case. The section states: -

“213. Causing death defined

A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases: -

.....

(c) If by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

It is my finding that in this case the accused’s conduct of bringing to the scene people who were armed with crude weapons and who attacked the people at the picnic site amounted to an act of actual or threatened violence which caused the deceased to run away to avoid the violence which in the circumstances was a natural reaction to the deceased but which led him to fall off the cliff to his death. It is my finding that the circumstances of this case fall squarely within the definition ascribed to **“causing death”** in Section 213 (c) of the Penal Code and that therefore it was proved beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act. My holding finds support in the case of **REPUBLIC v HONSTER KISANYA EDAGUA [2017] eKLR** where the court stated: -

“36. In the English case of Republic V white [1910] 2 KB 124 to establish causation in fact it must be proved that, but for the defendant’s acts, the death of the victim would not have occurred. It was also held in REPUBLIC v MALCHEREK [1981] 73 CR Appeal R173 that if the death is caused by a combination of two causes and the accused’s act remains an operating and substantial cause the accused will still be liable for the cause of death.”

Having established that the accused caused the death of the deceased by an unlawful act the next issue for determination is whether the unlawful act was perpetrated with malice aforethought. **Malice aforethought** is defined in **Section 206 of the Penal Code**. It is my finding that none of the circumstances in that section were proved to be applicable to this case. It is clear from the evidence that the accused, despite his conduct, was not aware that the deceased was at the site let alone that he had fallen off the cliff. The court heard that he had even made peace with the person (Wycliff) in whose car he had found his girlfriend Stacy and that upon learning of the deceased’s fate he assisted in taking him to hospital. Given the circumstances there is no evidence from which it can be deduced that he had formed an intention to cause the death of the deceased or to cause him grievous harm. Neither was evidence adduced to prove that he had knowledge that his conduct would probably cause the death of the deceased or cause him grievous harm. I am not therefore satisfied that in this case malice aforethought was proved as would warrant this court to find that the accused murdered the deceased. The accused nevertheless unlawfully caused the death of the deceased and in the premises I find him guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 and 213 of the Penal Code and convict him accordingly.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021

E. MAINA

JUDGE