



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE (MURDER) NO. 2 of 2017

REPUBLIC.....PROSECUTOR

VERSUS

CALVIN OUMAMADO.....1ST ACCUSED

JACK OMONDI OKUMU.....2ND ACCUSED

JUDGMENT

1. CALVIN OUMA MADO and JACK OMONDI OKUMU, herein after referred to as 1st and 2nd accused respectively) 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 12th March, 2017 at Konyango area in Kisumu East Sub-County within Kisumu County, jointly with others not before the court murdered FRANCIS OWINO OWUOR (hereinafter referred to as the deceased)

PROSECUTION CASE

2. The prosecution called 5 witnesses. PW1 Jared Ouma Otieno stated that on 12.3.17 at 3.00 am, he went out of his house after he heard found a crowd gathered and saw two men that were armed with hammers attacking the deceased who was lying in a trench. That he requested the attackers to take the deceased who was alleged to have stolen a TukTuk to the police station but instead they tied his legs to the back of a TukTuk and dragged him away. The witness stated that he called Kondele Police Station and immediately thereafter, police officers arrived in a vehicle and he directed them towards the direction that the Tuk Tuk had been driven to. He stated that he later learnt that the deceased had died. He said that he identified the 2 accused persons as the ones that dragged the deceased using a Tuk Tuk.

3. PW2 CPL Joseph Ouma stated that on 12.3.17 at about 3.00am, he was instructed to go to Koyango area and rescue a victim that had been attacked. That he went to the scene with his colleagues and upon arrival saw a TukTuk registration number KTWB863B dragging a man tied to it with a rope. That they followed the TukTuk and managed to arrest accused 1 who was a passenger and accused 2 that was the driver. That they took the victim who was barely alive to Avenue Hospital where he died later in the day.

4. PW3 Dr. Abiero Jorum of Jaramogi Oginga Odinga Teaching and Referral Hospital Mortuary produced deceased's post mortem filed by him whom he stated he had worked for 2 years and knew her signature and handwriting. The postmortem dated 20.3.17 (PEXH.4) shows that the body of deceased had the following injuries:

- 1) de gloving injury on left hand
- 2) extensive abrasions in both upper limbs
- 3) abrasion on abdominal region
- 4) massive subdural haematoma in both right and left parietal regions
- 5) brain oedema with pressure effects

5. The doctor formed an opinion that the deceased died of severe head injury with massive subdural haematoma secondary to blunt force trauma on the head.

6. PW4 PC Chrispinus Abula, a scene of crime officer visited Kondole Police Station on 13.3.17 where he took 5 photographs of a yellow a Tuk Tuk registration number KTWB 863B which had a rope tied to its boot and which was alleged to have been involved in murder which he produced as PEXH.1 (a) to (e) and a certificate thereof as PEXH.2.

7. PW5 CPL Samuel Sang, the investigating officer testified that he gathered information from deceased's wife Sharon Achieng that the deceased was attacked for allegedly stealing a Tuk Tuk. He told court that Sharon informed him that accused 1 went to their home at about 2.00 am on 12.3.17 and demanded that the deceased give him back his Tuk Tuk after which he raised an alarm and a crowd gathered and assaulted the deceased. He stated that he gathered information from accused 1 that the deceased used to drive accused 1's Tuk Tuk and would be paid Kshs. 1,000/- per day. That on 12.3.17 about 2.00 am, accused 1 allowed the deceased to use the Tuk Tuk to take his sick wife to hospital but the deceased called later and said that the Tuk Tuk had been stolen. He stated that accused persons were arrested having dragged the deceased on tarmac road for about 1km from scene of crime and they were later charged. With the consent of the defence counsel, the witness produced a statement by Sharon Achieng, deceased's wife recorded on 12.3.17 in which she named accused 1 as one of the persons that attacked the deceased for allegedly stealing a Tuk Tuk on 12.3.17.

DEFENCE CASE

8. After the close of the prosecution case, I placed the accused persons on their defences.

9. 1st accused denied that he was a Tuk Tuk driver. He stated that on night of 12.3.17, he went out of his house after he saw a crowd gathered and he found an injured man lying next to a yellow Tuk Tuk. He said police arrived at the scene and some people managed to escape but he was arrested and was later charged with an offence he did not commit.

10. 2nd accused stated that on the night of 12.3.17, he was driving his Tuk Tuk when he received information that another Tuk Tuk driver had been robbed of his Tuk Tuk at Koyango area. He stated that he went to Koyango area where he found several people and Tuk Tuks. It was his evidence that after he alighted from his Tuk Tuk, a man was tied to it and dragged away. He stated he was going after his Tuk Tuk when he was arrested and was later charged with an offence he did not commit.

ANALYSIS AND FINDINGS

11. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove the following three ingredients against the accused persons.

(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

12. The death of the deceased has been confirmed by the postmortem form PEXH.1 produced by PW4 that shows that deceased had degloving injury on left hand; extensive abrasions in both upper limbs; abrasion on abdominal region; massive subdural haematoma in both right and left parietal regions and brain oedema with pressure effects and had died of Severe head injury with massive subdural haematoma secondary to blunt force trauma on the head.

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

13. Both accused persons have conceded that they were at the scene where deceased was attacked but they have denied that they assaulted the deceased. And contrary to accused 1's defence, accused 2 in cross-examination stated that he knew accused 1 as a Tuk Tuk driver thereby dislodging accused 1's defence that he was not a Tuk Tuk driver.

14. PW1 Jared Ouma Otieno stated that he saw accused persons attack the deceased with hammers before they dragged him away tied at the back of a Tuk Tuk.

15. PW2 CPL Joseph Ouma stated he arrested accused 1 who was a passenger and accused 2 that was the driver of Tuk Tuk registration number KTWB 863B that was dragging the deceased along the tarmac on the night of 12.3.17.

16. I have carefully considered the prosecution case vis a vis the defence case. PW2's evidence that he arrested accused persons while they were dragging the deceased who was tied to Tuk Tuk registration number KTWB 863 B connects them with the crime, corroborating PW1's evidence in Material particular not only that the crime was committed but also that the accused persons committed it. (See Republic v Manilal Ishwerlal Purohit (1942) 9 EACA 58, 61).

17. Upon a careful evaluation of the evidence, this court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the accused persons. I am satisfied that accused persons inflicted the deceased with considerable injuries that led to his death which constitutes the 'actus reus' of the offence.

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

18. Malice afore thought was defined in the case of 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.

19. In the case of DANIELMUTHEE 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 afore thought 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 afore thought was established in terms of Section 206(b) of the Penal Code."

20. The deceased suffered severe head injury with massive massive sub dural haematoma in both right and left parietal regions, brain oedema with pressure effects secondary to blunt force trauma on the head.

21. The attack on the deceased was so brutal that he was not only injured on the head but was also dragged on tarmac as a result of which he suffered de gloving injury on left hand, extensive abrasions in both upper limbs and abrasion on abdominal region. The cruelty meted out on the deceased leaves no doubt in the mind of the court that accused persons must have known that the violence meted out on the deceased would either cause him grievous harm if not death.

22. From the foregoing, I am convinced that malice afore thought has been established in terms of Section 206(b) of the Penal Code.

Disposition

23. Consequently, I have come to the conclusion that the state has proved its case beyond reasonable doubt. Both accused persons are hence found GUILTY of the offence of murder and are accordingly convicted.

DATED AND DELIVERED AT KISUMU THIS 23rd DAY OF October 2018

T. W. CHERERE JUDGE

Read in open court in the presence of-

Court Assistant Felix Accused 1 present Accused 2 present

For Accused Mr Nenko For the State Mr Muia -