



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 11 OF 2016

THE REPUBLIC.....PROSECUTOR

=VRS=

MICHAEL MOSOMI OMENYL.....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 sheet being that on 18th May 2016 at Motorora village, Nyamauro Sub-location in Nyamira North District within Nyamira County the accused murdered Malack Onsombi Chemageri, deceased. The accused pleaded not guilty to the charge.

Briefly the evidence of the prosecution witnesses was that on the material day the deceased was walking towards his home in the company of Happiness Mora (Pw1), who had previously been married to the accused and his cousin Kerongo Kianyaga (Pw4). At about 7 pm they had reached a certain river near the deceased's home when suddenly a man emerged from some tea bushes, got hold of the deceased and stabbed him on the chest with a knife. Happiness Mora (Pw2) stated that she flashed the flash light of her phone and identified the assailant as the accused person. She stated that she knew the accused as she had cohabited with him for three months but they had become estranged. She stated that at the material time the accused was wearing a black jumper and that when he stabbed the deceased she screamed and people went to the scene but by then the accused had fled. People looked for him but did not find him. That same evening police officers went and carried her and the deceased's body to Ekerenyo Police Station. The body was thereafter taken to the mortuary.

The following morning a knife and jumper are said to have been recovered in a flower bed near the house of the mother of Happiness (Pw2). The jumper and knife were exhibited in court and produced in evidence. Both Happiness (Pw1) and her mother (Pw2) testified that the jumper belonged to the accused person. Chief Inspector David Mursoy (Pw5) told the court that on 24th April 2016 upon getting information concerning the items from Pw2, he went there and took possession of the same. He then submitted them and a sample obtained from the deceased to the Government Chemist in Kisumu for forensic examination. The report of the analysis did not however implicate the accused. He nevertheless continued looking for the accused.

On 6th May 2016 the accused was arrested by Administration Police who took him to Ekerenyo Police Station. On 7th May 2016, Pw5 recorded a statement under inquiry from the accused in which the accused admitted to killing the deceased. Pw5 therefore charged the accused with this offence.

The clothes alleged to have been worn by the deceased at the material time, a black jumper, a knife, the Exhibit Memo Form, report of the Government Analyst and the statement under inquiry were exhibited and then produced in evidence (Exhibit 1 -). Also produced was a post mortem report which indicated that the cause of death was haemothorax secondary to penetrating injury to the right lung cavity.

When this court put the accused on his defence he elected to make an unsworn statement. He maintained his innocence and stated that he was framed by Happiness (Pw1), his estranged wife after he insisted that he wanted to see the child she begot with him. He stated that he did not even know the deceased and contended that he was not arrested with any of the exhibits. He stated that they were all found in the home of Pw1. He urged this court to find him innocent.

In a summing up done through written submissions, Mr. Bwonwong'a, Learned Advocate for the accused, submitted that the prosecution did not prove the case against the accused beyond reasonable doubt. Counsel submitted that save for Happiness (Pw1), the other witnesses admitted they did not witness the crime. Counsel tore into the testimony of Happiness and urged this court to rule that she was not a credible witness as she had admitted she had differences with the accused person. Counsel also wondered why the deceased's father (Pw3) omitted the name of the accused and said his son was attacked by unknown person. Counsel contended that the circumstances under which the knife was recovered in Pw1's home were not clarified. Counsel submitted that this fortified his submission that Happiness implicated the accused. Counsel submitted that unless the evidence of a single identifying witness is corroborated, it becomes dangerous more so bearing in mind that the witness was on bad terms with the accused. Mr. Bwonwong'a further submitted that the post mortem herein was conducted by a

non-expert and it cannot be wholly believed. He pointed out that the Doctor did not indicate the date he conducted the post mortem. Mr. Bwonwong'a submitted that it was the investigating officer but not the Doctor who testified that a blood sample was taken from the deceased. He however pointed out that the analysis of the sample did not yield any results to connect the accused to this offence yet that would have been the best evidence. Counsel further submitted that the evidence of the investigating officer in regard to the colour of the trousers worn by the deceased contradicted that of the other witnesses. He submitted that the investigating officer coerced the accused person into recording the confession. He submitted that a confession should be given freely and before a competent witness and at least two police officers of the rank of Inspector and above. Counsel submitted that the conduct of the investigating officer reveals malice and hence the testimony of the investigating officer is inadmissible.

On the evidence of Kerongo Kianyaga, Mr. Bwonwong'a submitted that it was clear that this witness did not see the accused stab the deceased. Counsel urged this court to give the accused the benefit of doubt and acquit him.

Prosecution Counsel informed the court the prosecution did not wish to submit but would entirely rely on the evidence on record.

The three ingredients of Murder which the prosecution must prove beyond reasonable doubt so as to have a conviction are: -

- i) The death of the deceased and the cause of that death.**
- ii) That the accused committed the act that caused the deceased's death and that the act was unlawful and**
- iii) That the accused had malice aforethought.**

The death of the deceased and the cause of that death have been proved beyond reasonable doubt. Happiness Moraa (Pw1) and Kerongo Kianyaga (Pw4) who were walking with the deceased just before he was attacked confirmed his death. The deceased's father (Pw3) also confirmed the fact of death and was present when the post mortem was done. The Doctor confirmed that cause of death was haemothorax secondary to penetrating injury to the right lung cavity. This in my view is consistent with the evidence that the deceased was stabbed on the chest. All that remains for consideration is whether the accused is guilty of the unlawful act that caused the death of the deceased and whether it was of malice aforethought.

In this case, the forensic examination of the clothes (black jumper) that the accused person is suspected to have worn at the time of committing the offence and the knife suspected to be the murder weapon did not elicit any results pointing to the guilt of the accused person. However, there is evidence, first by Happiness Moraa (Pw1) that she identified the accused as the assailant and secondly by Chief Inspector Mursoy (Pw5) that the accused confessed to the crime.

It is not lost to this court that the evidence of Happiness Moraa (Pw1) is of a single witness. Kerongo Kianyaga (Pw4) who was in the company of Happiness and the deceased during the attack did not witness the attack. This court finds his evidence plausible that he had walked ahead of them so as to give them privacy. Happiness testified that she knew the accused person well as she had cohabited with him for two years, a period within which they begot one child. In his defence, the accused admitted that he had lived with Happiness. According to him they were married. The evidence of Happiness is not that of identification but recognition. In the case of **Ogeto Vs. Republic [2004] 2 KLR 140** the Court of Appeal stated: -

"4. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

In **Karanja & Another Vs. Republic [2004] 2 KLR 140** the same court held:-

"1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification."

On evidence of recognition, the court stated: -

"3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be born in mind that mistakes of recognition close relatives and friends are sometimes made."

I have carefully tested the evidence of Happiness (Pw1) and I am satisfied that she recognized the accused person positively. Although the offence was committed at night, Happiness was able to see the assailant with the help of the flash light of the phone she was carrying. The attacker emerged from some tea bushes and when he started stabbing the deceased, Happiness was able to flash the light which she was using towards him. She was close to the deceased when this happened and I am satisfied that this cannot be a case of mistaken identity. It was his evidence that she lied against him because he kept insisting that he wanted to see their child. I am however not convinced that he was set up. From the evidence including his own statement, Happiness had moved on and it was him who seemed bitter with their estrangement. Chief Inspector Mursoy (Pw5) produced a statement under inquiry which he obtained from the accused person during the investigation. I have perused that statement and whereas the same appears to be a confession, it is not admissible. The recording of confessions is governed by **Section 25 A (1) of the Evidence Act and the Evidence (Out of Court Confessions) Rule 2009** which were in use when Pw5 took the

statement from the accused. **Section 25 A (1) of the Evidence Act** and the definition of recording officer in the Rules preclude an investigating officer from recording such a statement and it should not therefore have been admitted in the first place. The same cannot be relied upon by this court even though the accused person did not challenge its production either at the point it was produced or in his defence.

Be that as it may, I have stated that I am satisfied that there is other evidence that overwhelmingly points to the accused as the person who committed this offence. The act he committed was unlawful. There is no evidence at all that the deceased had done anything to provoke him or that he, the accused, acted in self-defence. He waylaid the deceased and brutally stabbed him the injury being so deep that it penetrated to the right lung. In my view, this is not the kind of injury merely intended to scare a rival. To my mind it was an injury intended to cause the death of or to do grievous harm to the victim or with knowledge that it could probably cause the death of or grievous harm to the victim. I am therefore satisfied that malice aforethought has been proved beyond reasonable doubt and that the evidence is sufficient to convict the accused.

I find him guilty of Murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

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

E. N. MAINA

JUDGE