



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCR. NO. 06 OF 2015

THE STATE.....PROSECUTOR

=VRS=

EOA.....1ST ACCUSED

KOO.....2ND ACCUSED

JUDGEMENT

The accused persons, a father and his son are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the night of 29th and 30th July 2011 at Bonyengwe Sub-location in Nyamira County in the Republic of Kenya they jointly murdered IOO. They denied the charge.

To prove its case, the prosecution called six (6) witnesses. According to a statement that the deceased recorded at Nyamira Police Station following the incident on 29th July 2011 at about 6pm, the deceased then a Form three student at [Particulars withheld] Secondary School was on his way home from school when he met KO, the 2nd accused in this case. He had borrowed some books from K (2nd accused) and so when K told him he had the books at home he agreed to go to their home for the books. He followed the 2nd accused who went and left him at his brother's house. Shortly afterwards the 2nd accused went back to the house with his father. They were armed with rungs and a slasher. The accused persons started beating him and the 2nd accused even attempted to cut him with a slasher but his (1st accused's) sister took it away. They beat him till he became unconscious but before that he had managed to raise an alarm. Washington Angote first gave evidence as Pw1 but when another Judge took over the case and the accused asked that the matter start afresh he became Pw4. Washington (Pw4) testified that on the material night at about 3am, he was awakened by his grandson and told that the deceased was being beaten at their neighbour's house. He got up and went there. According to him he shares a boundary with the accused persons and their homesteads are about 50 meters apart. He stated that on arrival he found the accused persons beating the deceased and when his pleas to them to stop fell on deaf ears, he went and called another neighbour. Soon word reached a brother of the deceased who lived and worked in Machakos and he in turn called police at home who went to the scene.

Titus Ondieki Osuga (Pw1) was one of the people who went to the scene. He had been called by Assistant Chief Amos Ondieki Osuga (Pw2) and sent to the scene to prevail upon the 1st accused person to stop beating the deceased, who he accused of seducing his daughter, and take him to the authorities instead. It was Pw1's vehicle that the family of the deceased used to take him to hospital. Thereafter they took him to Nyamira Police Station where he lodged a complaint and recorded the statement I have referred to above. The court heard that the deceased was treated as an outpatient but on going back home he started vomiting blood and on 3rd August 2011 his condition deteriorated and he died as he was being rushed back to hospital. A post mortem which was witnessed by his older brother KOO (Pw5) and PC Maurice Diwa (Pw6) was conducted on 8th August 2011 and the accused persons were subsequently charged with this offence. A P3 form issued to the deceased following the report he made at Nyamira Police Station and which was duly filled at the hospital was produced in evidence by PC Maurice Diwa (Pw6), the investigating officer. The same assessed the degree of injury inflicted upon the deceased as maim. The statement made by the deceased at the police station was also produced in evidence (Exhibit 1, 2). However, the prosecution did not produce the post mortem report.

The accused persons both gave unsworn testimonies and denied that they assaulted the deceased. They both did however admit that the deceased was at their home on that night. The 1st accused stated that he heard murmurs in his son's house and went there to find out what was happening. When he reached the hut he met his son, 2nd accused at the door. The 2nd accused was followed by the deceased who dashed out and ran for about 15 steps. Then he fell down. He, the 1st accused, saw that the 2nd accused had a knife. He had however stated that he talked to the deceased who told him he was alright. The deceased had in fact stood up. He went and sat beside the hut. Both accused persons vehemently denied that they assaulted the deceased but could not say what he was doing in their home at that hour.

Their Advocate, Mr. Oguttu Mboya, summed up by way of written submissions. He has urged this court to find that the case against the accused persons was not proved beyond reasonable doubt and to acquit them. He submitted that the evidence of the prosecution witnesses was contradictory and further that as no post mortem report was not produced the cause of death was not proved. To buttress his arguments,

he relied on the Court of Appeal decisions in the cases of **Allan Khaemba Kwabi Vs. Republic [2000] eKLR** and **Chengo Nickson Kalama Vs. Republic [2015] eKLR**. Counsel contended that this court cannot undertake a fishing expedition as to why the post mortem was not produced. He urged this court to find that the evidence is insufficient to convict unless the conviction is anchored on empathy.

The prosecution did not submit at this stage and Senior Prosecution Counsel Mr. Ochieng indicated that he would rely entirely on the evidence of the prosecution witnesses.

To prove murder, the prosecution was required to prove the death of the deceased, the cause of the death, the fact that the death was occasioned by an unlawful act of the accused persons and that it was with malice aforethought. Those are the issues for determination in this case.

I have evaluated the evidence by both the prosecution witnesses and the accused persons. I am satisfied that on the material night the accused persons beat the deceased. This occurred at their home on the night of 29th July 2011. The deceased's statement which was produced by the investigating officer and which I find was admissible under Section 33 (a) of the Evidence Act gives this court insight as to how the deceased got to the home of the accused persons. He had been lured to the home by the 2nd accused who went and left him in his brother's house (Simba) then went to call his father, the 1st accused. Apparently the 1st accused was not happy that the deceased was trying to seduce his daughter and this provided a reason for him and his co-accused to mercilessly set upon the deceased. Evidence that they beat the deceased senseless is not just found in the deceased's statement but is also found in the testimonies of the two prosecution witnesses who saw the accused the next morning. Washington (Pw4) in the trial held by my predecessor Nagillah J (Retired) testified that he went to the home at about 3am and found the accused persons beating the deceased. His pleas to have them stop fell on deaf ears so he left to go for help. This witness testified that the deceased's hands were tied and that he had a torch and he could clearly see the assailants. I am satisfied that this witness positively identified the two accused persons as the ones who were beating the deceased.

Titus Odoyo (Pw1) confirmed that he went to the home of the accused persons early on the morning of 30th July 2011. He testified that among those he found there were Pw4 which means Pw4 was a truthful witness. Pw1 testified that the deceased was also there and that there was blood where he was sitting. He also told the court that the deceased was taken to hospital by his vehicle. Assistant Chief Amos Ondieki Osuga (Pw2) also confirmed that he received a report that the deceased was being beaten by the accused persons. He did not however go there himself. Evidence that the deceased was taken to hospital and that he in fact reported the incident to the police was provided by the investigating officer. The accused persons while they deny they assaulted the deceased admitted that he was in their home that night. The 1st accused conceded that the deceased was in his son's house which confirms the account given to the police by the deceased. The 2nd accused also mentioned that the deceased had gone there for books again confirming the statement of the deceased.

Whereas it is never the duty of the accused persons to disprove the prosecution's case or to prove their innocence, my finding is that the explanation they gave was not convincing. The court does not believe that a 15-meter dash followed by a sudden fall could have occasioned the injuries described as main in the P3 Form produced as Exhibit 3. It is my finding that the only logical explanation is that the accused persons beat the deceased. As I have stated, they were seen doing so by Pw4 and his testimony is corroborated by the statement made by the deceased to the police by the deceased.

I am satisfied that the accused persons acted unlawfully. However, it was the duty of the prosecution to prove the cause of death. The deceased's older brother (Pw5) and the investigating officer (Pw6) stated that on 8th August 2011 a post mortem was done on the body of the deceased. However, the prosecution did not produce that post mortem report and no evidence was led to rule out natural causes as the reason for his death. In **Ndungu Vs. Republic [1985] KLR 487** the Court of Appeal stated (**page 492**):-

".....where the body is available and the body has been examined a post mortem report must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the medical officer who performs the post mortem examination is cross examined....."

More recently in **Chengo Nickson Kalama Vs Republic [2015] eKLR** the same court while upholding its decision in **Ndugu Vs Republic (Supra)** and commenting on the Tanzanian case of **Republic Vs Cheya & Another [1973] EA 500** stated: -

"The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt. Accordingly, the Judge erred in convicting the appellant."

Again in **Joseph Angote Vs. Republic [2018] eKLR** the same court declined to send a case for retrial after it found that during the trial the prosecution had not produced a post mortem report and a retrial would then have provided the prosecution a chance to address that serious omission. I am of course aware of the decision of that court in **Dorcas Jebet Ketter & Another Vs. Republic [2013] eKLR**. The circumstances of this case are however distinguishable from those of that case in that there, the body was burnt beyond recognition and no post mortem was conducted. In light of the above decisions I agree with Counsel for the accused persons that the prosecution has not proved the charge of murder against his clients beyond reasonable doubt.

I am however satisfied that there is evidence to prove beyond reasonable doubt that the accused persons occasioned the deceased grievous harm. The evidence of Pw4 which is corroborated by the statement of the deceased and the medical evidence in the P3 form was cogent and credible. He knew the accused persons as they are his neighbours. Their homes are separated by a fence and he had a torch and I am satisfied he recognized them using that torch. In **Ndungu Vs. Republic (Supra)**, the Court of Appeal recognized that even where the accused is not found guilty of murder he can be convicted on a lesser cognate offence. I find the accused persons guilty of grievous harm contrary to Section 234 of the Penal Code and convict them accordingly.

Signed, dated and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE