



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO 22 OF 2019

REPUBLIC.....STATE

VERSUS

ROBINSON LESHAN.....1ST ACCUSED

BERNARD NYAKUNDI MUCHERE.....2ND ACCUSED

JUDGMENT

1. ROBINSON LESHAN and BERNARD NYAKUNDI MUCHERE jointly face a charge of murder contrary to **section 203** as read with **section 204 of the Penal Code**. The particulars of the offence were that on the 23rd May, 2019 at unknown time, within Lamina Bar and Restaurant within Kisii Township, Kisii central sub-county murdered DENNIS OMWANSU MOREKA. The 1st and 2nd accused persons pleaded not guilty to the charge.

2. The prosecution in support of its case called 10 witnesses. In summary, the prosecution's case is that the deceased left home at 5:00 a.m. and proceeded to Lamina Bar and Restaurant where he was beaten by the accused persons and as result suffered fatal injuries leading to his death.

3. Linet Bosibori Nyakundi (Pw1) the wife of the deceased recalled that on the morning of 23rd May 2019 the deceased left the house at 5:00 a.m. she left for work at 9am. Later the same morning she was informed of her husband's death by her colleagues. She found the deceased's body at Christamaria mortuary.

4. Mary Moimbe Mutuku (Pw2) a neighbor to the deceased testified that she last saw the deceased on 22nd May 2019 at 6.00pm climbing the staircase going to his house. At 8.00am the next day she was called by Brian a boda person, he informed her that he had seen a body and that he was not sure if the person was Dennis (the deceased) her neighbor. She called Mayaka and asked him to call the deceased. She later saw the body of the deceased. **Dennis Mayaka Nyakundi** (Pw3) testified that the 22nd May 2019 he was with the deceased and his wife Linet Bosibori Nyakundi (Pw1), at their home and left at around 9:30 p.m. at night. The next day whilst at his place of business he heard that there was a body outside St. Jude's building. He went there and found the body of the deceased lying outside Lamina Club. The deceased was wet and had no shoes. He also observed that the deceased was dressed in jeans of blue and black jumper. He accompanied the body to Christamaria Mortuary.

5. Evans Ngote Orero (Pw7) testified that on the material day he was at Lamina Bar and Restaurant having a drink and playing pool. He recalled that they were not many people. While at the bar, there was some commotion which led to some chairs falling down. The person on the floor asked for help. He testified that he saw the deceased on the floor being kicked and water was poured on him. He testified that the 1st accused poured water on the deceased while the 2nd accused was the one beating the deceased. The lady at the counter told the 2 not to kill the person. He testified that he decided to leave after the incident.

6. Lawrence OngeraOmbui (Pw6) testified that he is a taxi driver. That on 23rd May 2019 he was hired by a person not in court to take a sick person to hospital and after agreeing on the amount he proceeded to St. Jude. The deceased was carried by three people, the 1st accused being one of them. He testified that they placed the deceased in the boot and proceeded to Kisii Level six hospital in the company of the 1st accused. That on reaching the hospital they were informed that the doctors were on strike and were advised to take the deceased to Christamariane. He told court that because he had not been paid to take the deceased to Christamariane Hospital, the 1st accused went back to St. Jude to get him money. That upon arrival at Christamariane Hospital he was informed that the deceased was dead. The 1st accused came after 15-20 minutes and was told that the deceased had died. They were chased away from the hospital as they both refused to avail their identity cards. On their way back to St. Jude, the 1st accused person tried to get out of the vehicle and he was forced to drive in high speed and upon arrival at St. Jude he shouted that the person he had carried was dead. People gathered at the scene. The Manager came from the club, confirmed that the deceased was dead and ran away. The 1st accused attempted to ran away but he held him. He testified that the 1st accused remained with the body at the scene as he went to report the incident to the police station.

7. **Amos Agura** (Pw4) testified that on the material day he had travelled from Nairobi and arrived at the stage at around 7:00 a.m. He decided to get a *bodaboda* at St. Jude and while standing there he saw a man being carried by three people. The person looked drunk. One of the persons carrying him was holding his legs; another person was holding his hands and the third person his head. The man was put into the boot of a probox. The *bodaboda* riders asked why he was put in the boot and the response was that he was drunk. Pw4 identified the 1st accused as the person who spoke to the *bodaboda* riders.

8. **Doctor Benjamin Maibile** (Pw5) told court that he is a pathologist based at Kisii Teaching and Referral Hospital. He testified that he conducted the deceased's postmortem on 25th May 2019 at Christamarian hospital. On the external appearance of the body there was blood coming out of the nose head bruises on the right upper arm and bruises on the back upper side of the back. On opening the body there was blood in the chest cavity about a litre and half. The lungs had multiple bruises and the liver had signs that he was a chronic drinker. The other organs were normal. He formed the opinion that the cause of death was chest injuries due to blunt force trauma. He took specimens of the deceased's bold urine and fluid for further examination at the government chemist.

9. **Corporal Bernard Kirui** (Pw9) told court that he was the investigating officer in the matter while he was attached at Kisii Central Directorate of Criminal Investigations. He recalled that on 23rd May 2019 at around 9.30 a.m. he was informed by Mr. Kerongo of murder reported at Kisii police station and was tasked to investigate the case together with CPL Nyangwa. The case was reported by Pw6. He testified that the scene was documented as the photos were taken by Sergeant Robert Okalo (Pw10) and the deceased's body was taken to Christamariane awaiting post-mortem. They later interrogated the staff at Lamina Bar and Restaurant and the manager gave the names of the staff that were on duty and he recorded their statements. He confirmed that the deceased entered the bar at 05.00 hours and ordered a 210 mls of Kenya Cane and a soda. He was served by the 2nd accused. On the 25th May 2019 a post mortem was done at Christamariane and later charged the suspects for the offence of murder.

10. **Corporal Kennedy Nyangwa** (Pw8) testified on the 23rd May 2019 he recorded the statement of Pw6. They later took the statement of the staff from the bar and attended the post mortem of the deceased at Christamariane mortuary. **Sergeant Robert Okalo**(Pw10) told court that he is attached to crimes scene support services Kisii and his duties include taking crime scene photos and producing the same in court. He took 4 photographs of the area/scene and proceeded to Christamarian hospital where he took 4 photographs of the deceased. He testified that he printed out the photographs and prepared a report and certification. He produced the photo as exhibits 2(a) to (h) and 3.

11. At the close of the prosecution case, I put the accused persons on their defence and they both elected to give sworn statements. The 1st accused Robinson Leshan (Dw1) testified that he was on duty the 22nd May 2019 from 6.00 p.m. and left on the 23rd May 2019 at 6.00 a.m. Many people enter the club he cannot identify who entered and who left. He left work and headed home but was called back by the manager at 8:00 a.m. to help carry a sick person to hospital. He returned and they first took him to the general hospital but were advised to take him to Christamarian where they were informed that the deceased had died. They were asked for their ID cards since they did not have their ID cards they were told to go back with the patient. They returned to his place of work and the driver reported the incident to the police.

12. The 2nd accused Bernard Nyakundi Muchere(Dw2) recalled that at 6:00 p.m. on 22nd May 2019 he reported to work and no incident took place. He went home. He reported back to work on the 24th May 2019 and found people at the gate who informed him of the incident. He went to the police station to see the manager who had been arrested and he wasalso locked up.

ANALYSIS AND DETERMINATION

13. Both parties filled written submissions. I have considered the submissions by the Senior Prosecution Counsel, Mr.Otieno, the accused persons' submissions, the evidence on record and the law.

14. The offence of murder is defined under **section 203** of the **Penal Code** thus; *“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”* From this definition, the prosecution is expected to prove the following ingredients beyond reasonable doubt:

- a) *The death of the deceased and cause of that death;*
- b) *That the accused committed an unlawful act or omission that led to the death; and*
- c) *That the accused committed the unlawful act with malice aforethought.*

15. It is common ground that the deceased died. Pw3, Pw6 and Pw7 all confirmed that they had seen the body of the deceased at the scene. Pw5 who conducted the post mortem testified that the deceased was a 36 years old African male with a height of 186 cms. He testified that on the external appearance, there was blood out of the nose and head. The deceased also had bruises on the right upper arm and bruises on the upper side of the back. Pw5 testified that when he operated the body he observed that there about 1½ - 2 litres of blood in the chest cavity. He told court that the lungs had multiple bruises with native cells contusions. The deceased liver revealed that he had been a chronic drunk. The other organs were normal. He formed the opinion that the cause of death was chest injuries due to blunt force trauma. The fact and cause of the deceased's death was proved by the postmortem results.

16. As for whether the accused persons caused the unlawful death of the deceased, the prosecution relied on the evidence of Pw7 who was the only direct witness. In **Abdalla Bin Wendo & another v Republic [1953] 20 EACA 166**, the Court of Appeal for Eastern Africa had the following to say on the question of identification;

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule 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 following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

17. Pw7 testified that on the material day at 7:00 a.m. he went to Lamina Bar and Restaurant to drink and saw the deceased being beaten by the 2nd accused while the 1st accused poured water on the deceased. Pw7 testified that the 1st accused is well known to him as he is a bouncer at Lamina Bar and Restaurant. In the case of **Anjonomi & 2 Others v Republic [1980] eKLR** the Court of Appeal stated that:

“This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

18. The incident having taken place in the morning around 7:00 a.m. and the 1st accused being a person known to Pw7 I find that he was positively identified by Pw7. Pw6 also testified that the 1st accused was arrested at the scene when they returned to St. Jude with the lifeless body of the deceased. The 1st accused was thus positively identified as one of the perpetrators who committed the unlawful act as the prosecution evidence placed him at the scene at the time of the offence.

19. I now turn to whether the 2nd accused was positively identified. The only evidence tying the 2nd accused to the crime is the testimony of Pw7 who testified that he saw the 2nd accused beating the deceased. Pw7 testified that he was not familiar with the 2nd accused and he had seen him for the first time during the incident. Though no identification parade was held, however I believe Pw7 that saw the 2nd accused beat the deceased. The incident happened in the morning at 7am, I find that Pw7 was able to identify the persons who were with the deceased, who was later carried out of the club. Pw7 evidence that the deceased was the one in the club was corroborated by the evidence of Pw6 who saw the deceased carried from the premises into his vehicle.

20. The evidence of Pw7 shows that the 1st accused and 2nd accused shared common intention with another to inflict injury likely to cause death to the deceased. **Section 21 of the Penal Code** defines common intention as arising;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

21. The 1st accused poured water on the deceased and the 2nd accused beat the deceased. Despite cries from the counter girl plea, whom Pw7 heard that they should not kill him at the club, the 2 continued with their actions. Pw7 testified that he saw the deceased being kicked and his testimony was corroborated by the evidence of Pw5 who confirmed that the cause of death was chest injuries due to blunt force trauma. From the facts I have outlined, there is sufficient evidence to show that the 1st accused and 2nd accused assaulted the deceased and thereby causing his death.

22. The 1st accused defense places him at the scene on the material day. The 2nd accused too was on duty at the said premises. Their defenses cannot displace the prosecution evidence.

23. The next issue is whether there was malice afterthought. Malice aforethought is defined under **section 206 of the Penal Code** as:

“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.”

24. The evidence led by the prosecution was that the deceased entered into Lamina Bar and Restaurant and an altercation ensued between the accused persons and the deceased. The deceased was kicked as per the evidence of Pw7 which was corroborated by the evidence of Pw5 who testified that the cause of death was chest injuries due to blunt force trauma. The injuries on the deceased's chest must have been caused with the intention to cause grievous harm or indeed death within the meaning of **section 206 of the Penal Code**.

Pw6 also testified that the 1st accused attempted to jump off a moving vehicle while they were heading back to St. Jude and the 1st accused while at the scene of crime, again tried to run away. The said acts are inconsistent with innocence. There can be no doubt that the 1st accused had malice aforethought, considering the manner in which the injuries were inflicted on the deceased. The 2nd accused was with the 1st accused when the injuries were inflicted upon the deceased as per Pw7's evidence.

After considering the totality of the prosecution evidence, I find that the prosecution proved their case beyond reasonable doubt. I find **ROBINSON LESHAN** and **BERNARD NYAKUNDI MUCHERE** guilty of murder of **DENNIS OMWANSU MOREKA** and convict the accordingly as charged.

Dated, signed and delivered at KISII this 17th day of September 2020.

R.E. OUGO

JUDGE

In the presence of:

ROBINSON LESHAN 1ST ACCUSED

BERNARD NYAKUNDI MUCHERE 2ND ACCUSED

Mr. NYAKUNDI For the Accused Persons

Mr. OTIENO Senior Prosecution Counsel Office of the DPP

CHOMBA Court clerk