



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 26 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

ANDERSON AKHUSEMA ORONJE ACCUSED

JUDGMENT

1. The accused *Anderson Akhusema Oronje* is charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

It is alleged that on 18th day of April 2011 at Oslo pub, Munyaka Trading Centre, Eldoret East within the Rift Valley province, he murdered *Kipkorir Kemboi*. He denied having committed the offence.

2. In support of its case, the prosecution called a total of nine witnesses. The court record shows that the trial opened before *Hon. Karanja J* on 25th October 2011. He heard two witnesses. The case was taken over by *Hon. G. W Ngenye Macharia J* on 12th March, 2013 who started the case denovo. She proceeded to hear four witnesses before she left on transfer. I took over the case on 21st September, 2015 and following the accused's election, I continued with the trial from where *Hon. Ngenye Macharia J* had stopped. I then heard the rest of the prosecution witnesses and the defence case.

3. Briefly, the prosecution case is that on 18th April, 2013, the accused went to Oslo bar in the evening where he found two of his friends one *Joshua* (PW4) and *Nick* (the deceased) taking beer. The bar was being operated by PW3 *Esther Mugaa Mwaiga*. According to the evidence of PW3 and PW4, when the accused walked in, PW4 allowed him to share his beer which he did. But this action annoyed the deceased who picked a quarrel with the accused saying he was stupid for taking their beer. He threw a bottle of beer at the accused which hit him on the nose and he immediately started nose bleeding.

4. As the quarrel escalated, PW4 left the bar. PW3 tried to separate them to no avail. The two started fighting. PW3 managed to pull the accused away to the counter and immediately thereafter, she heard the deceased shouting "my knife, my knife" in Swahili. The accused fled. Upon his request, PW3 went to help the deceased as he was unable to walk properly but he collapsed on his knees as she held him. She noted that he was bleeding. On failing to get a vehicle to take the deceased to hospital for treatment, she called Kapsoya police station and reported the matter.

5. PW3's call was received by PW5 *Sergeant Philip Etyang*. He proceeded to the scene accompanied by

PW7 Chief Inspector *Abdi Noor* and other police officers. On arrival at the bar, they found the body of the deceased lying on its back in a pool of blood. There were broken pieces of glass on the floor and a broken table. Next to the deceased's body, they saw and recovered a knife's sheath. The body had multiple stab wounds on the back, below the right shoulder blade, on the face above the eye and on the right collar bone.

6. PW3 led PW7 to the accused's home. Therein, PW7 recovered two blood stained jackets and a motor cycle which had blood stains on its seat and fuel tank. He went back to Oslo bar where he found PW5 still guarding the scene. PW9 from Kitale scenes of crime office was called to the scene. He took photographs of the body and the bar's interior as well as the two blood stained jackets and motor cycle recovered from the accused's house. The photographs were produced in evidence as Pexhbit 8(a) and his report as Pexhbt 8(b). All the exhibits were taken to Kapsoya police station for further investigations while the body was removed to the Moi Teaching and Referral Hospital.

7. The deceased's body was on 26th April, 2011 identified by PW1, his father and PW2 his brother to PW8, the doctor who performed the post mortem. According to PW8, on examining the body, he found that it had multiple stab wounds on the face measuring 6x1.5 cms; on the right shoulder measuring 3x1.5 cms; on the left shoulder measuring 4x1; on the back measuring 2.5x1; on the right side measuring 2.5x1cm and on the back measuring 4x1cms. The stab wound on the right of the chest had penetrated to the lungs causing massive bleeding and eventual collapse of the lungs which in his opinion was the cause of the deceased's death. He completed the post mortem form which he produced as Pexhbt 10.

8. In the course of investigations, PW5 arrested the accused from his home. The accused admitted that he had the knife that was used to stab the deceased. He gave it to the police officers and according to PW5, he noted that it was blood stained. PW5 had the knife (exhb 4) the two jackets (exbt 5&6), blood samples of the accused and the deceased escorted to the government chemist for forensic analysis. The government chemist report and DNA profiles were produced by PW6 as Pexhibit 9(a) and 9(b) respectively. After completing his investigations, PW7 charged the accused with the present offence.

9. After the close of the prosecution case, the court found that the state had established a prima facie case against the accused and put him on his defence. In his defence, the accused elected to make a sworn statement and did not call any witness.

10. In his sworn statement, the accused denied having committed the offence as charged but admitted having gone to PW3's bar on 18th April, 2011 and getting involved in a fight with the deceased. He claimed that as they fought, the deceased wrestled him to the floor and wanted to stab him with a knife. He denied having stabbed the deceased with the knife deliberately and claimed that he was not sure whether or not he stabbed him as both of them were struggling for possession of the knife.

11. At the close of the defence case, learned counsel for the accused *Mr. Marube* made oral submissions but learned prosecuting counsel *Ms. Oduor* chose not to make any submissions.

12. I have carefully considered all the evidence adduced in this case in its entirety as well as the submissions made on behalf of the accused by *Mr. Marube* and the authorities cited.

13. The offence of murder is created by *Section 203* of the *Penal Code* which provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission commits the offence.

14. For the offence to be established, the prosecution must prove beyond any reasonable doubt the following key elements;

(i) The death of the deceased

(ii) That the deceased's death was caused by the accused's unlawful act or omission.

(iii) That when committing the unlawful act or omission, the accused had malice aforethought.

15. Malice aforethought simply refers to the intention to kill another person. It is defined under *Section 206 of Penal Code* as follows;

“Malice aforethought shall be deemed to be established by evidence 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”.

16. I have no doubt in my mind that in this case, the prosecution proved beyond any doubt the death of the deceased and that the cause of his death was massive bleeding due to a penetrating stab wound on his right chest causing collapse of the lungs.

17. From the evidence on record, it is clear that the deceased met his death in the course of a fight with the accused herein. From PW3 and PW4's evidence, it is clear that the deceased started the fight by picking a quarrel with the accused and hitting him on his nose with a beer bottle. The accused in his defence freely admitted this fact but denied having deliberately stabbed the deceased with Pexhibit 4 in the course of that fight. He inferred that the deceased was accidentally stabbed while the two struggled for possession of the knife.

18. Though PW3 the only witness who was in the bar when the incident unfolded did not claim to have seen how exactly the deceased sustained the fatal injuries, from the multiple deep stab wounds noted by PW5, PW6 and the pathologist and the various parts of the deceased's body that were affected, it cannot be true that the deceased sustained those injuries accidentally as alleged by the accused. If the accused was lying on the floor and struggling for possession of the knife, there is no way that the deceased could have sustained stab wounds on his face, chest and back and none on his hands or arms. The multiple injuries given their depth and their location on the deceased's body including his back leave no doubt that it was definitely a deliberate attack on his person as opposed to accidental injuries as alleged by the accused. And this is why in my view the accused went to hide the knife on the roof of his house where he retrieved it from before handing it over to PW5.

19. Learned counsel *Mr. Marube* in his submissions urged the court to find that the accused stabbed the deceased in self defence. Self defence when established is a complete defence to the offence of murder. See ***Ahamed Mohamed Omar V Republic (2014) eKLR***

20. In this case however, the accused did not raise the defence of self defence in the trial as he did not claim in his sworn statement that he had stabbed the deceased in self defence having sensed danger to his life. He only claimed that he struggled with the deceased for possession of a knife and that the deceased may have been stabbed in that process. There is no evidence on record to show that the deceased ever attacked the accused with a knife. But there is evidence to prove that the deceased provoked the accused into a fight in the course of which he sustained injuries that led to his death in a matter of hours.

21. That said, I am not satisfied from the evidence on record that the accused ever intended to kill the deceased. There is no evidence that he had come to PW3's bar with the intention of killing the deceased.

His death was not premeditated. It is therefore my finding that the prosecution failed to prove that the accused was possessed of malice aforethought when he caused the death of the deceased.

22. As stated earlier, malice aforethought is an essential ingredient for the offence of murder. Consequently, I find that the prosecution did not discharge its burden of proving the offence of murder beyond any reasonable doubt. The prosecution instead proved beyond any reasonable doubt that the accused without malice aforethought caused the death of the deceased. I thus find the accused guilty of the offence of manslaughter contrary to *Section 202* as read with *Section 205* of the *Penal Code* and I convict him accordingly.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET** this 30th day of March, 2017

In the presence of:-

The accused,

Mr. Isiji holding brief for Mr. Marube for the accused

Ms. Oduor for the state

Mr. Lobolia Court clerk