



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 5 OF 2015

THE REPUBLIC.....PROSECUTOR

VERSUS

GEORGE OTIENO OKOTH.....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 19th June 2010 at Obomo Bar & Lodging in Keroka Township in Masaba North District within Nyanza Province he murdered DMA alias K, deceased.

The accused pleaded not guilty to the charge and a trial in which the prosecution called seven (7) witnesses ensued. The trial commenced on 2nd December 2014 and most of the evidence was recorded by my predecessor Justice C. Nagillah who was prevented from concluding it by reason of his retirement. Throughout the trial the accused was represented by Mr. Ondari Advocate whereas the case for the prosecution was conducted by various Counsels.

Briefly the prosecution's case is that on 19th June 2010 at around 7am the lifeless body of DMA alias K, the deceased, was found lying on the floor in a room christened Bungoma at Obomo Bar and Lodging in Keroka by the hotel workers. Hudson Moseti (Pw1) one of the workers testified that the room was locked on the outside with a padlock but they could see her clothes on the table and her under-pant and some condoms strewn on the floor. Pw1 stated that the body was lying in a pool of blood and was covered with a blanket and the mosquito net inside the room had blood. They reported the matter to Keroka Police Station and police officers Corporal Peter Mukangi (Pw4) and Corporal Jephthah Ngetich (Pw6) immediately went to the scene. The police officers broke the door and on examining the body they saw it had a deep cut on the neck. The deceased who was lying in a pool of blood was naked and her clothes which were on the floor had blood and some of the condoms had been used. After the preliminaries which included taking photographs of the room and the body the officers removed the body to Gucha Hospital Mortuary and commenced investigations. Pw1 could remember seeing the young woman in the hotel the previous night. He also told the court that the accused had approached him while he was selling at the bar at 4pm and asked him if there was a room. The room was hired to him by another worker.

On the same day at about 8am Chief Inspector Barnfort T Surwa (Pw7) who at the time was the Officer Commanding Station (OCS) Sotik Police Station went to the Kaplong matatu stage and as he was there he noticed a man who kept moving from one vehicle to another asking for a lift. According to Pw7 the man seemed worried. He therefore became suspicious and confronted him and demanded to know where he had come from and where he was going. The man, now the accused in this case, said he was coming from Kisii and was going to Nairobi. Pw7 got even more suspicious as to why the accused had alighted at Kaplong. Upon a closer scrutiny of the accused, Pw7 noticed that his shirt had a fresh blood stain on the collar. He immediately handcuffed him and did a quick frisk and found two knives one of which had blood in his trouser pocket. Pw7 took the accused to Sotik Police Station and interrogated him further and also did a thorough search which yielded some human hair. Upon further interrogation the accused is alleged to have revealed that he had stabbed a young woman to death at a Keroka Lodging the previous night. It was then that Pw7 called the OCS Keroka Police Station and a team of police officers was dispatched to Sotik to pick the accused. Cpl Jephthah Ngetich (Pw6), the investigating officer in this case was in that team. They picked the accused and the items recovered from him by Pw7 and took him to Keroka Police Station.

On 20th June 2010 Chief Inspector Mohamed Jilo (Pw3) conducted an identification parade in which the accused is alleged to have been identified by Hudson Moseti (Pw1) among other witnesses. On 23rd June 2010 a post mortem was done on the body of Davina Kwamboka by one Dr. Mbeki. According to Dr. Joel Matingaye (Pw5) who produced the report on behalf of his colleague who he said was pursuing further studies in South Africa the body of the deceased was naked and bloody. It had a cut on the left side of the neck 4cm long and on the head there was loss of hair on the left side an area 4cm by 6cm. He stated that in the opinion of the doctor who did the post mortem the cause of death was cardiorespiratory arrest secondary to loss of blood following a stab ligation of the left jugular vein.

On 24th June 2010 Pw6 sent to the Government Chemist for analysis the two knives recovered from the accused, a short sleeved grey T-shirt

with blood stains which the accused was wearing at the time of his arrest, a white short sleeved checked shirt which the accused was wearing and which had blood, a pink under-pant, blood samples of the accused and the deceased and some hair obtained from the accused and the deceased.

On 30th June 2010 the accused was taken to Nyamira District Hospital for a mental assessment which was followed by another examination by Dr. A. O. Onyango – Kisumu Provincial Psychiatrist on 31st June 2010. Both examinations concluded that the accused person was fit to plead. On 1st July 2010 he was arraigned in court on this charge.

The court heard that when the blood on the exhibits and clothes belonging to the accused were examined the blood was that of a human origin. The examination also revealed that the blood on the exhibits matched the DNA generated from the blood sample of the deceased. The accused is also alleged to have made a confession to one Chief Inspector Isaac Mohamed who was not called as a witness as he was vetted out of the force.

An identification parade form, the report of Dr. Joseph K. Kimani (Government Analyst – Pw2), a kitchen knife, grey sleeveless T-shirt, a checked/stripped white shirt, a pink under-pant, a whitish biker, a post mortem form/report, a confession and a P3 form filled by Dr. A. O. Onyango were produced in evidence (Exhibit 1 – 12). Some photographs were also referred to at the trial but they were not produced.

When the court put the accused on his defence he made an unsworn statement. He begun by confirming that his name is George Otieno Okoth alias Arafat and stated that he hails from Siaya County. He then told the court that prior to 19th June 2010 he used to carry out the business of selling milk in Kaplong and that he did not commit this offence. He stated that on the said morning he woke up at Soimek near Kaplong and went to sell milk at Kaplong. A customer bought 70/= worth of milk and paid with a Kshs. 1,000/= note and because he had not made any sales he went to the bus stage and moved from one matatu to another looking for change. He stated that that was when a person he later learnt was a police officer told him he required a licence to sell milk. He told the man that his business was still small and continued looking for change. In the process he met the officer again and reminding him of the permit the officer said he would take him in for trading without a licence. His pleas to the officer to give him time for the business to grow for him to get capital for a licence fell on deaf ears and the officer made a call and the OCS went and the two of them arrested him and took him to Sotik Police Station. He stated that he remained there until 3pm when he was put in a vehicle and taken to Keroka Police Station. He stayed at Keroka Police Station for 1 ½ weeks after which he was taken to Kisii Police Station where he stayed for 2 days before he was arraigned for an offence which he had not committed.

In summing up Mr. Ondari, Learned Advocate for the accused reminded this court that in this case the prosecution was under a duty to prove the allegations beyond reasonable doubt; that in murder cases the evidence should be strong and without any contradictions because any doubt that arises must be to the benefit of the accused person and that motive must be proved. Mr. Ondari submitted that up to the close of the prosecution's case the motive if any, was not established. He submitted that in such a serious case where the sentence is only one although according to him the Supreme Court has rendered it unconstitutional, the burden of proof must be discharged. On the evidence of Pw1, Mr Ondari submitted that it was clear that the witness saw the accused for the first time that day and it was at night. He pointed out that the witness said the room was hired to the accused by someone else and wondered why that someone was not called to testify that the accused indeed hired a room. He submitted too that as no receipt was produced in evidence that created doubt as to whether the accused in fact hired the room. He reminded this court that the evidence of Pw1 was that he never saw the accused hiring the room and that he was not sure that the accused committed this offence. Counsel further took issue with the identification parade and concluded that the same was flouted. He submitted that the officer who conducted the parade contradicted the witness (Pw1) by stating that the parade had nine members while Pw1's evidence was that ten to fifteen people were parade. He contended that even the Judge (my predecessor) could not understand how the accused could have been identified while standing between 1 and 0 members. Mr. Ondari stated that the accused was charged out of suspicion that he was not boarding a vehicle.

On the exhibits he submitted that the same were in an envelope which was not opened to reveal the contents and that when he raised the question the witness (Pw7) affirmed that he too had not opened the envelope. He stated that the prosecution sought to fill the lacuna by recalling the witness to come and open the envelopes but the witness did not come. He contended that the photographs were neither stamped nor marked as exhibits. He submitted that in any event they were not properly received in evidence as no certificate was attached. As for the confession Mr. Ondari submitted that the same was not recorded in accordance with the law.

On the government analyst's report, Mr. Ondari submitted that both the deceased and the accused were of the same blood group and it was therefore not clear whose blood was on the knife as the accused had injuries on the head. In support of his submissions that the charge was not proved beyond reasonable doubt, Counsel relied on two cases: -

a. John Stelen Ole Mwenda Vs. Republic [1989] eKLR.

b. Criminal Appeal No. 199 of 1986 Samuel Mwaura Njihia Vs. Republic.

Mr. Ochieng, Learned Prosecution Counsel sought to rely entirely on the evidence adduced and did not wish to submit.

In this case what the prosecution needed to prove beyond reasonable doubt is **the death of the deceased and the cause of the death; that the accused caused that death by an unlawful act and that he had malice aforethought.**

Having carefully considered the evidence and submissions on record, it is my finding that the death of the deceased and the cause of that death are not in dispute. Although the photographs allegedly taken at the scene were not produced in evidence, there is no doubt that the deceased's lifeless body was found lying in a pool of blood in a lodging room at Obomo Bar and Lodging. From the post mortem there is no doubt in the mind of this court that the deceased was killed. The report states that she had a stab wound on the left side of the neck and that her death resulted from loss of blood and ligation of the left jugular vein.

Contrary to Mr. Ondari's submission, the law as it stands is that in a case of murder, what the prosecution is also required to prove is malice aforethought not motive. **Section 206 of the Penal Code** states that malice aforethought is established by 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.”

The nature and extent of the injury inflicted upon the deceased and the fact that she was left to die in a room that was secured with a padlock on the outside, with the assailant going away with the key, is proof that the assailant had an intention to kill her, and that the assailant had knowledge that the injury would probably cause her death. I am satisfied beyond reasonable doubt that not only was the death of the deceased caused by an unlawful act but that the killer had malice aforethought and that he murdered her.

The only issue remaining for determination is whether the accused was the person who committed this heinous crime. The issues that this court must grapple with in considering this are whether the accused was at the Obomo Bar and Lodging on 18th June 2010 as alleged by Pw1; whether at the time he was arrested at Kaplong by Pw7 he was in possession of two knives, hair and clothing that had blood or whether he was framed because of hawking milk without a permit as was his evidence; whether he was positively picked out by Pw1 at an identification parade conducted by Chief Inspector Jilo (Pw3); whether he confessed to the crime and whether he was connected to the crime by the forensic examination conducted by Dr. Kimani (Pw2).

Whereas **Rule 9 of the EVIDENCE (OUT OF COURT CONFESSIONS) RULES, 2009** requires that the confession shall at the end of it contain a certificate by the accused that the statement has been read to him and that he has been told that he can correct, alter or add anything he wishes and further that the statement is true and made of his own free will, the certificate in this confession is made by the recorder. Further, **Rule 13** requires that the recording officer shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with. In this case Mulssa Mohamed was not a witness and the investigating officer could not have confirmed to this court that the Rules were complied with.

The evidence that the accused was seen at the Hotel on 18th June 2016 by Pw1 is also shaky and hence unreliable. Mr. Ondari correctly submitted that there was a contradiction between the evidence of Pw1 and Pw3, the officer who conducted the parade. Whereas Pw1 testified that the parade had ten to fifteen (10 – 15) members of different height and build, Pw3 testified that there were nine members. Further, whereas Pw1 claimed that the deceased was standing in the middle of the line, the parade form completed by Pw3 indicates Pw1 touched the person who was standing between member No 3 and member No 4 which means that the person he touched could not have been too far down the line. It could be that there were ten to fifteen members in the parade and that the accused was in the middle and was positively identified by Pw1 but the officer who did the parade did not capture this properly in the form. It could also be that Pw3 captured the events of the parade properly but that Pw1 may have forgotten what exactly transpired at the parade. It could also very well be that the outcome of the parade was not what either of these witnesses told the court. In such a scenario the law enjoins this court to give the benefit of doubt to the accused person. My finding therefore is that that evidence is not reliable and cannot form the basis of the accused's conviction.

I am however satisfied, and this beyond reasonable doubt, that when the accused was arrested at Kaplong by Pw7, a fact which the accused admitted, he was found with two knives one of which had blood and some hair and that the shirt he was wearing had a fresh blood stain. The reason I believed Pw7's account rather than the accused's account is that Pw7 did not even know of the offence that had been committed at Keroka at the time he arrested the accused. The only reason he arrested him was because he was acting in a suspicious manner. There is also no evidence that he knew the accused prior to that or that he could therefore have had a personal vendetta against him that could have led him to fabricate such evidence against him. Pw7 had no interest in the case. It is also noteworthy that the issue of hawking milk was never put to Pw7 during cross examination and it was therefore an afterthought. Moreover, the accused's unsworn statement which in my view does not even amount to an alibi cannot carry as much weight as the testimony of Pw7 which was tested by vigorous cross examination but remained unshaken. It is my finding that Pw7 was an independent witness – a diligent police officer who was going about his business when he noticed the accused acting suspiciously and arrested him. There is evidence beyond reasonable doubt that the blood on the knife and on the accused's shirt and T-shirt were of human origin. Again this was evidence from an independent and objective witness (Pw2). Pw2 testified that when the blood and the knife were matched to the blood sample of the deceased, provided to him by the investigating officer, the same matched. It may be the case that the accused and deceased were of the same blood type but Pw2 was emphatic that the blood sample he used was that of the deceased. There is no evidence either from the prosecution or the accused that the accused had injuries on the head and the allegation by Mr. Ondari can only be taken for what it is, a statement from the bar which, with due respect, is not evidence. It is my finding therefore that the evidence that the accused had a knife and was wearing a T-shirt and shirt that had the blood of the deceased proves beyond reasonable doubt that he is the person who killed the deceased. The injury that caused the death of the deceased could only have been inflicted by a sharp object and I find that object is the knife that was found in the accused's possession by Pw7.

I have already stated that the accused unlawfully killed the deceased and that malice aforethought has been proved beyond reasonable doubt. Accordingly, 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 in open court this 20th day of December 2018.

E. N. MAINA

JUDGE