



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO.6 OF 2019

THE REPUBLIC.....PROSECUTOR

=VRS=

GEOFFREY ANARI MAKORI.....ACCUSED

JUDGEMENT

The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on 19th March 2019 at Mongoris Sub-location in Nyamira Sub-county within Nyamira County the accused murdered Stephen Ombachi Makori.

The accused who was represented by Mr. Kimaiyo pleaded not guilty to the charge. The prosecution called a total of seven witnesses with the key witness being Yobensia Kerubo Makori (Pw1) the mother of the accused and the deceased. She testified that on the material day at about midnight she was sleeping in her house when she heard the deceased asking her to open. When she inquired what the matter was he told her that he had been beaten and she should open. When she opened the door he allegedly told her that he had been beaten and stabbed with a knife by Anari. She started screaming thereby attracting her other sons Jackson Mbeche (Pw2) and Kefa Onguti Makori (Pw3) who went to the scene immediately. The accused was however nowhere to be found. The deceased's brothers Pw2 and Pw3 testified that they found the deceased sitting at their mother's door and when they asked him what had happened he told them he had been beaten but did not disclose the person who had done it and it was their mother (Pw1) who told them it was Anari. They quickly looked for transport and Pw2 and another of their brothers rushed the deceased to Keroka Gucha Hospital but on reaching there they were referred to Keroka General Hospital where they were again referred to Kisii Teaching and Referral Hospital. Pw2 stated that by this time the deceased could not talk. Pw2 stated that the deceased's intestines were exposed and that he soon succumbed to the injuries.

The court heard that the deceased suffered from mental disability but he was calm and friendly. Pw2 and Pw3 testified that on that night whenever they tried to ask him the name of his assailant he would cry and so they let him be and concerned themselves with taking him to hospital. As for the accused, he is said to have been found the next day in his hideout in their uncle/ neighbour's tea farm. A search party comprising the area Assistant Chief (Pw5) and the accused's brothers Pw2 and Pw3 had been mounted to look for him and when he was found he was handed over to the police who subsequently charged him with this offence. It is alleged that when he was found he surrendered a blood stained knife to the Assistant Chief. According to his mother (Pw1) and uncle (Pw4) other than the accused nobody else in that vicinity went by the name Anari.

The prosecution produced a post mortem report through the investigating officer Inspector MungaMugwana (Pw6). The report records that the deceased died as a result of multiple penetrating injuries to the chest and abdomen due to an injury with a sharp object. The multiple fractures as listed in the post mortem form are: -

“Five (5) stab wounds on the back

- 1. Near the right shoulder blade 2 x 0.5cm.**
- 2. Mid back – 2cm long.**
- 3. Lumbar region on the right – 2.5cm long.**
- 4. Below the one on the mid back – 2m.**
- 5. Wound above the posterior iliac spine 3mc long with the intestines protruding out.**
- 6. Stab wound on the right hypochondrial region – 4 x 1cm.”**

His other observations were that the lungs were grossly unremarkable but that there were fractures of the 10th and 11th ribs; the heart and great blood vessels were grossly unremarkable but the small intestines 2.5cm long appeared pale and purplish and were protruding outside the body 30cm from the pylaur. Also noted was a haematoma around the right kidney with a 2cm long laceration of on the upper pole. The pathologist also observed that a dressing on the abdomen extending to the anterior abdominal wall was as a result of medical interception.

The investigating officer (Pw6) testified that he took blood samples of the deceased and the accused, some soil collected from the scene and the knife allegedly surrendered by the accused to the government chemist for analysis. They were examined by Richard Kimutai Langat (Pw7) and according to him they all generated a DNA profile of the deceased but had no DNA genetic relationship with the DNA profile generated from the accused's blood samples which had been taken to him marked as exhibit E. Being convinced by this evidence that the accused had killed the deceased, Pw6 charged him with this offence. The Post Mortem Form, an Exhibit Memo Form dated 22nd May 2019, an Exhibit Memo Form dated 5th April 2019, the report of the government analyst and a knife were produced in evidence (Exhibit 1 – 5).

When the accused was put on his defence he testified that he lived in Kebirigo where he was a construction worker. He contended that he knew nothing of what happened and stated that on the day he was arrested he was going home and as he was approaching his house he met people near the tea farm who arrested him for allegedly killing someone. He stated that he hid in the tea bushes where the "Nyumba Kumi" arrested him. He also stated that his relationship with his mother was hostile as they quarrelled often and she never gave him peace. He stated that it is she who was saying that Anari was the one who killed. He contended that Anari is a family name and that there were many people in that locality with that name. He vehemently denied killing the deceased.

The death of the deceased is not in dispute the accused himself having conceded that the deceased died although he denied knowing when or what killed him.

The cause of the death is also not in doubt. Evidence adduced by the prosecution is that it was as a result of multiple penetrating injuries to the chest and abdomen due to injury with a sharp object. The multiple injuries are set out in the post mortem form and point to the death as being by a human hand. The injuries are also consistent with Pw1's evidence that the deceased was assaulted and Pw2's testimony that the deceased had an injury in the abdomen and his intestines were protruding. There is nothing in the evidence to suggest that the attack upon the deceased was provoked and the nature and extent of injuries would also not support that the attacker acted in self-defence as more than reasonable force was employed. I am therefore satisfied that the death of the deceased was by a human hand and by an unlawful act.

Having found the deceased's death was by an unlawful act, the only issues for determination are whether it is the accused who committed this heinous crime and whether it was of malice aforethought.

Having considered the evidence by both sides carefully it is my finding that there is proof that the accused killed the deceased. First we have evidence from the accused and deceased's mother that the deceased told her that she had been beaten by Anari. This is evidence of a dying declaration and whereas such evidence does not require corroboration it is supported by other evidence that confirms its truthfulness. Secondly, there is the evidence of conduct which points to his guilt. Pw2 and Pw3, the accused and deceased's brothers testified that when they went to the deceased's aid upon hearing their mother's shouts the accused was nowhere to be seen and there is also evidence which I found very credible and cogent that he was found a day later hiding in a tea farm adjoining their home. The Area Assistant Chief (Pw5) who I believed took part in looking for the accused corroborated Pw2 and Pw3's evidence that the accused was hiding in the tea farm. In his defence, the accused, although he did not expressly admit it, testified that he hid in the tea bushes and that it was there that he was arrested. This confirms the truthfulness of the testimonies of Pw1, Pw2, Pw3 and Pw5 and I am satisfied that the evidence is reliable and trustworthy.

There is also evidence, and I believe it, that at the time he was apprehended the accused had in his possession a knife which was blood stained. The Assistant Chief (Pw5) carried the knife which the accused had surrendered to them and handed it over to the police. The investigating officer (Pw6) corroborated evidence of the Assistant Chief (Pw5) that the knife was taken to the police station and handed over to him (Pw6). This knife was subjected to a forensic examination together with a sample of blood obtained from the deceased, a sample of blood in some soil collected from the scene and blood from the wall of Pw1's house where the deceased sat on the fateful night and according to Government Analyst Langat (Pw7), the blood on the knife and the other three specimens elicited a DNA that matched that of the deceased. This therefore proves beyond reasonable doubt that the knife was used to stab the deceased. It was therefore proved that the murder weapon was found in the accused's possession. This coupled with the dying declaration made by the deceased to their mother (Pw1). Pw2's testimony that the accused was the only person known as Anari in that locality and the accused's conduct of going into hiding prove beyond reasonable doubt that he was the assailant or killer.

What of malice aforethought. Malice aforethought is proved if any of the circumstances in **Section 206 of the Penal Code** are established. The Section states: -

"206. 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 of or 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."**

In the case of **Republic v Tubere s/o Ochen [1945] 12 EACA** it was held that **malice aforethought may be established inter alia from the weapon used, nature and extent of injuries inflicted and the conduct of the accused person.**

The multiple nature and extent of the injuries set out in the post mortem form as well as the parts of the deceased's body targeted establish an intention to cause death or grievous harm and it is also evident from his conduct of going into hiding after committing the offence that either he intended to kill or cause grievous harm to the deceased or that he had knowledge that that was a natural consequence of what he had done. If that was not the case then he would have sought help for the deceased instead of running away. I am satisfied from the evidence that he caused the death of the deceased by an unlawful act and with malice aforethought. The charge against him was proved beyond reasonable doubt and in the upshot I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered in Kisii Main Prison this 30th day of April 2020.

E. N. MAINA

JUDGE