



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: T.W.CHERERE-J)

CRIMINAL CASE (MURDER) 6 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PETER OCHIENG ADOYO.....1ST ACCUSED

POLYCARP ODHIAMBO OBIERO.....2ND ACCUSED

DAVID OCHIENG ADERO.....3RD ACCUSED

JUDGMENT

1. Accused persons herein are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that

On 30th January, 2015 at Rabuor Market in Kisumu East District within Kisumu County murdered NELSON AOKO ACHOLLA

PROSECUTION CASE

2. The prosecution called four(4) witnesses in support of the charge. PW1 Tom Onyango Nyaori, owner of Favourite Bar at Rabuor Market recalled that he shared a table with accused 2 at the bar on 30th January, 2015 at about 9.00 pm and that he had also seen Nelson and Sylvester enter the bar before he left bar. He stated that he returned to the bar at about 10.00 pm when he heard screams and he met Sylvester who told him that him and Nelson had been attacked. That shortly thereafter, his watchman one Abdalla and Sylvester brought Nelson into the bar and he noticed that he was bleeding profusely. That the witness directed Abdalla and Sylvester to take Nelson to hospital and Abdalla later informed him that Nelson had died on the way to hospital. He stated that Sylvester said him that they were attacked by Ochieng, Peter and Polycarp. He also stated that 1st and 3rd accused persons were arrested on the material night and that blood stained clothes were recovered from their respective houses and further that accused 2 was arrested on the same night but that nothing of interest was recovered from him.

3. PW2 sgt Godfrey Shikuku Wabomba after receiving information about the murder visited the scene of crime and was set out to look for the suspects whose names were given as PETER OCHIENG, POLYCARP ODHIAMBO and DAVID OCHIENG. He stated that he went to accused 1's house which he searched and recovered blood stained brown trouser and t-shirt and thereafter arrested him. He stated that he later arrested accused 3 and recovered from him blood stained navy blue trousers and overall. The witness further stated that he recovered a knife from the house of one Odero who said that it belonged to accused 1. The witness later arrested accused 2 who had an injury on his face and recovered a blood stained white jacket from him.

4. PW3 Sylvester Odida Ouma recalled that on 30th January, 2015 at about 7.00pm, he went to Favourite Bar in company of the deceased where they were joined by accused persons. He said that accused persons quarreled the deceased and for that reason they were ordered by PW1 to leave the bar. It was his evidence that as he was walking home with the deceased at about 10.00 pm, they found accused persons and waylaid them. That accused 2 hit the deceased and accused 3 gave accused 1 a knife which he threatened the witness with forcing the witness to run back to the bar leaving the deceased fighting off accused persons. He stated that deceased later went back to the bar bleeding profusely and groaning in pain and he later died on his way to hospital.

5. PW4 PC Peter Ooyi took over investigations of the case long after accused persons were arrested and charged. He produced a knife suspected to be a murder weapon, and blood stained clothes recovered from accused persons as PEXH.1 to 5. With the consent of the defence counsel, the witness produced the deceased's postmortem form PEXH.6, which shows that he died of internal bleeding due to ruptured spleen caused by a penetrating abdominal injury.

DEFENCE CASE

6. In his sworn defence, 1st accused stated that he went to Favourite Bar 30th January, 2015 at about 5.30 pm, bought his drink and left immediately. He said he was arrested from his house the same day at about 3.00 am and was later charged with an offence that he did not commit.

7. Accused 2 in his sworn defence stated that he went to Favourite Bar on 30th January, 2015 at about 9.30 pm. He said he left the bar at 10.00 pm and was attacked by the PW3 and another and was injured on the face with an iron bar. He said he was arrested from his house the same night at about 2.00 am and was later charged with an offence that he did not commit. He said the blood on his sweater was from his own injury.

8. The 3rd accused in his sworn defence stated that he went to Favourite Bar 30th January, 2015 at about 4.00 pm, bought his drink and left immediately. He said he was arrested from his house the same day at about 4.45 am on his way to the farm and was later charged with an offence that he did not commit.

ANALYSIS AND FINDINGS

9. I have considered the evidence on record. To secure a conviction on the charge of murder, the prosecution has to prove three ingredients against an Accused person. In *Anthony Ndegwa Ngari vs Republic [2014] Eklr*, the elements of the offence of murder were listed as follows:-

a) the death of the deceased occurred;

b) that the accused committed the unlawful act which caused the death of the deceased; and

c) that the accused had malice aforethought.

(a) The death of the deceased

10. The death of the deceased has been confirmed by the postmortem form PEXH.6 which shows that deceased died of internal bleeding due to ruptured spleen caused by a penetrating abdominal injury.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

11. There's corroborated evidence from PW1 and PW3 told court that accused persons were at Favourite Bar on the material night at about 9.00 pm to 10.00 pm. Accused persons were well known to PW1 and PW3. Accused 1 is alleged to have sat on the same table with PW1 while PW3 and deceased sat on the same table with accused 1 and 3 after which they were joined by accused 2. From the evidence on record, PW1 and PW3 had adequate time to see accused persons at Favourite Bar on the material night and the possibility of mistaken identity does not arise.

12. PW3 explained in detail how the 3 accused persons after quarrelling the deceased at the bar waylaid them on their way home and attacked them. Although the witness did not witness the actual stabbing of the deceased, it was his evidence that he ran away from the scene when the accused 1 threatened to stab him with a knife given to him by accused 3 and that he had left accused 2 fighting the deceased. The injury that caused the deceased's death was a penetrating injury to the abdomen caused by a sharp instrument which is most likely the same knife that accused 1 was holding when PW3 ran away from the scene of the attack leaving the deceased behind.

13. Having said that, evidence by accused persons that they went to the bar and left at different times is in my view an afterthought and it is rejected in view of the fact that evidence of their presence together at the bar is well corroborated by PW1 and PW3.

14. Further to the foregoing, Accused 2's defence that he was attacked by PW3 and another on the material night is in my considered view also an afterthought for the reason that PW3 was not cross-examined on that issue to test its veracity.

15. Upon a careful evaluation of the evidence, I find that failure to submit the government analysts report on the knife and clothes recovered from accused persons is not fatal since the prosecution evidence that accused persons jointly assaulted the deceased as a result of which he died is overwhelming and effectively dislodges the defence. Indeed by the time the assault stopped the deceased had suffered a penetrating wound to his abdomen as a result of which he later died.

16. The assault on the deceased, for whatever reason was unlawful act. The Court of Appeal in *Njoroge v Republic (1983) 197* held that:

“ If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to affect the common object of the assembly.....”

17. In *Dracaku s/o Afia – vs - Republic (1963) E.A 363* the court observed that:

“ even though there was no evidence that any agreement formed by the appellants prior to the attack made by each, it is not necessary if an intention to act in concert can be inferred from their actions, such as “ where a number of persons took part in

beating a thief.”

18. So it is in this case. Deceased died of a stab wound occasioned during an attack on him and PW3 by the accused persons. Although the deceased succumbed to injuries inflicted by one of the accused persons, it was in the cause of execution of their combined unlawful purpose, that one of them in the prosecution of it killed the deceased.

19. Consequently; I find that the Prosecution proved beyond any reasonable doubt that the three accused persons jointly committed the unlawful act which caused the death of the deceased which constitutes the ‘*actus reus*’ of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought.

20. There is of course no requirement under Section 203 of the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought.

The ingredients of murder were explained in the case of *Roba Galma Wario vs Republic [2015] eKLR* where the court held that;

“ for the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

21. Malice aforethought was defined in the following cases;

(a) *Nzuki Vs Republic [1993] KLR 171* where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

-intention to cause death

-Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of *Daniel Muthee Vs Republic Criminal Appeal No.218 of 2005 (UR)* cited in the case of *Republic Vs Lawrence Mukaria & Another (2014) eKLR*, *Bosire, O’kubasu and Onyango Otieno JJA.,* while considering what constitutes malice aforethought observed as follows:

“ When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

22. I have considered the extent of the penetrating stab injury on his abdomen which is a delicate part of the body and there is no doubt in the mind of the court that accused persons must or ought to have known that the unlawful act of wounding the deceased on the abdomen would cause him grievous harm or even death.

23. In my considered view, the prosecution case overwhelming and effectively dislodged the defence offered by the accused persons. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

Disposition

24. Consequently, I have come to the conclusion that the state proved its case beyond reasonable doubt. Each accused person is hence jointly found **GUILTY** of the offence of murder and each is convicted accordingly.

DELIVERED AND SIGNED IN KISUMU THIS 28TH DAY OF MARCH 2019

T.W.CHERERE

JUDGE

Read in open Court in the presence of

Court Assistant – Felix

Accused 1 – Present

Accused 2 – Present

Accused 3 – Present

For Accused persons –

For the State – Mr Muia