



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO.48 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS-

ABRAHAM NYABOGAMOMANYI.....1ST ACCUSED

BARASA ONIALA CARTER.....2ND ACCUSED

ANSETH KELVIN ONDARI BOYL.....3RD ACCUSED

JUDGMENT

1. By an information dated the 28th June 2010 **ABRAHAM NYABOGAMOMANYI, BARASA ONIALA CARTER and ANSETH KELVIN ONJARI BOYL** are charged with murder contrary to **section 203**, as read with **section 204, of the Penal Code, Cap 63, Laws of Kenya**. The particulars allege that the 3 accused persons on 3rd February 2010 at Emenwa Sub-location in Nyamache District within Nyanza province jointly murdered **JAMES NYAINGIRI MICHIEKA** (*‘the deceased’*). The accused persons denied the charge.

2. The hearing of the prosecution’s case commenced on 27th July 2016, the prosecution called 7 witnesses. OkwanyJ took the evidence of 5 witnesses after which she was transferred. I did not have the advantage of hearing and seeing 5 prosecution witnesses who testified before Okwany J. but have read their recorded evidence for the purpose of this Judgment having complied with **Section 200 of the Criminal Procedure Code**.

Prosecution Case

3. **James Onchiri Orori** (Pw1) recalled that on 3.2.2010 he went to the deceased’s home but did not find him, so he proceeded to his shop at Liabongera. After a short while, the deceased passed by at 8.30am and agreed to accompany him to the shamba. The deceased left after receiving a call from his father. Pw1 then left on a motor bike to Ememo to buy vegetables and when he came back he found a vehicle Toyota KBA 693C at Liabongera Tea center. He was informed that the deceased had gone toward the river and he decided to follow him. Upon reaching Mosasa primary school, he found and saw the 1st accused the assistant chief beating the deceased. He saw the 2nd accused with a metal rod which he was using to beat the deceased while the 3rd accused stepped on his legs. Upon getting closer, they threatened to beat him as well. He went back towards Mosasa primary school and after sometime the Toyota saloon car came up to Mosasa primary school to pick them. He followed them to the AP camp where he found the deceased crying and vomiting blood. He removed the deceased from the place and they took him to Nyamache district hospital but his condition got worse and he died. The deceased was wearing a black suit. He identified the 2nd and 3rd accused at an identification parade held at Ogembo police station.

4. **Vincent Juma Nyaingiri** (Pw2) testified that on 3.2.2010 he went to the deceased’s home and the deceased cut some grass for him to carry back home. While still at the deceased home the accused persons came into the home and the 1st accused said *“ndiyo huyu”*. They both ran. The 1st and 2nd accused persons started chasing the deceased while the 3rd accused chased him. Pw2 testified that he managed to hide and saw the deceased ran towards Mosasa primary school. The deceased then fell down and 1st and 2nd accused persons started to assault him. The 2nd accused took something like a pistol out of his pocket and started hitting the deceased while the 1st accused was kicking him. He testified that he did not see the 3rd accused beat the deceased but saw him assist the 1st and 2nd accused persons carry the deceased to the car. They put the deceased in the boot and he entered the vehicle and they went to the deceased home. Pw2 told court that before reaching the deceased’s home the 1st accused ran into a bush and retrieved 240 liters jerricans which he put inside the boot. Upon arriving at Nyamache, the deceased complained of pain in the stomach and he was taken to hospital where he died. On cross examination Pw2 testified that Pw1 was not present when the accused person was being assaulted.

5. **Pamela Nyambeki Nyaingiri** (Pw3) recalled that on 3.9.2010 she received a call from Pw2 informing her that the chief and 2 askaris had

chased them and arrested her husband the deceased. After sometime Pw2 informed her that they had gone to Nyamache hospital. She found the deceased at the hospital. He could not talk but pointed at his stomach. According to her the deceased had a bad relationship with 1st accused who had arrested him over allegations of an insult that took place in 2008.

6. Zablun Orenge Gitoi (Pw4). He recalled that on the material day he received a call informing him that the deceased had been arrested and taken to the police station and later to the hospital. He proceeded to Nyamache hospital where he found the deceased lying on bed complaining of serious injuries. The deceased told him that he had been beaten by the area assistant chief and 2 administration police officers. The deceased later died.

7. Dominic Kepha Michieka (Pw5) testified that the deceased was his brother. On 9.2.2010, he went to Hema Hospital Mortuary for the purposes of identifying the body during the post mortem. He identified the body of the deceased before the post mortem.

