



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO 7 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

KENNETH NAPUTO ESHO.....ACCUSED

JUDGEMENT

INTRODUCTION

The accused is charged with murder contrary section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, Keteere Esho. He pleaded not guilty.

The accused made an unsworn statement. The defence of the accused is that he was framed. He did not call any witnesses in his defence.

The case for the Prosecution

The prosecution called Sila Kudate (PW 3), who was with both the accused and the deceased. Pw 3 testified that on the material date on 2nd May 2018, they were going to the home of the deceased. It was his further evidence that a tractor driver gave the deceased shs. 500 for allowing him to pass through his land, since the road was impassable. The accused ran from behind the deceased and hit him on the left side of his head with a metal studded rungu. As a result, the deceased became unconscious. He was rushed to a local hospital, which was unable to treat him. The deceased was eventually taken to the hospital in Nakuru, where he died while undergoing treatment.

In addition to PW 3, prosecution called Saitoti Esho (Pw 4). Pw 4 is a cousin to the accused. He is also a brother to the deceased. The deceased told Pw 4 that he was weak and that he had been beaten by the accused. The deceased then told Pw 3 to take him to hospital.

Dr. Ngulungu did a postmortem examination on the body of the deceased. The report of the postmortem was put in evidence as exhibit 1 by consent of the parties by the investigating officer, No 96075 PC Dennis Mugambi (Pw 6).

A report was made to the police, who arrested the accused here in Narok town. It is the police who were in the company of Pw 6 that arrested the accused.

The case for the defence

Upon being put on his defence, the accused made an unsworn statement. He did not call any witnesses in his defence. The accused described the deceased as his cousin. On 2nd May 2018, the accused, Pw 3 and the deceased went to Topoti centre, where they drunk cane extra beer from 10.00am to 1.00 pm. At 1.00 pm he decided to go home, but Pw 3 prevented him from leaving the bar by locking the exit door. Thereafter he left that bar and went to another one. It was his further statement that the deceased was so drunk that he was unable to stand. The accused was also so drunk that he only regained his conscious by 5.00 pm. It is at that point in that P W 3 told him to escape since he had knocked someone. According to him it is Pw 3 who assaulted the deceased. Finally, he stated that it was Pw 3, Saitoti, Kennedy Taga and Wilson Esho who framed him in respect of this offence.

Submissions of counsel for the accused

Counsel for the accused filed written submissions in which he cited a number of authorities including *Rex v Kipkering arap Koske and Another (1949) 16 EACA 135*. He urged the court to acquit his client since the prosecution had failed to prove the charge.

Issues for determination.

I have considered both the prosecution and defence evidence together with the submissions of counsel in the light of the applicable law. I find the following to be the issues for determination. Whether or not it is the accused who caused the death of the deceased. Whether or not the evidence discloses murder or manslaughter.

Issue 1

I find from the prosecution of Pw 3 that the accused came from behind the deceased and hit him with a metal studded rungu on the left side of the head. The evidence of Pw 4 is that the deceased told him that the accused had assaulted him. The report of the postmortem exhibit 1 shows the cause of death to be due to a blunt head injury. This is consistent with the usage of the rungu by the accused. I find the evidence of these witnesses to be credible. I further find the unsworn statement of the accused to be incredible. The evidence of PW 3 is direct evidence. The evidence of Pw 4 is that of a dying declaration in terms of section 33 (a) of the Evidence Act (Cap 80) Laws of Kenya. I therefore find that this is not a case of circumstantial evidence as contended for by counsel for the accused. In the circumstances I find that it is the accused who caused the death of the deceased.

Issue 2

I find from the evidence that the attack by he accused was not provoked at all. I further find that the accused used a metal studded rungu in attacking the deceased. I therefore find that the accused had malice aforethought when he attacked he deceased. The attack was unprovoked. In the circumstances, I find that the evidence discloses murder and I therefore convict the accused of murder.

Judgement dated, signed and delivered in open court at Narok this 25th day of March, 2019 in the presence of Mr. Omwega for the state and Mr. Meingati for accused.

J. M. BWONWONGA

JUDGE

25/03/2019