



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 14 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

ROBERT NYAIKA MOKORO.....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 6th July 2019 in Nyamira North Sub-county, Nyamira County the accused murdered Phillip Maina Osoro.

The accused pleaded not guilty to the charge whereupon the prosecution called six witnesses to prove its case. The case was initially prosecuted by Miss Okok and thereafter by Mr. Majale while the accused was represented by Mr. Bwonwong'a, Advocate.

The key witness was JO (Pw1) a child aged thirteen at the time of giving evidence. He made an unsworn statement as he did not understand the nature of an oath. JO (Pw1) testified that on the material day at about 4pm he was at the Nyanderema road when he saw one Chapa go to the place Phillip (the deceased) was lying down. He stated that the said Chapa hurled insults at the deceased and then ran away. This annoyed the deceased and he got up and went to his home and returned with a stick to beat Chapa. JO (Pw1) stated that it was at that juncture that Nyaika (the accused) who was well known to him came to the scene and started throwing/pelting the deceased with stones but when the stones missed the deceased he (the accused) took a stick and used it to beat the deceased on the head. He stated that the deceased fell down then got up and went to his home. JO (Pw1) stated that he saw that the deceased's face was covered with blood. He gave evidence that the accused ran away after assaulting the deceased and that he himself did not know what transpired after the deceased left the scene but later he saw the deceased sitting on a chair outside their (deceased's) house. The next day he heard the deceased had died. He was later asked to record a statement detailing what he had witnessed.

The deceased's mother Monica Moraa Daniel (Pw2) testified that on the material day she returned home from Church at around 4pm to find the deceased lying on a couch in her house. She tried to awaken him but he did not respond so she let him be. She stated that at around 4am she noticed foam around his mouth and decided to look him over. She did not see any injury although she had received information that he had been assaulted. She however noticed there was blood on the floor and when she touched him she felt his body was stiff. Perceiving him to be dead she informed her sister-in-law who went and insisted they take him to hospital. Pw2 testified that they carried him to the road so they could take him to hospital but they were advised by people that he was dead. She stated that she had seen the accused and the deceased on the road as she went to Church. On confirming he had died they started wailing and their wailing attracted Assistant Chief Albert Nyagwechi Nyauma (Pw3) who happened to be on another mission in the area. He went to the scene and on seeing the person was dead he notified Ekerenyo Police Station who went to the scene and took the body away. The Assistant Chief (Pw3) inquired what had happened and when he was told the deceased had been assaulted by Robert Nyaika (the accused), Bob and a person nicknamed Chinese/Japanese he asked for directions to the accused's house and on his way there he met Bob who claimed to have spent the night at the accused's house. He stated that he proceeded to the accused's house and apprehended him as he attempted to flee. He took the accused to Ekerenyo Police Station and requested the police to institute investigations into the occurrence.

Chief Inspector David Mursoy (Pw5) of DCI Nyamira North testified that he was the investigating officer in this case. He confirmed that he received a report of the occurrence from the Assistant Chief (Pw3) and stated that he accompanied the Assistant Chief to the home in issue and found the body of a person aged about 20 years lying on a mattress outside. He stated that he examined the body closely and observed that the head was swollen and there was foaming in the mouth. He stated that he suspected the deceased had sustained internal head injuries. He interrogated the mother of the deceased and learnt that the deceased had died at about 7.30am as preparations were being made to take him to hospital. Chief Inspector Mursoy (Pw5) further testified that he interviewed JO (Pw1), the key witness, who told him that he had witnessed the attack upon the deceased by the accused person. He stated that Pw1 led him to the scene and told him that after the attack the deceased ran towards his home and the accused to his home. Inspector Mursoy stated that since the accused had already been apprehended by his father he proceeded to his (accused's) house to look for the rungu but did not find it. Thereafter he recorded the statements of the witnesses and made arrangements for a post mortem to be conducted on the body of the deceased. He stated that the post mortem was witnessed by one of his officers and Joseph Ombogo Okemwa (Pw4) who is a relative of the deceased.

Dr. Angela Ogendi (Pw6) testified that she conducted the post mortem on the body of the deceased at Nyamira County Hospital at 1.20pm on 9th July 2019. She stated that the body had no visible injuries but it had a depression on the skull measuring 5cms deep. All other systems were normal and her opinion was that the cause of death was severe head injury caused by a blunt object leading to cardiopulmonary arrest (intracranial haemorrhage). She produced the post mortem report in evidence.

When this court put the accused on his defence he elected to give evidence on oath and call five witnesses. He testified that he hailed from Nyanderema and earned a living as a manual labourer either as a farm hand or a herder. He stated he had recollection only of the day on which he was arrested. He stated that he was preparing to go to the shamba when their village elder one Moi Matege went and told him that someone he had been drinking with at the chang'aa den had died and he was required to record a statement. He stated that it was the village elder who apprehended him and took him to the Assistant Chief who gave evidence in this case. The accused stated that he did not know the name of the Assistant Chief as their homes are far from each other. He contended that the stones and club he allegedly used to assault the deceased were not produced. He told the court that he used to drink alcohol and smoke bhang. He however vehemently denied that he killed the deceased and stated that after drinking he went home and it was upon arrival at his home that he was told someone had died and he needed to record a statement. He stated that he has not been released since then. On being cross examined he stated that he had no recollection of the happenings of 6th July 2019. He also testified that he knew JO (Pw1) as he used to drink chang'aa in their home and he would at times send him (Pw1) to get him cigarettes. He stated that he could not recall if he saw Pw1 on the material day as he was drunk but confirmed that he heard his testimony. He contended that he has never had an altercation with anybody since he was born.

This court adjourned the defence case several times so that the accused could call his witnesses but in the end only two turned up. Sospeter Mokoro (Dw2) told this court that the accused is his older brother; that he knew the deceased because they hailed from the same village although their homes were far apart; that on 6th July 2019 the accused who had been out drinking returned home at noon and went straight to bed without eating the food he was served and that he later heard wailing that someone had been found dead at the drinking den. He stated that thereafter the village elder went to their home for the accused as he was one of those that had been drinking with the deceased. Dw2 stated that the accused pleaded that he had gone home early and had left the deceased with the others. The witness contended that Pw1 gave hearsay evidence and stated that one year prior to the death of the deceased he (deceased) had been hit on the head with a stone and he had kind of lost his mind and would run aimlessly on the road. He contended that the wound would ooze pus and that at the time in issue the deceased was carrying a panga which accidentally cut him when he slipped and fell. He stated that people were afraid of coming to say that in court. However, when Dw2 was cross examined he revealed that he was not present when the accused returned home at noon and stated that this was what his mother had told him. He added that at 1pm he was sent by his mother to call the accused but he did not see him. He revealed that he did not see the accused on that day or accompany him to the drinking den. He stated that the thing he said about the deceased falling on a panga is what he heard the villagers saying but he did not witness it. He reiterated that the deceased had earlier on suffered an injury to the head which made him lose his mind. This was reiterated by Derrick Ombati (Dw3) who stated that he too knew the accused and the deceased. He also testified that the accused and deceased were at a chang'aa den and that a fight broke out between the deceased and another person at the den and the accused intervened and pushed the deceased causing him to perhaps fall on a stone. He stated that after that the accused went home. He stated that he knew the deceased well and had seen him that morning and later at 4pm while drunk. He stated that the fight at the drinking den happened at 6pm. He however confessed that he did not witness the fight. He contended that the cause of the deceased's death must have been the wound on his head.

In closing, Mr. Bwonwong'a submitted that the evidence of the prosecution witnesses was contradictory; that Pw1 stated that the three stones the accused threw at the deceased missed the deceased and that as it was said the scene was littered with stones it was likely that the deceased fell on the stones. Mr. Bwonwong'a also submitted that the evidence of Pw1 was not credible; that Pw1 did not name the persons he alleged were at the scene and that being a child his evidence should have been corroborated. Mr. Bwonwong'a also wondered why the other two assailants referred to by the Assistant Chief (Pw3) were not arrested and charged and why the information omitted to state that the accused acted with others who were not in court. He contended that it is likely that it is those two who killed the deceased; that the motive for this crime is not clear and that evidence was adduced that the accused acted under the influence of alcohol. Counsel contended that there was no direct evidence pointing to the accused as the killer and that the investigating officer contradicted the evidence of Pw1 by stating that the deceased was hit with a rungu. He pointed out that no weapon was recovered. He contended that the accused's witnesses testified that the accused did not kill the deceased and that he died because of a wound on his head. Mr. Bwonwong'a reiterated that the evidence of JO (Pw1) was not reliable. He urged this court to acquit the accused.

The prosecution did not file its closing arguments although Mr. Majale had undertaken to do so.

The issues for determination are: -

- (a) The death of the deceased.**
 - (b) The cause of that death and whether it was by an unlawful act.**
 - (c) Whether the accused committed the unlawful act which caused the death of the deceased.**
 - (d) If so, whether he did it with malice aforethought.**
- (a) The Death of the Deceased**

The death of the deceased is not in doubt. The deceased's mother (Pw2), his uncle (Pw4), the Assistant Chief (Pw3) and the defence witnesses all attested to it and their testimonies were confirmed by the doctor who performed the post mortem.