8. Doctor Willis Omwaya (Pw6) told court that he was called to conduct a postmortem on the deceased on 9th February 2010. He noted that the deceased was an African male of about 39 years of age with satisfactory nutrition and physique. The body had lacerations on the mid-tibial region on both legs. There were also lacerations at the elbow and wrist joints bilaterally and evidence of bleeding from the nostrils. There was a tear of 2cms involving the spleen. The vessels that provide blood to the intestines, the mesenteric artery, had ruptured. There was a tear of 3cms on the right kidney. There was hematoma involving the liver and the small intestines and there was pooling of blood on both the right and left lung. He testified that upon considering the finding, he concluded that the deceased suffered a blunt abdominal trauma that resulted into intra-abdominal organ injury and concealed bleeding causing cardio respiratory arrest. The abdominal trauma resulted into the internal injury.

9. Sgt Philip Lukadero No.65996 (Pw7) told court that he was the investigating officers in the matter. He recalled on 3/2/2010 they received a report from Pw3 claiming that the deceased had been assaulted by the accused persons. He conducted his investigations and recommended that the accused persons be charged with manslaughter for unlawfully causing the death of the deceased through use of excessive force. The accused persons were arraigned before Ogembo Law Courts. Later their file was taken to the headquarters and they were charged with murder at Kisii High Court. Sergeant Samuel Mulunga took over the investigations.

Defence Case

10. When put on their defence, the accused persons all gave sworn testimony and called **Nyakambi Ambaye (Dw4)** as their witness. **Abraham Nyaboga Momanyi (Dw1)** told court that he is an Assistant Chief of Emenwa sub county Kisii County. He testified that there was a land dispute between the deceased's father Nyaingiri Michieka and Dw4. A meeting was held and it was agreed that a sufuria and blanket be paid to Nyaingiri Michieka. However when the items were taken to him, the deceased refused to accept them prompting Dw1 to write requesting him to give reasons for his refusal. The deceased refused to meet with him to give any reason for his refusal and the dispute was then reported to the District officer. The District Officer summoned the deceased but he failed to show up. Dw1 was then given 2 police officers to arrest the deceased and they proceeded to his home. Upon arrival they found the deceased and Pw2 who ran away and they noted that the two had been drinking illicit brew. They decided to follow the deceased who ran towards Mosasa Primary school. They found a boy who indicated where the deceased was, and they found the deceased was lying there. The deceased was crying in Ekegusii saying '*I am dead completely and I have gone completely*'. The 2nd accused handcuffed the deceased and they carried him to the vehicle. Pw2 was also arrested and put in the vehicle and they took them to the station. He testified that both Pw2 and the deceased were drunk. He was later informed that the deceased died. He had no grudge with the deceased nor had they quarrelled. He did not arrest the deceased in 2008.

11. Barasa Onialo Carter No.233057 (Dw2) told court that he is currently under Special Forces command in Lamu County. He recalled that on the material day he was instructed by Chief Inspector Abraham Olesuke to go assist the assistant chief (1st Accused) to execute arrest of Michieka in Emenwa area. He was with Kelvin Ondari (3rd Accused). They left to arrest the deceased and was given a gun 'talvas' and 4 bullets. Upon arrival he saw 2 people under a tree. The 2 on seeing them jumped over the fence and ran away. They discussed what to do as the area was known for laying traps for officers. The deceased went towards Mosasa Primary and Pw2 Vincent Juma ran in the opposite direction. They could not chase after the deceased as they did not know the area well. A man within the area showed the chief where the deceased was. They found that the deceased had fallen in Napier grass and he was crying in Ekegusii '*Nachire pi nakurepi*' (*I am gone completely and finished completely*). He tried to make him get up. The deceased could not stand. He handcuffed him and was carried to Mosasa Primary before being picked by the driver from the school. On the way the chief identified Vincent. They took Vincent with him. They went to the deceased's home to find out what they had beneath the tree. They recovered 23 litres of Kangara which Vincent carried to the car. He asked for water saying he had chest pains. His boss said the deceased be left at the station and that he was pretending. The deceased's wife poured water on the deceased. They booked him in the OB and later at the instruction of their boss they took the deceased to hospital. He was later informed that the deceased died. Subsequently they were arrested and detained at the police. After 4 days they were taken for a parade, then charged with manslaughter and later murder. The identification parade was not done as per the law. He testified that he was given a gun but did not use the gun at all. He had no intentions to kill the deceased. They did what they could to help the deceased. The deceased was smelling of alcohol.

