



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 20 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

BONFACE JUMA MAGAMB.....ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The information states that on 19th February 2014 at Omia Malo sub-location in Rarieda District within Siaya County he murdered Benard Okoth Waga.

He pleaded not guilty to the charge Briefly the facts of the case are that on the material day at about 2.30pm the accused called the deceased to the grazing field on the pretext that he wanted to send some music to his phone. According to Kevin Ayara (PW1) who like the accused was a herdsman and who had taken cattle to drink, after the accused called the deceased he did not come and so the accused went for him. They came back together at 3pm listening to music on the deceased's phone. Thereafter the accused told the deceased he was sleepy and they both went to a place with long grass. After about ten minutes Kevin Ayara (PW1) heard a scream. Shortly thereafter the accused came back carrying in his hand the phone belonging to the deceased. He had blood on his hands and his eyes were red. He told Kevin (PW1) that he had killed the deceased and his only interest was the phone. After warning Kevin (PW1) not to tell anyone what he had told him he returned to the scene with a big stone saying he was going to finish the deceased as he had left him moving. Despite the warning Kevin Ayara (PW1) went and informed the village elder (PW4) who in turn reported the matter to the Assistant Chief

of the area (PW6). Kevin (PW1) told this Court that about a week earlier he and the accused had discussed the deceased's phone and the accused had said he liked it and would buy one like it. He stated that the accused and deceased were his friends and that the accused confessed he had used a knife to kill the deceased.

Anna Atieno Owano (PW2) testified that the deceased was her brother in-law and that when she learnt of this incident she went to the scene with Kevin's father. She stated that the deceased was lying on his belly in some very tall grass and that he had a wound on the back of the head. They went away and she went and informed the deceased's father. The police went to the scene but could not remove the body as they were prevented by an unruly crowd that demanded to see the killer first so that they could lynch him. The body remained at the scene until the following day.

Charles Obiayo Osaka (PW4) the village elder confirmed that Kevin (PW1) reported the matter to him. He also confirmed that it was he who reported the matter to the area Assistant Chief. He told the

Court that thereafter the accused was arrested at a nearby shopping Center and subsequently taken to Aram Police Station.

On 25/2/2014 Elly Onunga Adhola (PW5) and Annah (PW2) identified the body of the deceased to a doctor who performed a postmortem. Dr. Biko Steve Opidi (PW7) testified that the body had multiple sutured cut wounds on the scalp the longest being 13 centimetres. It also had the mark of a tie on the neck and cut wounds on the upper part of the body and abdomen. On the left side of the head there was a haematoma on the membrane just before you get to the brain; a fracture of the skull and bleeding beneath one of the membranes covering the brain. The cause of death was opined as cerebral injury due to blunt force of the head and haemorrhagic shock due to multiple cuts. Dr. Biko produced the postmortem report on behalf of one Dr. Malingi whose

whereabouts are unknown. He stated that he had worked with Dr. Malingi at the Siaya District Hospital for one and a half years and was familiar with his handwriting and signature from the hospital records.

Douglas Wamalwa (PW8) a Police Constable attached to Scenes of Crime Siaya produced photographs of the body taken at the scene.

The accused gave sworn testimony. He stated that before his arrest he worked as a herdsman for one Daniel Ogweyo of Asembo. He knew the deceased as they were from the same area. He stated that there was a grudge between him and Charles Obiara Saka who Kevin (PW1) worked for. He explained that this was because Kevin had been sacked by the said Charles when he (the accused) went to work there. He denied that he knew nothing about the death of the deceased and stated that on the material day he was at the Center and not in the grazing field. He contended that when he was arrested he was beaten and told to confess to the killing before being taken to Kevin's home and then to Nyelima Administration Police Post. He was subsequently taken to Aram Police Station. It was there that he was told he had killed Benard because of a phone. He stated that no phone was found in his possession and that it was Kevin Ayara who surrendered it to the police. He denied that he was herding cattle with Kevin on the material day and stated that he did not see Kevin or the deceased on that day. He also denied coveting the deceased's phone stating that he had his own phone. He further denied that he hit the deceased with a stone and contended that he knew nothing about his death.

A person commits murder if he of malice aforethought causes the death of another person by an unlawful act or omission - Section 203 of the Penal Code. Section 206 of the Penal Code provides that 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.”

The points of determination in this case therefore are:-

(a) Whether the death of the deceased was occasioned by an unlawful act or omission of the accused person;

(b) If yes whether it was of malice aforethought.

Having evaluated the evidence on record very carefully I am satisfied that the accused person killed the deceased. Though only fifteen years old Kevin Ayara (PW1) vividly narrated the events culminating in the death of the deceased. He told the Court how he together with the accused were herding cattle, each their own masters and how at about 2.30pm the accused called the deceased and asked him to come as he wanted to give him some music. He told the Court that when the deceased took long to arrive the accused personally went for him. When they arrived together at about 3.00pm both were in jovial mood and were listening to music on the deceased's phone. They were friends after all. A short while later the accused lured the deceased to a place with long grass where he committed this heinous crime. Although Kevin Ayara was too scared to go to the scene he afterwards reported the matter to the village elder. The village elder (PW4) confirmed to this Court that a scared and trembling Kevin (PW1) reported the incident to him. He also confirmed that he went to the scene and that it was surrounded by tall grass. This was also confirmed by the area Assistant Chief (PW6). This Court therefore believed Kevin Ayara when he said that the accused lured the deceased to the scene and that he himself afterwards told him that he had killed the deceased. Kevin Ayara (PW1) also saw him take a stone to go finish what he had started. There were no other people at the scene at that time. My impression of Kevin Ayara (PW1) is that he was a credible and truthful witness and that his evidence is reliable. What he did after the incident is corroborated in all material particulars by both the village elder (PW4) and the Assistant Chief (PW6). It is also noteworthy that this incident occurred in broad daylight and both the accused and the deceased were people well known to him. The chances of his having mistaken their identities is therefore nil. He clearly saw the accused and the deceased arriving and heard what they were saying as he was close to them. He also saw them going to the place with long grass and heard the deceased scream. In other words he was at close proximity to the place where all this happened. After attacking the deceased the accused came back and told Kevin Ayara (PW1) what he had done and sure enough the deceased was later discovered dead at the place where Kevin (PW1) had seen them walking to. This evidence is water tight. The postmortem report, the testimonies of the witnesses and the photographs exhibited in Court offer corroboration to the evidence of Kevin. The photographs show the deceased lying on his belly in some long grass. He has what look like lacerations on the back of his head. The Postmortem report indicates the cause of death was cerebral injury due to blunt force of the head and haemorrhagic shock due to multiple cuts. Understandably this report was produced by a Doctor other than the maker as it was not possible to procure the doctor who drew it without occasioning undue delay. This doctor was competent to produce it as he knew the other doctor's handwriting and signature.

The accused's defence that he was framed because of a grudge was not convincing. He himself told this Court that Kevin was his friend. If Kevin was his friend then it means there was no grudge between them and to say that Kevin

fabricated evidence because of a grudge between him (the accused) and one Charles Obiaro is far fetched. Moreover it is on record that the cattle Kevin Ayara used to herd belonged to his father and he was not an employee. The upshot is that the death of the deceased was occasioned by an unlawful act of the accused person.

What of malice aforethought? The Court heard that a week earlier the accused had intimated to Kevin that he liked the deceased's phone. On the fateful day when he called the deceased he told him to come as he had music which he wished to give to him and in fact when they came to the grazing field together they were listening to music on the deceased's phone. After bludgeoning the deceased the accused told Kevin (PW1) that his only interest was the deceased's phone. It is evident that the accused coveted the deceased's phone and put into action a plan to get it. The death was not accidental. It was carefully planned by the accused person. I am satisfied that the prosecution has established beyond reasonable doubt that not only did the accused kill the deceased but that he did so of malice aforethought.

This Court finds the accused guilty of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Kisumu this 23rd day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Chelangat for the State

Mr. K'Opot for the accused person

C/A: Serah Sidera