- (b) The Cause of that Death and whether it was by an unlawful act**

There is evidence that the deceased died in the early hours of 7th July 2019 as his mother and her kin were preparing to take him to hospital.

There is also evidence that the previous day the deceased had been assaulted on the head as he was lying down along the Nyanderema road and that he had sustained injuries which caused him to bleed. His mother (Pw2) stated that she did not see any injury on the body of the deceased while Chief Inspector Mursoy (Pw5) stated that his only observation was that the deceased's head was swollen. The defence witnesses testified that the deceased had prior to the occurrence sustained an injury on the head for which he had been receiving treatment and which had made him lose his mind. Dr. Angela (Pw6) confirmed that the deceased had no visible injuries on the body but that he had a depression on the skull measuring 5cm deep. The post mortem report however indicates that the deceased had an injury with blood stains on the head and that the scalp was cracked. It is my finding that this evidence is more consistent with a recent beating as described by Pw1 as opposed to an old injury as described by the defence witnesses. I am satisfied therefore that the deceased died as a result of injuries inflicted through an assault that had just occurred in the recent past but not from an old injury. Dw3's evidence that the deceased fell on a panga was based on hearsay and hence not credible. Since there was no evidence that the assault upon the deceased was provoked or was as a result of self defence, his death was caused by an unlawful act.

(c) Whether the accused committed the unlawful act which caused the death of the deceased

The case against the accused person is largely based on the evidence of a single witness who is also a child. In the case of **Maitanyi v Republic [1986] KLR 198** the Court of Appeal held as follows in regard to evidence of a single witness: -

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to ward itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

I have warned myself of the danger of relying on the evidence of JO (Pw1) and also subjected it to the test laid in the **Maintanyi case (supra)** and I am satisfied that the evidence squarely places the accused at the scene of this offence. JO (Pw1) testified that this incident occurred at 4pm meaning it was in broad daylight. Secondly, it occurred by the road meaning it was in an open place. He also stated that the accused was lying down near a kiosk by the roadside meaning that the deceased could not have provoked the assault. Pw1 also stated that he knew the accused person a fact which the accused admitted in his defence. His was therefore evidence of recognition and I am therefore satisfied that the prevailing conditions favoured a correct identification which was free from error. Moreover, JO's (Pw1) evidence was corroborated by that of the deceased's mother who testified that at around 4pm she saw the accused person on the road (where this incident is alleged to have occurred). This court is satisfied therefore that Pw1 was a witness of truth; that his evidence was credible, trustworthy and reliable. This is as opposed to the evidence of the accused and his witnesses which was inconsistent, contradictory, speculative and based on hearsay and which was clearly geared not to assisting this court to arrive at the truth but to exonerate the accused. I am satisfied and I find that the accused committed the unlawful act which caused the death of the deceased. Drunkenness or intoxication is never a defence unless as provided under **Section 13 (2) of the Penal Code** which states: -

“13. (1)

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.”

None of those circumstances were established by the accused person.

(d) Whether the accused acted with malice aforethought.

To sustain a conviction on the charge of murder, the prosecution was required to prove the existence of malice aforethought beyond reasonable doubt. Malice aforethought is proved by establishing any of the circumstances provided in **Section 206 of the Penal Code**. 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.”

As to how malice aforethought is proved, we have guidance in the case of **Republic v Tubere s/o Ochen [1952] 12EACA 63** where it was 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 attack (whether acts with impunity).

In this case JO (Pw1) told the court that at first the accused threw stones at the deceased but the same missed him and so he took a club and hit him on the head several times then ran away. The accused’s case may be distinguished from that of an assailant who continues to strike the victim until the victim passes out or dies. The accused hit the deceased albeit several times then ran away and when the deceased got up and headed to his home he did not follow him. There is also evidence that he did not flee from the area and that he was apprehended at his home the next day. I am not therefore satisfied that any of the circumstances establishing malice aforethought were proved beyond reasonable doubt. I nevertheless find that the accused unlawfully caused the death of the deceased and as this court has power to reduce the charge under **Section 179 (2) of the Criminal Procedure Code**, I find the accused guilty of **Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code** and convict him accordingly.

Signed, dated and delivered in Nyamira this 30th day of July 2020.

E. N. MAINA

JUDGE

Judgement delivered Electronically via Video Link