

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCR 26 OF 2015

STATE.....REPUBLIC

- V E R S U S -

GEOFFREY NDUKO NYABANDO ALIAS KUNDO.....ACCUSED

JUDGEMENT

The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on 7th October, 2017 at Nyaramba village, Mwabosire Sub-location in Manga District within Nyamira County he murdered Kepha Bosire Kebaya.

The accused pleaded not guilty to the charge and the prosecution called six witnesses to prove its case. Briefly, the prosecution's case is that on the material day at about 7.30pm the deceased was walking home in the company of his friend and village mate Obadiah Bosire Mwamba (PW1.) They were coming from Ikobe Trading Center and the deceased was drunk. As they were walking in the dark a motor cycle hit them from behind and they fell, the deceased to the left and Obadiah (PW1) to the right. The motor cycle also fell on its side. Obadiah (PW1) quickly got back on his feet but the deceased was left lying on the road. PW1 testified that the cyclist who both of them recognized as the accused went and asked them why they did not get off the road to which Obadiah (PW1) responded that the motor cycle had lights and the road was wide and the accused could have passed on the side. It was then that the accused went and kicked the deceased in the stomach. PW1 testified that he (accused) kicked the deceased twice and that he was wearing gumboots. The incident attracted Charles Bosire (PW3) who was passing by and he went there but left when other people arrived at the scene. Obadiah testified that the deceased complained of pain in the stomach. He helped the deceased up and supported him and when they reached near his (deceased's) house PW1 left him to go inside and he too went to his house.

Eileen Kwamboka (PW2), the deceased's wife, testified that when the deceased got to their house she heard him say he was dying, that he had no tummy as Geoffrey (the accused) had injure him. He told her that he was with Obadiah (PW1) when that happened. She then called her mother in-law but he would not heed their pleas to go to hospital saying that he was "dying - finished" as the accused had kicked him in the stomach.

The next morning Obadiah (PW1) and a nephew of the deceased took him to Oreke Clinic in Mosochi but they were referred to Nyamira District Hospital. He died on the way there. The matter was reported to the police station. On 8th October, 2012 a post-mortem was done and the cause of death was found to be cardiopulmonary arrest due to peritonitis occasioned by a ruptured perforated stomach due to trauma. The post mortem which was produced on behalf of the maker, one Dr. Basweti, by Dr. Samuel Ombati Atangi also showed that there were bruises over the deceased's abdomen. The accused was subsequently arrested and charged with this offence.

The accused gave sworn evidence. He testified that on 6th October, 2012 at about 7.30pm he met Kepha Kibaya (the deceased) Obadiah Mwamba and Collins the son of George on the road. He stated that they were drunk and so he hooted and slammed the brakes of his motor cycle. He stated that they were staggering and that Obadiah fell on Kepha while his motor cycle fell on one side. He alighted and asked them whether they were drinking on the road. He stated that a neighbour whose name he could not remember also arrived and asked them what they were doing on the road. After that they all went their separate ways. Whilst conceding that Kepha died the next day, he denied that he killed him and stated that he did not beat anybody. He stated that the next day Kepha's mother went and asked him about it but he told her exactly what he told this court. He disclosed that he had no personal differences with Obadiah and confirmed that none of the two got injured. He also stated that it was him who reported the matter to the assistant chief and the chief but maintained that he was not responsible for the death of the deceased. He denied that he kicked the deceased in the stomach.

In his summing up, Mr. Okemwa Advocate who represented the accused throughout the trial submitted that the prosecution did not prove its case beyond reasonable doubt. He submitted that the only witness who claimed to have seen the accused hit the deceased did not say what kind of light he used. He contended that the evidence that the deceased was hit in the stomach was a mere allegation as he could have been hit by an object where he fell. Counsel wondered why the prosecution did not produce the boots the accused is alleged to have been wearing. As for the post-mortem, it was his evidence that the doctor did not say what kind of trauma affected the deceased's stomach. Counsel contended that since PW1 was with the deceased he must be aware of what happened. He took issue with the omission by the prosecution to call the other neighbours who went to the scene and submitted that this created doubt. He urged this court to give the benefit of that doubt to the accused and acquit him.

Mr. Ochieng', Prosecution Counsel did not submit but stated that the prosecution would rely on the evidence tendered.

Having charged the accused with murder the prosecution was required to prove firstly, the death of the deceased and the cause of the death; second, that the accused caused that death by an unlawful act and thirdly that he did so with malice aforethought. The deceased's death and the cause of that death are not in dispute. Even the accused concedes that the deceased died the day following their encounter. The post mortem report, which I find was produced by a competent witness under Sections 33 (a) and 77 (1) of the Evidence Act indicates that the deceased died as a result of ruptured stomach due to a blunt trauma and that he had bruises over his abdomen. The only other issue for determination is whether the accused was responsible for the death of the deceased and if he was whether it was of malice aforethought.

The accused's own testimony places him at the scene of the occurrence which is alleged to have led to the death of the deceased and the difficult issue of identification is therefore out of the way. The accused whilst admitting that he did have an encounter with PW1 and the deceased denied that he did anything that could have caused his death. It is my finding however, that he kicked the deceased on the belly perhaps incensed by the fact that the deceased was drunk and had not moved aside to allow his motor cycle to pass. Obadiah (Pw1) stated that the accused walked back to the place the deceased had fallen and kicked him twice in the stomach. This is consistent with the post-mortem findings of bruises on the abdomen. The fact that the accused was wearing gumboots is also consistent with the nature of the bruises and ruptured stomach. Eileen (PW2) told this court that when the deceased arrived at the house he complained of pain in the stomach and told her that he was finished; that he had been killed by Geoffrey and there was no need for him to go to hospital. The evidence of Obadiah (PW1) and the statement of the deceased to his wife (PW2) that he had been killed by the accused which statement is admissible under **Section 33 (a) of the Evidence Act** as the cause of the deceased's death proves beyond reasonable doubt that the accused caused the death of the deceased. It is my finding that these witnesses are credible and trustworthy. To a large extent their testimonies were confirmed by the accused person which means they were truthful. They had no reason to lie against the accused and his evidence does not in any way cast doubt on their credibility. Save for not moving from the road the deceased did not do anything to provoke this attack and it is my finding that it was unlawful.

It is however, my finding that whereas the accused person caused the death of the deceased by an unlawful act the prosecution did not prove that he did so of malice aforethought. It was not proved beyond reasonable doubt that the accused had an intention to cause the death of or to do grievous harm to the deceased. It was also not proved that he had knowledge that his kicking the deceased could probably cause death or grievous harm to the deceased. Neither did the prosecution prove that the accused had an intention to commit a felony. Nevertheless, the accused kicked the deceased and unlawfully killed him and, in the circumstances, I hereby reduce the charge to Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, find him guilty of the same and convict him accordingly.

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

E. N. MAINA

JUDGE