



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 29 OF 2011

REPUBLICPROSECUTOR

VERSUS

SAMSON ALUBE NGOTA.....1ST ACCUSED

ROBINSON NGINYA KAMANU.....2ND ACCUSED

JUDGEMENT

Introduction

Samson Alube Ngota, 1st accused, and Robinson Nginya Kamanu, 2nd accused, are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 24th day of March 2011 at Dandora Phase Two Estate, Njiru District within Nairobi County, they jointly murdered Sammy James Oyongo. Each accused person has denied committing this offence. Ms Celine Odembo is representing the two accused persons.

The Prosecution Case

Nine witnesses have testified in support of the prosecution case. Their evidence is that on 24th March 2011, Jane Akinyi Otieno, who lived at Dandora Phase 2 with her family were fetching water from the tap and ferrying it upstairs to their apartment. She was being assisted by her daughter Winnie Achieng and James Oyongo, the deceased. The time was midnight and due to chronic water problems it was not unusual to fetch water at this time of the day. The three were accosted by 1st and 2nd accused persons who demanded money from them. The 2nd accused guarded the gate while the 1st accused pushed the deceased away from PW4. Shortly after, PW4 heard sound of something falling down and the deceased calling for help from a tenant known as Kyalo. PW4 realized that it was the deceased falling on the gate. She and her daughter Winnie were ordered to get inside the house which they did. After sometime and after ascertaining that the two attackers had left, PW4 and her daughter went downstairs and found the deceased had been stabbed on the chest. He was dead.

On the same night at the same Estate, Dandora Phase 2, David Adali Abednego, PW5, was hosting a funeral meeting following the death of his son. At around 1.00am on 24th March 2011, two young men entered into his house where the meeting was taking place. They looked drunk. One of the two people lay on the table and the other on the chair. PW5 identified the one who lay on the table as the 1st accused person in court and the one who sat on the chair as the 2nd accused person. The 2nd accused person went out stating that he was going to buy cigarettes. The 1st accused became sleepy on the table where he lay. PW5, who had noticed a knife sticking from the 1st accused person's pocket, picked it while the 1st

accused was dozing off. He called the police.

Among the police officers who went to scene following that call was CPL Bosco Makali from Jogoo Road Police Station Mobile Patrol. He went to the scene and arrived there around 4.20am. He was in company of other police officers including PC Ndegwa and PC Morara.

Further evidence is that the 2nd accused person returned to PW4's house unaware that the 1st accused had been arrested. He was also arrested. Both the 1st and the 2nd accused persons were positively identified by PW4 and her daughter Winnie during an identification parade conducted at Dandora Police Station by CIP Richard Kioko, PW2, on 2nd April 2011. PW2 informed the court that he followed the procedure for conducting identification parades and that the two accused persons were satisfied with the exercise. He produced in evidence the identification parade forms in respect of the two accused persons as exhibits 1 and 2.

The body of the deceased was examined by Dr. Peter Muriuki Ndegwa, PW3, on 1st April 2011 at the City Mortuary. He found a penetrating stab wound on the left anterior chest wall inwards of the left nipple measuring 5cm by 2cm; the left ventricle was perforated and there was blood in the cavity surrounding the heart. He formed the opinion that the cause of death was due to exsanguination due to stab wound to the chest. He produced the post mortem form as exhibit 3.

The knife, which this court was told was the murder weapon, was submitted to the Government Analyst together with blood sample from the deceased and clothes recovered from the two accused persons. The DNA profiles generated from the blood stains found on the knife (Exhibit 7) matched the blood sample from the deceased.

The defence Case

The 1st accused testified without taking oath. He told the court that he was arrested on 23rd March 2011 from a funeral meeting in Dandora Phase 2. He said he was taken Buruburu Police Station where his clothes were taken and he was told to call for a relative; that his sister went to see him but police refused to let him take the clothes she had brought for him; that on 2nd April 2011 he was taken to Dandora Police Station where the identification parade was conducted; that he was the only person who was dirty since the other parade members were clean and that the police forced him to take part in the parade.

The 2nd accused also gave testimony without taking oath. He testified that he was arrested with four other people on 24th March 2011 near the Dumpsite as he was going to work. He testified that he was taken to a parade on 2nd April 2011 where he was the only dirty person and forced to sign the identification parade form. He said that he did not understand the charge and that he did not commit this offence.

Analysis and Determination

Murder is committed when a person with malice aforethought causes the death of other person by an unlawful act or omission. Malice aforethought is defined under section 206 of the Penal Code. It includes 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 and 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. The law places the onus of proving a criminal case on the prosecution and the standard of proof is that of beyond reasonable doubt.

I will be determining whether the death of the deceased occurred; the cause of that death in order to determine whether the act or omission causing the death was unlawful or not and whether the person(s) who caused that death had malice aforethought.

Defence counsel in her submissions at the close of the defence case stated that the prosecution has failed

to adduce sufficient evidence against the accused persons; that Winnie Achieng, the second identifying witness did not testify; that there is no evidence on the intensity of the light when the offence is alleged to have been committed given that it was said to have been at night; that whoever inflicted the single stab wound on the deceased did not intend to kill him; that the case rests on a single identification witness; that there were no blood stains in 1st accused's pocket where the knife is said to have been recovered from and that there is no evidence that the knife was dusted for fingerprints.

On the other hand the prosecution submitted that they have discharged the onus of proving beyond reasonable doubt that the accused persons committed this offence.

It is true that the pathologist found a single stab wound. In his own words: **“There was a penetrating stab wound on the left anterior chest wall inwards of left nipple 5 x 2cm..... There was blood in the left chest cavity and the left ventricle of the heart had been stabbed and there was blood in the cavity surrounding the heart. Cause of death was haemorrhage due to the chest injury due to stab wound.”**

This was a fatal wound. It was a deep wound and it caused excessive bleeding leading to the death of the deceased. One of the heart chambers had been stabbed and this indicated how deep the wound was. Obviously the person who caused it had knowledge that it would cause death or grievous harm. Given the circumstances of the attack, the intention of the attack was to kill or to cause grievous harm. Evidence shows that the attackers asked for money from the family of Jane and attacked her son.

I find sufficient evidence that the unlawful death of the deceased occurred. I also find sufficient evidence as discussed above to show that the person who inflicted the fatal injury intended to cause death or grievous harm to the victim. This therefore proves beyond reasonable doubt that the death of the deceased occurred and that the person who caused that death possessed malice aforethought.

This leaves the last ingredient of murder: identity of the person or persons who caused that death.

Jane (PW4) told the court that there was light at the scene. She stated that: **“There was electricity light from the shop of Kyalo and street light.”** On cross examination she said that: **“There was bright light. I saw 1st accused well..... There was light from the house and street light.”** From this evidence, it is clear that the source of light and its intensity is clear. PW4 further said in cross examination that the whole incident took about five minutes. PW4 further said that 2nd accused was not new to her as she had known him for a long time. She reiterated this evidence in cross examination that she knew the 2nd accused and that he did not talk that night. PW4 also identified the two accused persons at the identification parade conducted by PW2 on 2nd April 2011.

The evidence on identification of the two accused persons by PW4 is not the only evidence implicating them. There is the evidence of PW5 David Adali. He is the one in company of other mourners who arrested the 1st accused persons. The 1st accused went to PW5's home also in Dandora Phase 2 around 1.00am on 24th March 2011, one hour after the attack on PW4 and her family. The 1st accused fell asleep on the table and PW5 who had noticed a knife protruding in 1st accused's pocket took it from him and arrested him. PW5 called the police who arrived and re-arrested the 1st accused. The 2nd accused, who had gone out to buy cigarettes and who was not aware that the 1st accused had been arrested, came back and he too was arrested. The knife recovered from the 1st accused was subjected to DNA testing. The DNA profiles matched the blood sample extracted from the deceased.

I have considered this evidence and I must disagree with the defence counsel in stating that there is only one identifying witness. While it is true that Winnie did not testify, the evidence on the identification parade at the police station is not the only evidence touching on accused's identity as the attackers. There is ample evidence to point to the accused persons as the attackers who killed the deceased. The light at the scene of the attack was bright enough for positive identification; the attackers took about 5 minutes with the victims; the 2nd accused was known by PW4 before that day; the 1st accused was arrested with the

knife that was found to contain bloodstains whose DNA matched the blood of the deceased; the 2nd accused was also arrested and handed over to the police and later, together with 1st accused, they were identified during identification parade. I find this evidence sufficient to prove beyond reasonable doubt that the two accused persons are the attackers who confronted Jane and her children as a result of which the deceased was stabbed and later died; that they are the same people who went to the home of PW5 and arrested there and later identified during identification parades.

I have considered their defence especially their claim that they were the only parade members who were dirty and therefore easily identifiable. I have considered that the identification of the accused persons during the police parades is not the only factor of their being implicated in this case. They were seen in bright light by PW4 and arrested and handed over to the police. PW4 knew the 2nd accused and observed the 1st accused well on the day of the attack because as she testified the light was bright and the attack took about five minutes.

I find that the prosecution has proved beyond reasonable doubt that the accused persons were together when they attacked PW4 and her children and stabbed the deceased. They had formed a common intention to execute this crime. I find the offence of murder proved beyond reasonable doubt against each accused person. Consequently I find Samson Alube Ngota, 1st accused, and Robinson Nginya Kamanu, 2nd accused person, guilty of murder as charged. I hereby enter conviction for the offence of murder against each of them accordingly. It is so ordered.

Dated, signed and delivered this 30th January 2017.

S. N. Mutuku

Judge