

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 52 OF 2015

THE REPUBLIC.....PROSECUTOR

VERSUS

VINCENT MOMANYI ORINA.....ACCUSED

JUDGEMENT

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 8th June 2011 at Komonso village, Girango Sub-location, Gachuba Location in Masaba North District within Nyamira County the accused murdered Antony Otuge Onani.

Three witnesses were heard by my predecessor Nagillah J, before he retired and when I took over the case they were all recalled for cross examination pursuant to the accused exercise of his rights under Section 200 (3) of the Criminal Procedure Code.

In sum, the evidence of the prosecution witnesses was that on 7th June 2011 at about 6.30pm the deceased who used to work as an assistant at a kiosk cum hotel owned by Kepher Ongwae (Pw1) and his wife Hellen Nyanchama (Pw2) was carrying on with his duties at the kiosk. It was starting to get dark so he went to remove some things from the front of the shop to put them inside. Suddenly Kepher Ongwae (Pw1) who was inside the kiosk and his wife Hellen (Pw2) who was behind the kiosk heard the deceased make a sound followed by a thud. They quickly ran there and found him lying on the ground. Much as they tried they could not get him to stand so they called his son Steve (Pw3) who took him to Kisii District Hospital where he was admitted until 8th June 2011 when he died as he was waiting to be transferred to Eldoret for a scan. A post mortem conducted on his body revealed that he had died as a result of cardio respiratory arrest secondary to head injury resulting from a blunt force. Among the findings noted on the body were sub-conjunctival haemorrhage, abrasion on the skin around the sternum, fracture of the left 6th rib, a scalp haematoma, multiple skull fractures, a depressed skull fracture on the left parieto-temporal region and a commuted right parietal fracture of skull.

Pw1 and Pw2 testified that they had seen the accused quarrelling with the deceased before they heard him collapse. Pw1 testified that they (the accused and the deceased) almost fought and Pw2 stated that she saw the accused holding a big stone which he dropped after she persuaded him to do so. She stated that she also heard the accused saying he would kill someone. Pw1 and Pw2 also testified that at about the same time the deceased cried out and collapsed they saw the accused fleeing the scene. Pw2 also stated that she picked a rungu (club) which she found close to the body of the deceased and which had not been there before and gave it to their Assistant Chief. The next day she went to the hospital to see the deceased but found he had died. She stated that he had a swelling on the head. The club was treated as an exhibit in this case and was produced by Corporal Jonathan Kepkonga (Pw5) as Sergeant Baraza who investigated the case retired and could not be found.

In his defence, an unsworn statement, the accused stated that he hails from Kiomosi village, Gachuba, Girango, Masaba North and that he is a student. He stated that on the material day his mother sent him to the shop to buy something and that he could remember very well that an old man who he knew very well as a village elder was hit by somebody and taken to hospital. He disputed that Pw1 could have seen him quarrelling with the deceased while he was inside the shop. He stated that at that particular time he was at home. He pointed out that Pw1 had said he did not know why those who were outside were quarrelling. He denied that he was at the scene when the offence was committed and contended that the rungu found at the scene was not his. He stated that Pw1's wife never called anybody to see the rungu while it was outside the shop. He maintained he was innocent and urged this court to consider the evidence and statements of the witnesses which are at variance. The accused did not call witnesses and after the close of his case his Advocate Mr. Magara summed up by highlighting his written submissions. He urged this court to find that the accused had in his defence raised an alibi and that the prosecution had not proved beyond reasonable doubt that the accused had the intention to kill the deceased. He urged this court to acquit the accused.

The Counsel appearing for the prosecution however submitted that evidence adduced proved that the accused had a plan, that there was evidence that he had threatened to kill the deceased and that he picked a stone and threatened him with it. He submitted that it was proved that the accused hit the deceased with a rungu and that the two of them had disputed. Counsel submitted that both the actus reus and mens rea were proved and pointed out that the accused raised an alibi defence in total contrast to self-defence which was alluded to in Mr. Magara's written submissions.

In reply Mr. Magara submitted that the witnesses could not have identified the accused and that no forensic evidence was adduced to connect him to the rungu. He urged this court to ignore such evidence. He further submitted that there was no nexus between the threats and the offence alleged and reiterated that the accused is innocent and he should be acquitted.

The death of the deceased and the cause of that death are not in dispute. Pw1, his wife Pw2 and the deceased's son (Pw3) both attested to the deceased's death. The post mortem report produced by Dr. Samuel Onchere (Pw4) who I am satisfied was competent to do so under Sections 33 (b) and 77 (1) of the Evidence Act even though he was not the maker, revealed that the deceased had several fractures on the head and that the cause of his death was cardio respiratory arrest secondary to head injury resulting from trauma from a blunt force. Pw1 told

this court that when he went to see what caused the deceased to fall he noticed the deceased had a swelling on the head. This is consistent with the post mortem findings. I find that the death of the deceased was as a result of an unlawful act by a person who was seen fleeing the scene by Pw1 and Pw2 at the time they heard the thud caused by the deceased fleeing. The only issues for determination are whether that person was the accused and if he was whether he killed the deceased with malice aforethought.

Having evaluated the evidence and considered the submissions by both sides carefully I am satisfied that the accused killed the deceased. I am satisfied that he was positively identified as the killer by Pw1 and Pw2. His altercation with the deceased started at about 6.30pm when Pw1 and Pw2 saw him and persuaded him to stop it. Pw1 testified that the deceased and the accused nearly fought but he intervened and even escorted the accused and he left. Pw2 testified that she pleaded with him to throw a stone which he had in his hand and he heeded her advice and left. However, as it was getting dark he returned and attacked the deceased as he was removing some wares that required to be kept in the shop overnight. The two witnesses (Pw1 and Pw2) were candid that they did not see the accused assaulting the deceased but that when they heard the deceased's cry and a thud and rushed to his side they saw the accused person fleeing. The two witnesses were very consistent. Their testimonies did not change even when they were recalled to be cross examined by the accused's Advocate pursuant to exercise of his right under Section 200 (3) of the Criminal Procedure Code. This court therefore believed them. They knew the accused person and I am satisfied that their identification of him which is fortified by the fact that they knew him, was accurate and could not have been mistaken. In his written submissions, Counsel for the accused alluded to the defence of self-defence. The accused did not raise such a defence and there is nothing in the evidence to suggest that he was provoked or that he acted in self-defence.

As for the alibi, it is my finding that by the accused merely stating that he was not at the scene when the offence was committed that is not an alibi and whereas it is never the duty of the accused person to prove his alibi but rather for the prosecution to disprove it (**See Macharia Vs. Republic [2001] KLR 155**), in this case there was no alibi set up by the accused. If anything the accused confirmed that he was at the scene when he stated that his mother sent him to the shop to buy something. It is my finding that it is at that time that he committed this offence.

I am further satisfied that the prosecution has proved that the accused person acted of malice aforethought. The instances of malice aforethought are enumerated in **Section 206 of the Penal Code** and any one or more of the circumstances thereat are sufficient to establish malice aforethought. It is my finding that the "rundu" exhibited in court was the weapon used by the accused to kill the deceased. Both Pw1 and Pw2 who I find are credible witnesses stated that it was not there before and Pw2 only saw it at the point she went to find out what caused the deceased to collapse. The mere size of that club and the injuries inflicted upon the deceased (mainly on his head) betray a person whose intention was to cause the death of the deceased or if not to kill him to occasion him grievous harm. I must say that the brutality meted out and which is corroborated by the post mortem findings does not bespeak of an assailant who merely wanted to scare his adversary. It is also on record that the accused person had uttered threats to the effect that he would kill the deceased. The charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code has been proved against him beyond reasonable doubt. I find him guilty as charged and convict him accordingly.

It is so ordered.

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

E. N. MAINA

JUDGE