



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 7 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

VINCENT NYABUTO.....ACCUSED

JUDGMENT

1. Victor Nyabuto is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 2nd day of February 2019, at Tridev area Webuye Township location, Webuye West sub County within Bungoma County, murdered No. 259158 APC Elishaphan Mwangi.
3. The prosecution case was that the accused was found beating his wife. The deceased intervened and separated the two. The accused felt that he was humiliated before his wife and pursued the deceased who was in company of his (deceased's) wife. An altercation ensued and the accused pushed the deceased who fell on the tarmac with the back of his head. He was assisted to the hospital following the injuries he sustained. He subsequently succumbed to the injuries. The accused was charged with murder.
4. Victor Nyabuto, the accused herein, contended that he found his wife and another woman fighting, apparently over a man. When he enquired from his wife what the matter was, the man in her company started to beat him. As he was going to the police station to report the man held the motor cycle from behind and fell on the tarmac. He stood and pursued them while wielding a stone. After making his report, he was allowed to go home but later that that night he was arrested.
5. The issues for determination are:
 - a) Which of the two versions is credible;
 - b) Whether the accused was the one who caused the fatal injuries to the deceased; and
 - c) Whether the offence of murder was established.
6. Chimakile Kuyefwe (PW1) was a guard at the Tridev Super Market. He saw a man and a lady walking and were followed by some three men who were on a slow moving motor cycle. When they reached near where he was, two men alighted from the motor cycle. One man asked the man who was walking with a lady (the deceased) why he beat him in front of his wife. The accused made a call and told the person he had called that he was with "him" and he was still arguing. This is when the deceased hit the phone of the accused and it fell down. The accused picked his phone and pushed the deceased who fell down and did not rise again.
7. When the wife of the accused reported that she had been beaten by her husband, Senior Sergeant Hellen Bii (PW3) and other officers went to the scene at about 9.10 p.m. They found the accused who informed them that he was prevented from beating his wife by a man who pretended to be a policeman.
8. I am satisfied that the version by the prosecution, therefore is the correct one on how the incident happened.
9. The evidence of PW1 and PW5 is clear that it was the accused who pushed the deceased down and caused the fatal injuries to him. This is in spite of his allegation that the deceased fell down when he held the rear of a moving motor cycle.
10. The act of the accused to pursue the deceased for feeling slighted in front of his wife was an unlawful act. This was even after the deceased had identified himself to the accused, who was unlawfully assaulting his (accused's) wife.

11. For an offence of murder to be proved, malice aforethought must be shown to have existed. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

12. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

13. In the instant case, I find that the prosecution has not proved the existence of malice aforethought. Therefore, the offence of murder has not been proved. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 25th day of June, 2020

KIARIE WAWERU KIARIE

JUDGE