



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

RODGERS AKHUDU MAGIO.....ACCUSED

JUDGMENT

1. **Rodgers Akhudu Magio** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the night of 4<sup>th</sup> and 5<sup>th</sup> day of May 2018, at **Mungina** village Bunyala **East** Location of **Busia** County, murdered **Rosemary Auma Mayamba**.
3. The prosecution case was that the accused and the deceased were a husband and wife. Apparently they had some differences and the deceased sought refuge in her grandmother's home. The accused followed her there and asked her to accompany him home but she declined. On the following day he went and fatally stabbed her.
4. **Rodgers Akhudu Magio**, the accused, in his defence denied any involvement in the murder. He contended that he was a sand harvester and not a boda-boda rider.
5. The issues for determination are:
  - a) Whether the accused was a boda-boda rider;
  - b) Whether, if so, he could be connected to the motor cycle that was abandoned in the home of Jentrix Mugendi (PW1);
  - c) Whether it was the accused who fatally stabbed the deceased; and
  - d) Whether the offence of murder was established.
6. The prosecution contended that the accused was a boda-boda rider. Evidence was adduced by Joseph Busaka Wafula (PW7). This witness testified that he had employed him as a boda-boda rider. In the course of their employment agreement, he made a copy of his (accused's) identity card. This copy of identity card was produced as an exhibit.
7. In his evidence, the accused, contended that he was a sand harvester and said he was never a boda-boda rider. He went on to suggest that the investigating officer may have made a copy of his identity card.
8. The contention by the accused is hollow for it does not explain why Joseph Busaka Wafula (PW7) could testify falsely against him. I therefore make a finding that the accused was a boda-boda rider engaged by Joseph Busaka Wafula (PW7).
9. Jentrix Mugendi (PW1) testified that on 4<sup>th</sup> May 2018 at about 8 p.m. a boda-boda rider requested to leave his motor cycle outside her home. She consented and the motor cyclist went away. Unfortunately, she did not take note of the rider's face. When she woke up the following day, she found the motor cycle still outside her house. When she returned home at about 10 a.m. and found the motor cycle still there, she reported to the chief who collected it together with police officers.
10. Augustine Swart (PW6) and P.C Solomon Wasilwa (PW8) testified that the motor cycle found in the home of Jentrix Mugendi (PW1) was bearing registration number KMDT 007E.

This is the motor cycle that Joseph Busaka Wafula (PW7) went to the police and confirmed to be his and which the rider he had engaged said was the accused.

11. There is therefore sufficient evidence on record to connect the accused to the motor cycle KMDT 007E.

12. According to the evidence of Florence Nelima (PW3) and who was the grandmother of the deceased herein events leading to the death of her granddaughter started on 2<sup>nd</sup> May 2018. On this particular night the accused went to take the deceased away. She said the two were husband and wife. When the deceased declined to accompany him indicating that it was at night, he started to beat her. Apparently he left without her for he returned on 4<sup>th</sup> May 2018 at about 9 p.m.

13. The events of 4<sup>th</sup> May 2018, according to the evidence of Florence Nelima (PW3), occurred when the deceased had gone out to answer a call of nature. She said the deceased returned to the house crying that Rodgers had stabbed her and she was bleeding from the stomach. Though this witness testified that she saw Rodgers when he was fleeing I make a finding that this was not possible. My finding so is informed by the evidence of Rodgers Ojiambo Ekesa (PW4) who was in the same house with her.

14. In his testimony, Rodgers Ojiambo Ekesa (PW4), said that the night was dark and that when he opened the door he never saw anybody. At the time he went out, he left his grandmother(PW3) inside the house.

15. Florence Nelima (PW3) and Rodgers Ojiambo Ekesa (PW4) however agreed on whom the deceased said had stabbed her. Both testified that both said that she had been stabbed by Rodgers, her husband. Rodgers Ojiambo Ekesa (PW4) said that he had not known Rodgers, the husband of the deceased. This evidence gives credence to that of Ojiambo Wafumbua Odinga (PW2). He testified that he recognized the accused from a distance of about 17 paces by use of a spotlight. The recognition was made when the accused was passing by him.

16. In the celebrated case of **R v Turnbull [1976] 3 All E.R. 549** Lord Widgery CJ said the following:

**Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?**

In the instant case, the witness testified that he saw a person running away from Musumba's home where an alarm had been raised. When this person passed near him, he recognized him as Rodgers, the accused. This was at about 9.30 p.m. He further testified that he had known him before. I therefore make a finding that the recognition of the accused by this witness was safe.

17. The evidence of recognition by the deceased and by Ojiambo Wafumbua Odinga (PW2) is further bolstered by the evidence of Joseph Busaka Wafula (PW7) that he had engaged the accused to ride his motor cycle. This is the motor cycle that was left at the home of Jentrix Mugendi (PW1) on 4<sup>th</sup> May 2018 at about 8 p.m. It is my finding therefore that it was the accused who fatally stabbed the deceased.

18. Though no witness testified of existing differences between the accused and the deceased, it is clear from the evidence of Florence Nelima (PW3) that all was not well between the two. She testified that on 2<sup>nd</sup> May 2018 when the deceased declined to accompany the accused to their home, he started to beat her.

19. Prior to the deceased going out on what she said was a call of nature she had received three calls and Rodgers Ojiambo Ekesa (PW4) testified that she had told them it was her husband who was calling her. Shortly she went out to answer a call of nature.

20. In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR** defined malice aforethought as follows:

**Malice aforethought describes the mens rea or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If 'malice aforethought' is lacking the unlawful homicide will be manslaughter.**

Section 206 of the Penal code gives four instances when malice aforethought may be established. It provides:

**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.**

21. We may not know what transpired when she said she was going to answer a call of nature. What we may conclude safely is that she was going out to meet her husband. Sad as it is, we cannot know whether the accused had come to the home to kill her or to persuade her to return home. We also cannot tell what the response of the deceased may have been. With these doubts, I make a finding that the prosecution has not proved malice aforethought. I therefore reduce the charge of murder to that of manslaughter. I accordingly convict the accused for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 26<sup>th</sup> day of November, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**