12. Anseth Kelvin Onjari (Dw3) No.232981 told court that he is currently attached to the Deputy Governor Kitui as his Security. On the material day he was given a Cescapistol P8930 which had a capacity of 15 rounds of ammunition and instructed to arrest the deceased. He went with the 1st and 2nd accused persons. The 1st accused lead them to the deceased's home. Upon arrival at the deceased's home the chief who was behind them identified the person they were to arrest. The 2 people in the home ran away and they reported that the suspects had run away. Before getting to the vehicle they saw a crowd of people and there were shouts. They went to the place, a man who could not talk but was using sign language pointed to where the deceased was. They found the deceased near the Napier grass, he was crying and groaning like he was in pain. They thought he was pretending so as not to be arrested. The 2nd accused decided to handcuff him but he could not stand so they took off the handcuffs. They carried him. A crowd had formed and they were shouting and the 1st accused identified Pw2 whom they also arrested. They went back to the deceased's compound to find out what he was drinking in case it was the one ailing him. The deceased was taken to the police station, booked him in OB No. 30. He asked for water. His wife who came to the police station poured water on him. Later he was taken to hospital as he was crying of pain. He testified that he did not see Pw1 at the scene. Pw2 was at the scene. He was not satisfied with how the identification parade was done. He testified that he did not beat the deceased and had no intentions of doing

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13. **Nyakambi Ambaye** (Dw4) testified that he bought a shamba from Mzee Michieka but he refused that he should not build on the land. He reported the matter to the sub chief and later to the District Officer. They then went to get the deceased who came out of the vehicle with 2 buckets of liquor and he was staggering. Pw4 was advised to return on the following day.

SUBMISSIONS

14. After the close of the defence case, the respective parties filed written submissions. Brief oral submissions were also made in court

15. The prosecution filed its submissions on 26th November 2019. It was submitted that the deceased was lying down, not resisting arrest to warrant use of force. The accused person's decision to use force imputes an intention to cause grievous harm on the deceased thus malice aforethought. That it was immaterial that the deceased was drunk as the cause of death was clearly a blunt trauma that caused internal injuries. It was submitted further that even though their initial intention was to arrest the deceased, their mission changed when they descended upon the deceased and beat him up inflicting injuries on him. The prosecution cited the case of **Wanjiro D/o Wameria v Republic 22 EACA 521** where the court held that; '*Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with*'. It was further submitted that the deceased talked to Pw4 and told him that he was hospitalized because of the beating from the accused persons. It was argued that this was a dying declaration and admissible by virtue of **section 33 (a) of the Evidence Act**.

16. The 1st accused filed its submission on 8th November 2019. He submitted that none of the prosecution witnesses proved that the acts that led to the death of the deceased were as a result of the actions of the 1st accused. It was argued that it would be an error to consider circumstantial evidence where malice aforethought has not been established. They argued that the prosecution failed to prove its case beyond reasonable doubt. To buttress the argument they cited the case of **Kariuki Karanja v Republic (1986) KLR** where the court held that '*in order for circumstantial evidence to support a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of guilt*'.

17. The 2nd and 3rd accused persons filed their submissions. They submitted that the prosecution had a duty to prove *mens rea and actus reus*. They argued that the prosecution was charged with the responsibility of proving their case beyond reasonable doubt and they failed in their duty. It was advanced that in any case the accused persons were executing a lawful order of arrest and the injuries sustained by the deceased were from a fight.

ANALYSIS AND DETERMINATION

18. For the offence of murder under **section 203** of the **Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

19. There is sufficient evidence to prove the fact that death of the deceased occurred. Pw1, Pw2, Pw3, Pw4, Pw5 and Pw6 all confirmed the death of the deceased. Pw4 testified that he identified the deceased body before postmortem.

20. As to the cause of death, Pw6 formed the opinion that the cause of death was a blunt abdominal trauma resulting into intra-abdominal organ injury and concealed bleeding causing cardio respiratory arrest.

21. I now turn to consider whether the accused persons committed the unlawful act that led to the death of the deceased. The direct witnesses were Pw1 and Pw2. Pw1 who witnessed the ordeal testified that he screamed when he saw the accused persons beat the deceased but when he got closer to the scene the accused persons threatened to beat him and he retreated to Mosasa Primary School. Pw2 who was hiding in the tea plantation watching the ordeal confirmed that he knew Pw1 but did not see him at the scene and only saw him later at the car in Mosasa Primary School. That notwithstanding the evidence of both Pw1 and Pw2 was clear and remained unshaken even on cross examination. They were both within the area and but not together. They were also with the deceased at different times before the assault. The incident occurred during the day, in broad daylight and both positively identified the accused persons as the persons who assaulted the deceased. The evidence of Pw1 and Pw2 was clear and consistent with the finding of Pw6 in regard to the injuries sustained by the deceased.

22. The prosecution further sought to rely on the doctrine of common intention. **Section 21** of the **Penal Code** defines common intention as arising;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offense is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

23. The accused persons have argued that they did not have any intention to kill the deceased, they had simply come to arrest the deceased. This is their defense. Pw1 testified that he saw the 1st and 2nd accused person assault the deceased as he lay down. Pw2 testified that he did not see the 3rd accused person beat the deceased that the 3rd accused only helped to carry the deceased to the vehicle. The court of Appeal in the case of **Dickson Mwangi Munene & another v. Republic [2014] eKLR** stated:-

“[56] Common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia vs R [1963] E.A.363 where “there was no evidence of any

agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief.”

24. Although Pw2 testified that he did not see the 3rd accused person beat the deceased the doctrine of common intention would be applicable even in instances where the 3rd accused did not inflict the fatal injury. The court of appeal in **Joel Maiyo Rongolim v Republic [2019] eKLR** cited with approval the case of **Uganda - v - Sebaganda s/o Miruho [1977] HCB 7**, where the court held:

“That where is common intention, it is immaterial who inflicts the fatal injury to the deceased as long as when the injury is inflicted the parties are carrying out a common purpose and in such a case one is responsible for the acts of the other.”

25. The prosecution case is further fortified by the testimony of Pw4 who testified that the deceased told him that he had been beaten by the area assistant chief and 2 administration police officers. The prosecution argued that the statement was a dying declaration. In **Philip NzakaWatu v Republic Criminal Appeal No. 29 of 2015 [2016]eKLR**, the Court of Appeal, while accepting that such statements are admissible, observed as follows:

“Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe”

26. Considering the prosecution evidence cumulatively, I find that the prosecution proved that indeed it was the accused persons that assaulted the deceased causing him to sustain fatal injuries. In their defenses they each admit they were at the scene. However am not persuaded that they did not inflict the injuries the deceased sustained.

27. I shall now proceed to make a determination whether the prosecution established the actions of the accused were actuated by malice aforethought. **Section 206** of the **Penal Code** states that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- 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 the death or a grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c. **an intent 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 a felony.”**

28. The accused person’s defense was that there was a dispute between the deceased and Dw4 and that they only intended to arrest the deceased. PW1 saw the assault taking place and described what each accused did as they arrested the deceased. Pw2 too gave evidence that the deceased was on the ground when the 1st accused kicked him while the 2nd accused beat him with a pistol. The post mortem form reveals that the deceased had a tear of the spleen and kidney and a hematomas to the liver and small intestine. In the case **Republic v Tubere s/o Ochen [1945] 12 EACA 63** the court held that:

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack”.

29. Although the evidence of Pw1 and Pw2 corroborate each other on the assault inflicted on the deceased, the evidence adduced by the prosecution is not sufficient to establish malice aforethought on the part of the accused persons. Pw6 testified that the intra-abdominal organ injuries, caused by kicking the deceased and beating him, and the concealed bleeding caused the deceased to suffer cardio arrest. The prosecution has established that there was excessive force used by the accused persons jointly from the nature of the injuries sustained by the deceased at the time they arrested the deceased. I am unable to find that the accused persons intended to cause grievous harm or death. Consequently, I find that the prosecution has established a case of manslaughter against each of the accused person. I find **ABRAHAM NYABOGA MOMANYI, BARASA ONIALA CARTER** and **ANSETH KELVIN ONDARI BOYI** guilty of the manslaughter for the unlawful killing of **JAMES NYAINGIRI MICHIEKA** and I convict each accused person accordingly.

Dated, Signed and Delivered at Kisii this 10th day of March 2020.

R.E. OUGO

JUDGE

In the presence of;

1st Accused Present

2nd Accused Present

3rd Accused Present

Miss Angasa h/b for Mr. Omwega for the 1st Accused Person

Mr. Magara for the 2nd and 3rd Accused Persons

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant