



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 11 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

GODFREY OBAYE BOGONKO.....ACCUSED

JUDGEMENT

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 20th June 2019 at Vallet Club in Keroka Township, Masaba North Sub-county within Nyamira County in the Republic of Kenya the accused murdered SAMUEL NGUNYI WAMBUI.

The accused pleaded not guilty to the charge and a trial ensued in which the prosecution called a total of thirteen witnesses. The accused was represented by Mr. Mainga, Advocate.

Briefly the prosecution's case is that the deceased was an Administration Police Officer (driver) attached to Masaba North Critical Infrastructure Protection Unit (CIPU) in Nyamira County. On the material day he parted ways with his superior Julius Oloo Okello (Pw1) an Inspector of Police at 5pm and said he was going to look for food in Keroka Town. According to Inspector Okello (Pw1), the deceased had changed into civilian clothes and was not armed. It is said that at around 10pm the deceased went to Vallet Lounge (a club/bar) and sat at a table which was close to the counter where the accused person who had gone there at about 8pm was having his drink. There were conflicting accounts of the events that followed but all the witnesses were in agreement that it all begun when Onchiri Jared Bundi (Pw6), a drunken reveler arrived at the club at about midnight and decided to go greet one Aloyce who was at the counter with the accused. However, before Pw6 could even say hello the accused shoved him aside causing him to fall on the table where the deceased was sitting. The motion spilled the deceased's beer. The deceased is said to have stood up and demanded to know why the accused had spilled his beer whereupon an altercation ensued between the accused and the deceased. According to Mark Mitunda Omari (Pw2), the Manager of the Club, the altercation between the two became heated and degenerated into a brawl. He, (Pw2), intervened and separated them and escorted the accused out of the premises and told him not to go back. The accused however insisted on going back for his unopened beer and the Manager (Pw2) allowed him to get it but told him not to return again. The accused then said that he had forgotten his shopping in the bar and the Manager (Pw2) went and got it for him. When the accused insisted on going back to finish the beer he had left in the glass, the Manager (Pw2) ordered the watchman to see to it that he did not enter and went for the beer himself only to return and find the accused had gone back inside. The deceased saw the accused and asked him if he had returned to provoke him again "*kuchokoza*". Pw2 testified that the accused closed in on the deceased and the deceased boxed him whereupon the accused moved even closer and told the deceased "*you cannot do anything to me*". Then a fist fight ensued between them. This court heard that the accused put his head to the deceased's chest which seemed to provoke the deceased even more and as they fought the accused kept walking towards the exit in a backward motion with the deceased following him. Fancy Cherotich (Pw4) a waitress who was stationed at the counter, confirmed that she was asked by the Manager (Pw2) to give the accused his unfinished beer and shopping. She (Pw4) and Linnet Nyanganyi (Pw5) also a waitress at the bar but who was off duty but present in the bar at the material time testified that before the accused and the deceased started fighting they heard the accused say he was a KDF (army officer) and the deceased retort that he was a police officer. They stated that the accused then told the deceased if he was man enough he should rise up and fight. According to these two witnesses, this happened before the intervention by the Manager (Pw2) and the ejection of the accused from the bar. The two witnesses confirmed that the accused returned as the Manager (Pw2) was getting the things which he (the accused) had left in the bar and told the deceased he had returned for a fresh fight. Pw4 testified that the accused hit the deceased and floored him whereupon the deceased took a bar stool and threw it at the accused. The stool hit the door but it did not hit the accused. The court heard that it was at that juncture that the accused walked out and the deceased followed him. The Manager (Pw2) told the court that when they reached the door he saw the accused draw something from his pocket and stab the deceased once on the left side of the chest. He then fled the scene. According to Pw5, the deceased staggered back into the bar while bleeding profusely from a wound on the chest and with his hand clasp the chest and collapsed on a table. With the help of Pw5 and other revelers the Manager (Pw2) carried the deceased to a vehicle and took him to Keroka District Hospital where he died as he was being attended by a doctor. The occurrence was then reported to Keroka Police Station. Inspector Okello (Pw1) confirmed that he rushed to the hospital and confirmed the deceased had been stabbed on the left side of the chest and had died.

Onchiri Jared Bundi (Pw6), who it was said provoked the altercation between the accused and the deceased when he fell and spilt the latter's beer after being shoved by the accused, confirmed that he too went to the hospital and saw the deceased had a stab wound on the ribs on the

left side. Like Fancy Cherotich (Pw4), Pw6 stated that he did not witness the stabbing. Charles Maeba Maraburi (Pw7) told the court that he was working at the Club as a guard and that at about 1.55am on the fateful night he witnessed the accused who had been ejected from the Club by the Manager (Pw2), but who had forced his way back, leave the Club in a huff. He stated that shortly afterwards he saw the Manager (Pw2) and other young men who he perceived were customers carrying a person they were taking to hospital. He stated that the man who was being carried was bleeding profusely from his belly and was in a serious condition.

Christine Nyaboke Nyaramba (Pw8) was the deceased's girlfriend. She narrated how she was called to the Club by Linnet (Pw5) at about 1.50am and how she went there and found the deceased had been taken to hospital. She stated that she left for the hospital and found the deceased being attended by the doctors who soon thereafter informed her he had died. She stated that she saw that he had a wound on the left rib cage. She confirmed that he was an Administration Police Officer whose designation was a driver. She testified that they had communicated at about 4pm on that day and that she had seen the deceased driving another police officer in a police vehicle Reg. No. GKB 158J.

Shanel Kipkoech (Pw9) confirmed that he helped the Manager (Pw2) to put the deceased in the motor vehicle and stated that it was him who drove the vehicle that carried the deceased to Keroka District Hospital. He stated that he noticed the deceased was bleeding although he did not see where the blood was coming from. He however stated that he was not privy to the events that culminated in the deceased getting injured saying he was asleep in his quarters at the time it all happened.

Samson Momanyi (Pw10) told this court that he was inside the bar and was at the same table with the deceased. He stated that an argument which degenerated into a fist fight broke out between the deceased and the accused after a drunken reveler hit the deceased's table and spilt their drinks. He stated that calm was restored after the management intervened and separated the accused and the deceased but that another argument soon arose between them and the accused who claimed to be in the army was ejected. Pw10 stated that he then decided to leave but as he was leaving he saw the accused draw something from his right trouser pocket which he identified as a knife and stab the deceased. The accused then fled. He stated that he saw blood in the chest area of the deceased's shirt and that he too followed those who took the deceased to the hospital. He stated that the lighting in the Club was very bright and they were seated in an area that was well lit.

Dr. Morebu (Pw12) testified that he conducted a post mortem on the body of the deceased at Hema Hospital and that he formed the opinion that the cause of his death was a penetrating injury which pierced the lungs. Inspector Daniel Marucha (Pw11) of Scenes of Crime produced photographs which he took at the scene.

The case was assigned to Sergeant David Muriithi (Pw13) of Keroka DCI who after collecting the evidence started looking for the accused. He stated that he begun by visiting the home of the accused and not finding him he travelled to his place of work at Menengai and arrested him and caused him to be charged with this offence.

In his defence, the accused admitted that he was at Vallet Lounge on that material night. He testified that he got there at about 10pm and sat at the counter. He stated that at about midnight the deceased started fighting with another man with who was sitting at a table not far from the counter. He stated that the Club bouncers went and separated them and the other man was taken to the counter leaving the deceased at the table alone. He stated that not long after that the deceased went to the counter and started fighting the other man; that the deceased took a metal chair and attempted to hit the man with it but it missed the target and hit him (the accused) instead. When he asked the deceased why he had hit him yet he was not party to the altercation the deceased allegedly asked if he knew who he (the deceased) was and hit him again. The accused stated that he fell down and that at that juncture the man the deceased was fighting with violently pulled a chair and hit the deceased sending him sprawling on the floor. He stated that a number of revelers joined in the fight. He denied that he had a knife or that he stabbed the deceased. He contended that he was the victim and that he was treated for his injuries at Hema Hospital as evidenced by treatment notes which he produced as Exhibit D1. He contended that he travelled to Nakuru soon after leaving the hospital and it was only after police officers went to look for him that he learnt of the death of the deceased. He denied that he was ejected from the Club at one point and contended that he left at the point when the deceased and the other man started throwing chairs at each other. He stated that the deceased was wounded by the man he was fighting with and contended that despite the deceased assaulting him twice he did not retaliate. He also clarified that he is a welder at the Geothermal Development Company and not a KDF (army man). He confirmed that that was his third visit to the Club and stated that some of the waiters knew him and his favourite tittle. He described what he was wearing on that day as a long sleeved shirt and khaki trousers and told the court that the Club had bouncers who screened/frisked people before they could enter the Club. He vehemently denied that he had a knife. He called two witnesses Douglas Nyaswano Mabera (Dw2) and Radley Mogotu Mose (Dw3) who both testified that they were in the Club at the material time and that they witnessed the fight between the deceased and the other man. Further, that the deceased tried to hit his combatant with a chair but he missed and hit the accused instead. They stated that the deceased intentionally hit the accused with the chair again when the accused demanded to know why he had hit him. Dw3 described the deceased as a quarrelsome customer who always fought and used chairs as weapons. She stated that revelers in about six tables joined the fight and therefore it involved many people. The defence witnesses stated they did not see the accused with a knife and contended he could not have had it as people were frisked for weapons at two stages before they get into the Club.

In summing up, Mr. Mainga, Learned Counsel for the accused submitted that while the death of the deceased is undisputed, the fact that the accused committed the unlawful act which caused that death was not proved beyond reasonable doubt. Counsel submitted that the prosecution witnesses gave evidence that they did not see a knife and that in any event the evidence by Dr. Morebu (Pw12) that the injury that caused the death of the deceased was 30cm deep and with irregular margins leads to an inference that the deceased may have been injured by a chair used in the second fight referred to by the defence witnesses. Counsel contended that the veracity of the evidence of prosecution witnesses Pw2, Pw5 and Pw10 leaves a lot of doubt as to whether the deceased was assaulted inside Vallet Club, outside or at the counter. Counsel further submitted that the fact that prosecution did not produce a murder weapon, evidence on the same was purely speculative and that left a glaring gap in the case. Counsel contended that there was no direct evidence linking the accused person to the murder of the deceased. He stated that the evidence adduced was circumstantial and uncorroborated. He also stated that as none of the witnesses testified that the accused had an intention to harm the accused malice aforethought was not established. He concluded by stating that the standard of proof (beyond reasonable doubt) was not met. Counsel cited the following cases in support of his submissions: -

- **Republic v Peter Ngugi Mwaura ([2016] eKLR.**
- **Migori HCCR 20 of 2017 – Republic v William Mbelisia Odando.**
- **Musii Tulo v Republic [2014] eKLR.**
- **Nzuki v Republic [1993] KLR 171.**

Counsel for the State did not make closing arguments instead electing to rely entirely on the evidence adduced.

The death of the deceased is undisputed. The issues that remain for determination therefore are: -

- (i) Whether that death was caused by an unlawful act.**
- (ii) If so, whether the accused committed that unlawful act.**
- (iii) If he did whether he did it of malice aforethought.**

(i) Whether the death was caused by an unlawful act

The sum total of the evidence adduced by the prosecution and the defence points to an altercation that took place between the accused and the deceased in the Vallet Lounge. All the witnesses were in agreement that it all begun when a drunken reveler who was shoved aside by the accused lost balance and knocked the deceased's table spilling his beer. The accounts of what transpired next is what creates divergence between the evidence of the prosecution witnesses and those of the defence. According to the defence the deceased got up and confronted the drunken reveler before attempting to hit him with a chair but the chair missed the target and hit the accused instead. The accused and his witnesses alleged that when the accused asked the deceased why he hit him the deceased hit him intentionally and boasted that he was a police officer and nothing could be done to him. According to the defence, the accused did not as much as touch the deceased. The prosecution witnesses who were at the Club however told the court that after the drunken reveler poured the deceased's beer an altercation ensued and when the drunken reveler said it was not him to blame the altercation spilt over to the accused and the deceased and the accused and the deceased started fighting. While the defence alleged that the deceased fought the accused with a bar stool and chairs, the prosecution witnesses told this court that what ensued was a fist fight.

