



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 62 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JONATHAN ONGWEKO OFWENDE.....ACCUSED

J U D G M E N T

Introduction

1. The accused herein, Jonathan Ongweko Ofwende is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the offence are that on the 20th day of December, 2011 at 8.00pm at Bunyang'anyi Village in Navakholo District within Kakamega County, he murdered Japheth Ofwende Wanje.
2. The accused denied the charge when read to him and the case proceeded to full hearing Miss Mahuni Advocate represented the accused during the trial.

Prosecution Case

3. The prosecution called a total of five witnesses, but because PW4 was skipped in the record, there were four witnesses. PW1 Stephen Nyongesa (Stephen) testified that on the 20th December, 2011 at about 9pm he was told that the accused was killing his grandfather. He ran to the scene where he found the accused, and the deceased who had been assaulted. He took the deceased to hospital in the company of his brother one Moses and then he went back home.
4. At about 4.00am he was called from the hospital and informed that the deceased had passed on. On cross examination he explained that he did not see the accused and his mother assaulting the deceased but found the accused sleeping in the kitchen while crying uncontrollably.
5. PW2 Moses Wawire (Moses) testified that on 20th December, 2011 he was at home at about 8 pm when he was called by one Boniface and informed him that his uncle Jonathan who is the accused herein was assaulting their grandfather. He went to the scene where he found the deceased lying down on the ground with his mouth, face and head injured. Together with PW1 they took the deceased to hospital. The deceased was treated but he died at about 5.00am next morning.
6. Moses testified that he identified the deceased's body for purposes of post mortem examination. It came out from his testimony that the accused used to quarrel with the deceased, especially when the accused was drunk. PW3 Dofik Douglas Ofwende was informed of the death of the deceased by one Stephen on the 21st December, 2011. The deceased was his father. He witnessed the post mortem examination and also identified the body of the deceased to the doctor who performed the post mortem examination. On cross examination he explained that he had received reports that the accused used to quarrel with the deceased whenever he (accused) was drunk.
7. The area assistant chief, Peter Nabiswa also testified and told the court that he got a report from one of the village elders that the deceased had been assaulted by his son on the 19th December, 2011 while they were eating. According to PW5 (Peter), the son hit his father with a chair. Apparently the two were both drunk. The deceased was then taken to hospital where he succumbed to the injuries. He visited the scene and saw blood in the house near the kitchen where the fight occurred. He was the one who apprehended the accused in the first instance and took him to Navakholo Police Station. He claimed that the accused's mother witnessed the fight and according to him the weapon used was a chair.
8. Dr. Juma Khayombe, a Medical Officer of Health from St. Mary's Mission Hospital Mumias testified as PW6 and produced the post mortem report on behalf of Dr. Duncan Oluoch who left for further studies. He testified that he was familiar with his colleague's handwriting and signature. The post mortem report was dated 22nd December, 2011.

9. According to the report the post mortem examination was done on 22nd December, 2011 at 5.00pm. Dr. Juma found that the body, which was by then stiff, had bruises on the face and head. There was also haematoma on the head and a healing wound on the left leg. Internally the head had subdural haematoma which he said was the cause of death.

10. A death certificate was issued being No. 093528 in which the doctor opined that the cause of death was increased intracranial pressure secondary to subdural haemorrhage secondary to blunt trauma. He produced the post mortem report which is marked as "PEX1." The prosecution closed its case at this juncture.

Defence Case

11. The accused was put on his defence after this court found that a prima facie case had been established against him. The accused chose to give a sworn statement but he did not call any witnesses.

12. He testified that on the 20th December, 2011, he was at home at about 5.20pm when his father asked him for a bull. He gave the said bull to his father who sold it at Nambacha Market on the 21st December, 2011 for Kshs.85,000/=. After selling the bull, the deceased told the accused that he wanted to go to Bungoma.

13. The accused maintained that his relationship with his father was good and that he had no grudge with him. He further testified that the Assistant Chief arrested him because the Assistant Chief had a grudge with him. He claimed that the assistant chief's evidence was full of false-hoods.

14. On cross examination the accused stated that deceased died after he had been at Bungoma. He claimed to have found his father drinking chang'aa and he decided to take him to hospital because he looked sick and has scratches on his face. He also claimed that his father told him that he had fallen. He denied hitting his father with a chair.

Analysis and Determination

15. The events that led to the death of the deceased took place in the deceased's home. It was at night and the deceased together with accused and accused's mother were having supper. There is no clear evidence on record as to what actually happened and how and with what the accused assaulted the deceased. What is on record is that Stephen was called the same night and informed of the assault. Together with Moses they took the deceased to hospital but deceased who was their father succumbed to the injuries in the wee hours of the morning. A post mortem was performed and the report produced by PW5. None of the prosecution witnesses saw what happened between the deceased and the accused on that fateful night.

16. The accused claimed that his father the deceased squandered the money he received after selling one of his bulls. He claimed to have found his father drinking chang'aa and the father told him that he was sick and he took him to hospital. He claimed that the deceased told him he had fallen.

17. Section 203 of the Penal Code defines murder as a death that is caused by a person or persons with malice afore-thought and through an unlawful act or omission. There are three ingredients of murder which must be proved beyond reasonable doubt in order to secure a conviction.

a) The death of the deceased and the cause of that death

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

c) That the accused acted with malice aforethought

18. All the prosecution witnesses testified to the fact that the deceased died. There was an autopsy done on the body and the post mortem report was produced by Dr. Juma. From the report, the cause of death of the deceased, was increased intracranial pressure secondary to subdural haemorrhage secondary to blunt trauma. The post mortem report was produced before this court as PExhibit 1.

19. The second ingredient is whether it was the accused who committed the unlawful act which caused the death of the deceased. The prosecution called Stephen and Moses who both went to the scene immediately after they received information of the assault. They however arrived after the incident had taken place. They found the accused and their grandmother and the deceased who was lying down crying. Stephen and Moses took the deceased to hospital. From their testimonies both the accused and the deceased were drunk.

20. In my considered view, there is a missing link in this evidence, which would have shown that the accused is the one who hit the deceased, although there is every suspicion that he did so. However, the law does not operate on suspicion but on facts, and suspicion, no matter how strong cannot be used as a basis for a conviction.

21. Lastly on the issue of malice aforethought, the prosecution witnesses only stated that the accused often quarreled with the deceased but this has not properly come out from the testimonies of both Stephen and Moses. It is my considered view that this case was not properly investigated. Where was Boniface and the other child who went to call Stephen? Although the prosecution is not under a duty to call everyone or anyone in particular as a witness, it was necessary in this case for the prosecution to have called the witnesses I have mentioned above to tie the loose ends together. It was also necessary to call the Investigating Officer to tell the court why and when the accused was arrested. With these glaring gaps in the prosecution case, there can be no proof of malice afterthought on the part of the accused. This court cannot manufacture evidence for the prosecution, and inspite of my sixth sense telling me the accused killed his father, there is no evidence to support that felling and the accused must receive the benefit of the doubt. I therefore find the accused not guilty and acquit him according

under Section 322(1) of the Criminal Procedure Code. Unless he is otherwise lawfully held, the accused is set free forthwith.

It is so ordered

Judgement delivered, dated and signed in open court at Kakamega this 23rd day of May 2018

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Ngetich (present).....for state

.....Miss Mahuni (present).....for accused

.....Polycap Mukabwa.....court assistant.