



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 10 OF 2019

STATE.....PROSECUTION

- VRS -

WILLIAM GECHIKO GETATE.....ACCUSED

JUDGMENT

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 16th June, 2019 at Sekemu Village, Ikonge Sub-County within Nyamira County the accused murdered Nemwel Nyaribo Sarimo, deceased.

The accused pleaded not guilty to the charge whereupon the prosecution proceeded to call seven witnesses to prove its case. On his part the accused testified on oath and called one witness.

This court heard that the deceased died as a result of severe head injury caused by a blunt object leading to cardiopulmonary arrest. Dr. Angela Ogendi (PW1) testified that she came to this conclusion after conducting a post mortem on the body of the deceased at Nyamira County Mortuary on 17th June, 2019. She stated that there was no visible injury on the body and all the internal systems were normal until she opened the head where she noted an intercranial haematoma. She stated that there were dark blood clots that had likely lasted for 5 to 7 days and bleeding into the brain. She noted that the deceased had been attended at the hospital on 13th June, 2019 and a CT Scan had been taken which showed diffused brain oedema mainly on the right. She also disclosed that the deceased had a chronic subdural haematoma.

As to how the deceased sustained the injuries, the deceased's wife Esther Moraa Nyaribo (PW2) and her friends, Eunice Wangui Ndubi (PW3) and Cecilia Kerubo Nyamweya (PW4) testified that on 1st June, 2019 at about 6.30pm they were attending "Jumuiya" (Catholic small Christian Community Fellowship) at the home of one Norah Gechemba Sarem when they were notified by Happiness, a daughter in-law of the accused, that he was assaulting the deceased. They testified that they immediately went to the scene and found the accused beating the deceased on the head and shoulders with a stick but when he saw them approaching he left and went to his house. They testified that they carried the deceased who was drunk to his house not far from the scene, washed his feet, changed his clothes and put him to bed. The next morning the deceased complained he had a headache and so his wife (PW2) got him a painkiller which he took. However, on 3rd June, 2019 PW2 noticed the deceased was incoherent so she looked for money and took him to Ekerenyo Hospital. They were referred to Nyamira County Hospital but because they could not afford the Kshs. 6,500/= required for a CT Scan that had been prescribed they went back home. On 14th June PW2 took the deceased to Litein Hospital where she thought the CT Scan would be cheaper but it was more expensive and so they went back home. Finally, they went back to Nyamira County Hospital on 15th June with the requisite fee but after the scan was taken it revealed a clot in the head whose removal could only be done at Moi Teaching and Referral hospital in Eldoret. PW2 testified that she could not afford to take him there so they went home after which at about 8pm she reported the assault at Ekerenyo Police Station. When she returned home she found the deceased just snoring. He could not walk and at about 2am he succumbed. Her wailing attracted villagers who incensed carried the body and dumped it outside the accused's house. When word reached Ekerenyo Police Station a team of officers was dispatched that went and picked the body and the accused. He was subsequently charged with this offence.

Richard Ndubi Masongo (PW5) a boda boda rider testified that on 14th June, 2019 he was the one tasked to take the deceased to hospital by his wife (PW2). He stated that he found the deceased had covered himself in a blanket and when he called him the deceased said "**Gechiko you have done this to me. Gechiko you have finished me like this**" as he held his head. PW5 stated that he took the deceased to Litein Hospital but the charges were too high and all they got were painkillers after which he dropped the deceased and his wife (PW2) at their home and left. He stated that the next day he heard noise at the deceased's home. He went there and found other people and observed the deceased was staring into space. They took him to Nyamira Hospital where a CT Scan was taken. He confirmed that the deceased was referred to Moi Teaching Referral Hospital but they took him back home as they did not have the money. He also confirmed that the deceased died at about 2am on that day.

In his defence the accused testified that on 1st June, 2019 at 5p.m he was at his home. He denied having gone anywhere or meeting the deceased on that day. He contended that he was with his daughter in-law Happiness for a while who after leaving his house went to her house a distance from his. He contended that he only saw the deceased when his body was taken to his house. He denied that he assaulted the deceased but admitted that he knew him and that they were neighbours. He understood he was charged with causing the death of the deceased but vehemently denied having done so. He called his daughter in-law Happiness as a witness. She began by disputing that she called PW2, PW3 and PW4 to the scene and demanded that this court show her the statement she recorded to the effect that the accused killed someone. She stated that she was at home the whole day and knew nothing about the allegations of murder. She denied witnessing the accused beating the deceased and stated that the accused was in her house from morning up to evening then returned to his house. She denied she knew Eunice, Cecilia and Esther (the prosecution witnesses PW1, 2, 3 though not in that order.) In Cross Examination, she stated that she saw the deceased walk past while drunk. She stated that his home was 10 Kilometres from theirs. She reiterated that on that day the accused stayed in her house from morning until 6pm in the evening.

In summing up Mr. Kaba learned defence counsel submitted that the evidence of the prosecution witnesses was a fabrication as no assault was reported; that it had been admitted the deceased suffered from a chronic haematoma which was a possible cause of death; that there was no nexus between the alleged assault and the cause of death and further that an intention to kill or cause grievous harm was not established and that therefore the charge against the accused was not proved beyond reasonable doubt. To support his arguments counsel made reference to the following cases: -

- **Republic v Smith (1959) 2 ALLER 193.**
- **Benson Ngunyi Ndundu v Republic CACRA NO. 171 of 1984.**
- **Republic v Tubere s/o Ochien (1945) 12 EACA 63.**
- **Cunlife v Goodman (1950) 1 ALLER 724.**
- **Earnest Asami Bwire Abang alias Onyango v Republic CACRA No. 32 of 1990.**
- **Karani & 3 Others v Republic (1991) KLR 622.**
- **Republic v Godfrey Ngotho Mutiso (2008) e KLR.**
- **James Masomo Mbacha v Republic (2015) e KLR.**
- **Republic v Daniel Onyango Omoyo (2015) e KLR.**

Counsel for the Prosecution preferred to rely on the evidence on record and did not make any closing arguments.

As was correctly submitted by defence Counsel, to succeed, the prosecution must prove beyond reasonable doubt that the death of the deceased was caused by the unlawful act of the accused person with malice afterthought. Malice afterthought is proved if any of the circumstances set out in Section 206 (a) of the Penal Code are established beyond reasonable doubt.

After carefully evaluating and considering the evidence and submissions by both sides I am satisfied that the deceased's death was caused by the unlawful act of the accused person. The deceased's wife (PW2) and her friends PW3 and PW4 testified that they saw the accused person hit the deceased person with a stick on the head and shoulders. The accused admitted that they were neighbours with the deceased and that he knew the deceased and his family well. This corroborated the testimonies of PW2, PW3 and PW4 that the deceased's home was roughly 200 metres from that of the accused and that they knew him well. Given that this occurrence took place at about 6.30pm I am satisfied that these three witnesses had opportunity to see and make a positive identification of the accused who fled the scene to his house on seeing them. Although, their accounts of how they came by information that the accused was beating the deceased were somewhat different they were very clear and consistent that they saw the accused hitting the deceased on the head and shoulders with a stick. They even described the size of the stick as big and unanimously stated it was the stem of a coffee tree. I am satisfied that the evidence of identification was completely free of error and that therefore the fact of an assault was proved beyond reasonable doubt. Although no evidence that an assault was reported to the police was tendered there is evidence that the deceased had been attended at Nyamira County Teaching and Referral Hospital on 13th June, 2019. A report to that effect was produced by Dr. Angela Ogendi (PW1). This was on the same day that PW2 reported the assault to the police. PW2 had no control on how the police dealt with the report she made but this court finds her evidence that she made the report credible and reliable.

The accused's defence fades when juxtaposed with the testimonies of the prosecution witnesses which includes a dying declaration made by the deceased to Pw4 who in my view was also credible and reliable. The testimonies of the accused and his witnesses were so contradictory that it was evident that one or both of them were not telling the truth. Whereas the accused alleged to have been with Happiness (DW1) for only a short time it was her evidence that they spent the entire day together (morning to 6pm in the evening). The accused also admitted the deceased was his neighbour but Happiness alleged the deceased lived ten kilometres away. Her denial that she drew attention of the prosecution witnesses to the assault cannot also be believed as she could have been instigated by fear to lie given her relationship to the accused. She did not however strike this court as a trustworthy witness and I am not persuaded that her testimony was credible and reliable. Moreover, whether or not she is the one who alerted the witnesses the fact remains that they went to the scene and witnessed the accused beating the deceased with a stick. It is however significant that she herself told this court that she saw the deceased in the vicinity of her home on that material day. This is significant because the incident occurred in their home and it lends credence to the evidence of the prosecution witnesses that the accused assaulted the deceased near his house. I am further satisfied that there was a nexus between the assault and the cause of death. True the deceased already had a chronic subdural haematoma a pre-existing condition which may as well have caused his death but from the evidence the deceased had lived with this and the beating by the accused exacerbated it. This scenario is envisaged by

Section 213 (d) of the Penal Code which states: -

“213. 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 –

.....

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death

.....”

By assaulting the deceased who already had a pre-existing haematoma in the head, the accused inflicted injuries which I find hastened his death. The post mortem report reveals that the deceased suffered intracranial haematoma (bleeding into the brain) an injury which I find is consistent with the beating inflicted on his head by the accused person. The attack on a drunken man who was lying on the ground and which was unprovoked was certainly unlawful.

The next issue for determination is whether malice aforethought was established. Section 206 of the Penal Code 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.”

Malice afterthought can be deduced from inter alia **the weapon used, the manner in which it is used, the part of the body targeted and the nature of injuries inflicted** (*See Republic v Tubere s/o Ochen (1945) 12 EACA 63*). The accused in this case hit the deceased repeatedly on the head with a big stick as he lay on the ground drunk. He must have done this for a while before the deceased's wife was alerted by Happiness, although she denied it. The accused, a mature man who was himself sober must have known that the act of hitting the deceased on the head repeatedly could probably cause him grievous harm if not death and it is immaterial that he did not wish it to be caused. At the very least grievous harm was an obvious consequence of the accused's conduct and he must have foreseen it and intended it. I am satisfied therefore that malice afterthought was proved beyond reasonable doubt. In the premises I find that the charge against the accused was proved beyond reasonable doubt. 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 Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE