



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL CASE NO. 22 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

AYUB RAPANDO LUBWA ACCUSED

JUDGMENT

1. The accused, *Ayub Rapando Lubwa*, is charged with the offence of murder contrary to *section 203* as read with *section 204* of the *Penal Code*. It is alleged that on 16th March 2012 at Kiliboti Villiage, Kiliboti Sub-location in Western Province, he murdered *Jackline Naibei*. He denied the charges.
2. In support of its case, the prosecution called a total of nine witnesses. The court record shows that the trial opened before *Hon Mshila, J* on 23rd May, 2012. She heard two witnesses before proceeding on transfer to another station. I took over the trial on 10th December 2014.
3. Briefly, the prosecution case is that both the deceased and PW1 were living in the same compound but in different houses. PW1 *Joash Amiya Nawate* in his evidence recalled that on 16th March, 2012 at around 8 pm, he was in his house when he heard persistent knocks on the door to the deceased's house. On getting out of his house, he saw that it was the accused, his neighbour who was knocking on the door. Upon enquiry, the accused claimed that he wanted to talk to the deceased. He noted that the accused was holding onto a bicycle and was armed with an iron bar.
4. On hearing the two men conversing outside her house, the deceased enquired from PW1 what was happening. PW1 informed her that there was a man who wanted to talk to her. The deceased then opened her door and on seeing the accused, she asked him why it was necessary for him to follow her into her house after refusing his advances. According to the evidence of PW1, the accused without uttering any word hit the deceased on the head with the iron bar he was holding. She fell down and the deceased fled the scene with the iron bar.
5. After the attack, the deceased started bleeding profusely. PW1 left her under the care of his wife Nancy while he went to report the matter to the area assistant chief. On the following day, he took the deceased to Webuye District Hospital for treatment. Her wound was stitched and she was discharged.
6. It was PW1's further testimony that on 18th March 2012, the deceased's condition deteriorated. He took her back to Webuye District Hospital and she was admitted for further treatment. *Vincent Mulunda Momo*, her brother (PW3) was notified about her condition. He went to the hospital and was advised to transfer her to Moi Teaching and Referral Hospital for further treatment. PW3 testified that he did not have money to transfer the deceased to Moi Teaching and Referral Hospital. He opted to take her to Tororo Hospital which was near their home. Unfortunately, on their way to Tororo, the deceased succumbed to her injuries. This was on 20th March, 2012. He took her body to their home at Kapina village.
7. The deceased's death was reported to PW8, *Cpl Godfrey Opwora* on 21st March, 2012 at Lukamanda Police Station by PW1 and the deceased's brother who testified as PW5. PW8 was the investigating officer in this case. Accompanied by the officer in charge of the police station, PW8 visited the scene of crime at Nandirima village. He had the deceased's body taken to Bungoma District Hospital mortuary. In the course of his investigations, he established that the deceased had been employed by PW1 in his illicit brew business and that the accused and the deceased were lovers.
8. On 26th March 2012, a post mortem examination was performed on the body of the deceased. The body was identified by the deceased's two brothers PW3 and PW5 to PW9, *Dr Raymond Damba* who conducted the autopsy. According to the doctor, the deceased had suffered a linear skull fracture on the parietal region measuring 100 metres in length. There was massive bilateral subdural haematoma. He formed the opinion that the cause of death was severe head injury secondary to blunt force trauma with fractured base of the skull. He completed the post mortem form which he produced as Exhibit 4.
9. After the close of the prosecution case, I determined that the prosecution had established a *prima facie* case against the accused. I

consequently put him on his defence. In his defence, the accused elected to give a sworn statement and called his brother as a witness.

10. In his evidence, the accused testified that on 16th March, 2012 at 6pm, he left his place of work at Indangasi Jaggery located at Lurambi, Kakamega District. He went to PW1's house riding a bicycle arriving there at around 6pm. He found several people consuming *busaa*, a traditional brew.

11. He conceded that PW1 was his neighbour and that the deceased who used to work for PW1 as a waiter was his girlfriend. At the time he arrived, the deceased and PW1's wife were serving customers. The deceased served him with *busaa* worth KShs.50. He paid for it using a KShs.1,000 currency note. The deceased then engaged him in some conversation regarding his expected change. This infuriated PW1 who started quarrelling him. Sensing trouble, he left the house but PW1 followed him and started beating him up. The deceased and PW1's wife who had followed them started screaming. As he was trying to run away riding his bicycle, PW1 held it back and as they were struggling, pushing and pulling for possession of the bicycle, it accidentally hit the deceased on her forehead. He eventually managed to run away to the safety of his home leaving the bicycle behind. He only learnt about the death of the deceased five days later. He denied having assaulted the deceased with an iron bar as alleged and claimed that he had no reason to do so since the deceased was his good friend.

12. In his evidence, DW2 the accused's brother conceded that he was not in PW1's compound on 16th March, 2012 and that he did not witness how the deceased sustained the injuries that led to her death. He only heard about what allegedly happened from other people.

13. Learned counsel for the accused, *Mr Omboto* made final written submissions but learned prosecuting counsel *Ms Kainga* elected not to make any submissions. She relied on the evidence on record.

14. I have carefully considered the evidence on record in its entirety, the submissions made by *Mr Omboto* and the authorities cited.

15. I wish to start my analysis of the evidence adduced in this case by pointing out that in a case of murder, like in all criminal cases, the prosecution bears the burden of proving the charges against the accused person beyond any reasonable doubt. The prosecution must prove beyond reasonable doubt that the deceased died as a result of the deceased's unlawful act or omission; that in perpetrating the act or omission, the accused had malice aforethought. Put differently, the prosecution must prove both *actus reus* and *mensrea* on the part of the accused.

16. The *mensrea* required for the offence of murder is otherwise referred to as malice aforethought. The circumstances which give rise to malice aforethought have been prescribed in *section 206* of the *Penal Code* as follows:

“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.”

17. In view of the foregoing, I find that the only issue which emerges for my determination is whether the prosecution has proved beyond doubt that the accused caused the death of the deceased herein with malice aforethought.

18. From the evidence of PW1, PW3, PW9 and the accused's testimony, there is no doubt that the deceased died on 20th March, 2012 as a result of injuries she sustained while in PW1's compound on the night of 16th March, 2012. However, PW1 and the accused, the only witnesses who claimed to have been present when the deceased sustained those injuries gave conflicting evidence regarding how the deceased was injured. PW1 claimed that it was the accused who hit the deceased on the head with an iron bar when he went to her house and she expressed reluctance to talk to him.

19. The accused in his defence denied that allegation and claimed that the deceased was accidentally hit and injured on her head by his bicycle as he was struggling to run away from PW1 who was assaulting him. It is worth noting that both PW1 and the accused in their evidence alluded to the presence of PW1's wife when the deceased sustained the fatal injuries but the prosecution did not call her as a witness to tell the court what exactly happened.

20. Given that the prosecution did not avail any other witness to support PW1's evidence against the accused and considering that the accused gave a sworn statement in defence denying having committed the offence as alleged and introducing another version regarding how the deceased sustained the fatal injuries, I find it difficult if not impossible to make a clear finding of fact on how the deceased sustained the injuries that caused her death. The difficulty arises from the fact that the iron bar allegedly used as the murder weapon was not recovered. The evidence on record therefore amounts to the word of PW1 against that of the accused.

21. When I juxtapose the evidence of PW1 and that of the accused with the rest of the evidence, I am more inclined to believe the evidence adduced by the accused in his defence since he appears to have been a more truthful witness than PW1. He was consistent in his narration of

events on the fateful night from the time of his arrest and throughout the trial. I say so because what he said in his defence tallied with what he told PW7 soon after his arrest when he recorded his statement under inquiry.

22. PW1 on the other hand did not appear to have been candid in his evidence. His evidence was totally discredited by the evidence adduced by the other prosecution witnesses. Though PW8 established in the course of his investigations that PW1 was a trader in illicit brews, PW1 strenuously denied this fact in his evidence under cross examination. In addition, he categorically denied that he had ever employed the deceased in his brew business yet PW3 and PW8 confirmed in their evidence that the deceased was indeed his employee. In his bid to cover up his illicit brew business, PW1 deliberately failed to disclose the circumstances in which the deceased was living in his compound. I must say that I formed the distinct impression that PW1 was not a credible and reliable witness.

23. In view of the foregoing, I find that the prosecution has not proved to the required standard its allegation that the accused exclusively caused the death of the deceased by unlawfully assaulting her with an iron bar. The evidence considered as a whole points to a possibility that the deceased could have sustained the fatal injuries after being accidentally hit by a bicycle in the course of a commotion between PW1 and the accused as claimed by the accused in his defence.

24. In view of the foregoing, it is my finding that the prosecution has in this case failed to prove beyond reasonable doubt both the *actus reus* and *mens rea* on the part of the accused to establish the offence of murder. Consequently, as required by the law, I will give the accused the benefit of doubt and enter a finding of not guilty. And as the evidence on record does not prove beyond doubt the lesser offence of manslaughter, the accused is hereby acquitted. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED and SIGNED at NAIROBI this 7th day of June, 2018.

C. W. GITHUA

JUDGE

DATED and DELIVERED at ELDORET this 26th day of June, 2018.

S. M. GITHINJI

JUDGE

In the presence of:

Mr Chepkwony h/b for Mr Omboto: Advocate for the accused

Ms Oduor: Advocate for the State

.....: Court Clerk