I have carefully analyzed and evaluated the evidence by both sides and my finding is that the account given by the prosecution witnesses is more plausible. The Manager (Pw2), Fancy Cherotich (Pw4) and Linnet Nyanganyi (Pw5) gave an account which was corroborated by the guard (Pw7) as well as another reveler (Pw10). The witnesses attested to the fact that the deceased did not sustain the injury that caused his death inside the Club or during that first altercation with the accused. It was their evidence that after the Manager (Pw2) separated the deceased and the accused, the accused was ejected from the bar. He however made certain demands pertaining to some beer and shopping that he had left at the counter and when the Manager (Pw2) was in the process of getting them for him he forced his way back into the Club. He then went and showed himself to the deceased and challenged him to a duel. I find it a fact from the evidence that it was the accused who upon going back into the Club, provoked the second fight. I also find it a fact from the evidence that upon provoking the deceased, he retreated from the Club walking in a backward motion and when the deceased followed him and they reached the door something happened and the deceased returned to the bar clasp his chest. Pw5 stated that the deceased collapsed on the table she was seated and she saw he was bleeding on the left side of the chest. I find it a fact therefore that the injury which caused the death of the deceased was sustained at the door where the only two people present were the accused and the deceased. The deceased did not sustain the injury in a *"free for all fight"* as alleged by the defence witnesses. The accused person testified that the attendants at the bar knew him well hence corroborating the testimonies of the Manager (Pw2), the counter lady (Pw4) and the attendant (Pw5). They all knew him as he had patronized the Club several times. However, it is my finding that their knowledge of him was not so personal as to cause them to lie against him. In my view they were truthful and credible witnesses and hence their evidence was trustworthy and reliable. This is as opposed to the evidence of the defence witnesses more so Radley Mogotu Mose (Dw3) whose description of the deceased as a quarrelsome man who fought in the Club thrice using chairs as weapons, betrayed a witness who harboured ill feelings and bias against the deceased. Dw3 clearly had reason to give evidence that would go against the deceased to exonerate the accused.

(ii) Whether the accused committed that unlawful act.

My finding that the deceased sustained the injury at the door of the Club when he was alone with the accused leads me to conclude that the injury was caused by the accused. There is direct and cogent evidence that the accused stabbed the deceased. As I stated and as admitted by the accused he was well known to the witnesses who gave evidence to that effect. It is also my finding that since the Manager (Pw2) had calmed the situation even going to the extent of ejecting the accused from the bar, the accused acted unlawfully by going back to provoke the deceased and to start another fight with him. I find that the accused did not act in provocation or self defence as he had had time to cool off and that therefore the act was unlawful. Needless to say therefore it is my finding that he committed the unlawful act which caused the death of the deceased. All the witnesses testified that upon the encounter at the door they saw the deceased bleeding on the left side of the chest. He also returned inside while clasp that side of the chest. The post mortem confirmed that the cause of death was a deep penetrating injury to the left side of the chest which is consistent with the evidence of the prosecution witnesses that the deceased was stabbed on the left side of the chest. The object used to stab him was not recovered because the accused fled with it and it is immaterial that no murder weapon was produced in evidence.

(iii) Whether the accused acted of malice aforethought

Section 206 of the Penal Code provides 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 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.”

The case of **Republic v Tubere s/o Ochen [1952] 12EACA 63** cited with approval in the case of **Republic v Peter Ngugi Mwaura [2016] eKLR** provides guidance on how malice aforethought can be proved. In that case the court held that malice aforethought may be inferred from-

- (a) The nature of the weapon used.
- (b) The part of the body targeted whether vulnerable or not.
- (c) The manner in which the weapon is used (whether repeatedly or not).
- (d) The conduct of the accused before, during and after the act (whether acts with impunity).

In the instant case the accused stabbed the deceased on the left side of the chest thereby inflicting a penetrating injury about 4cm deep between the 6th and 7th ribs. It is my finding that the nature of the weapon used (whether it was a knife or other sharp instrument) and the part of the body targeted were premeditated. Whereas he may not have formed the intention to kill the deceased, the accused clearly intended to cause him grievous harm and he also must have had knowledge that using that kind of weapon and targeting that part of the deceased’s body would cause his death or do him grievous harm. He had sufficient time to cool down when he was ejected from the Club but he forced his way back in and provoked the deceased into another feud intending to lure him out of the Club as he did and after stabbing him he fled the scene. I am satisfied that all the ingredients of the offence of murder have been proved against the accused beyond reasonable doubt. Accordingly, 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 30th day of July 2020.

E. N. MAINA

JUDGE