



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 65 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MORARA ONDARA.....ACCUSED

JUDGEMENT

Introduction

Charles Morara Ondara (herein the accused) is charged with the murder of Victor Mogwasi (herein the deceased) contrary to section 203 as read with section 204 of the Penal Code. It is alleged in the particulars of the offence that the deceased was killed on 9th June 2013 within Ongata Rongai Mayor Road at about 19.00 hours. The accused has denied committing this offence.

Murder is defined under section 203 of the Penal Code as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

The prosecution bears the onus of proving murder, being a criminal offence, beyond reasonable doubt. The evidence tendered by the prosecution must establish that the person charged before the court with malice aforethought caused the death of the deceased person by unlawful act or omission. There must be proof of the unlawful act or omission causing the death of the deceased and there must be proof that the accused before the court is the person who caused that death and that he intended to cause that death. Intention to cause death is defined under section 206 of the Penal Code. It includes an intention to kill the deceased or to cause grievous harm to him/her and the knowledge that the act or omission will probably cause the death of or grievous harm to the deceased whether the person killed is the intended deceased or another person.

Prosecution case

In support of its case against the accused, the prosecution presented evidence of nine (9) witnesses. Samuel Ombati, PW1, worked with the deceased. He received a call from one Peter (not a witness) on 9th June 2013 at 7.00pm informing him that the deceased had been injured after a fight. Ombati went to the scene and assisted in taking the deceased to hospital. He did not know who had fought with the deceased.

Tiberius Omwenga Mogwasi, PW2, brother to the deceased also received a call informing him that his brother the deceased had been stabbed and seriously injured. He went to Mariakani Cottage Hospital where the deceased had been taken. Omwenga found the deceased had died. He had no information about

what had happened to his brother.

Police Constable David Gichua, PW3, and Police Constable John Moturi, PW5, both from Ongata Rongai Police Station testified that on 9th June 2013 around 7.30pm the accused was taken by members of public to the Station where both officers were on duty. It was reported that the accused had stabbed the deceased. The accused was placed in cells and police went to the scene at a single-roomed house made of iron sheets. In the room were a broken wooden bed and scattered items. A small blood-stained kitchen knife (exhibit 2) was recovered from the bed. Police visited the hospital where the victim had been taken but found he had died.

Nelius Wangari Peri, PW6, is the owner of the residential houses where the deceased and the accused are said to have lived. On 9th June 2013 her agents went to collect rent from the tenants. In house No. B7 where the accused and the deceased are said to have lived the agents found no one in. Rent for B7 had not been paid for about six months. To force the tenants to pay, the agents removed the door to that house and informed PW6. She did not like the idea and decided to check on the tenants around 7.00pm. As she approached the house she heard commotion inside B7. She decided to retreat to some distance from the house. She saw two people pushing each other. One of them, identified as the deceased, was pushed towards the door of house number 6. The attacker was hitting him repeatedly. The deceased was pushed down to a sitting position with the attacker still hitting him repeatedly with something he was holding in his hands. PW6 who was now near the two heard the deceased say “Morara, nimalizie” which can be translated loosely as “Morara, finish me or finish for me”. This was uttered by the deceased as the attacker was still hitting him. The attacker tried to escape after this but was overpowered by members of public who had gathered and captured before he escaped.

PW6 further testified that inside B7 was another person known as Brian. She identified the attacker as the accused before the court and told the court that he was taken to Ongata Rongai Police Station immediately he was arrested by members of public.

The knife was examined by Elizabeth Oyiego, PW4, together with accused’s blood sample and cotton wool with blood collected from the scene. The DNA profiles from the blood stains on the knife and from the deceased’s blood sample matched confirming that the bloodstains on the knife belonged to the deceased. The blood on the cotton wool did not produce a full DNA profile. It showed partial DNA profile of unknown male origin.

Defence case

The accused is the only witness for the defence. He testified under oath and told the court that 9th June 2013 he heard noise at a place on Mayor Road. He asked some women the cause of the noise and was told that someone had been found dead. He said he found a dead man lying down but he could not get near him; that he saw one Peter making a call to one Samuel Ombati telling him to go and assist in taking the deceased to hospital; that when Samuel arrived the accused joined them to go to Ongata Rongai Police Station to report but on arrival at the Station he was locked in the cells; that police tortured him forcing him to tell the truth and admit he had assaulted the deceased; that to avoid further torture he admitted committing the offence. He said he showed the doctor who examined him the injuries he sustained as a result of beatings by the police.

At the end of the defence case Mr. Masake for the accused submitted that the accused was not positively identified as the person who stabbed the deceased occasioning him fatal wounds; that the only person who testified to witnessing the stabbing is PW6 Nelius; that this witness did not know the accused before; that it was at 7.00pm and she stood at a distance; that she could not have seen the accused well since she admitted to having poor eyesight due to diabetes; that the members of public who allegedly took the accused to the police station did not testify; that the evidence is not clear whether there were two people or three in house No. B7 and that blood samples did not connect the accused with the commission of the offence.

Determination

I have carefully read and analysed the evidence from both sides. The prosecution bears the onus of proving a criminal case beyond reasonable doubt. I find from the evidence of Dr. Dorothy Njeru who examined the body of the deceased that the deceased had five stab wounds as follows:

- i. On the right anterior chest wall measuring 3cm long sharp on one edge at level of 1st rib superficial in nature;
- ii. On the midline chest wall anterior about 2cm long sharp on one edge and superficial in nature;
- iii. On the left anterior chest wall about 5cm long above clavicle sharp on one edge and penetrating in nature;
- iv. On the right temporal-occipital region about 6cm long and superficial in nature; and
- v. On the left temporal-occipital region about 3cm long superficial in nature

The doctor also found internal bleeding in the chest cavity with 2 litres of blood accumulated and an injured heart and left lung. The doctor formed the opinion that the cause of death was due to chest injuries due to penetrating sharp force trauma. From the doctor's evidence I find that the death of the deceased as a result of injuries to the chest has been proved beyond reasonable doubt.

The other issues for determination are whether the accused is the person who caused that death and if so whether he possessed malice aforethought. Of all the nine prosecution witnesses, it is only PW6 who testified to having witnessed what happened. Her evidence is that she went to house No. B7. She intended to check on the tenants of this house because earlier on her agents had removed the door to that house to force the tenants to pay rent. As she neared the house she heard some commotion inside with a lot of banging. Two people came out pushing each other. Her evidence is captured as follows:

“There were two people. They came out pushing each other. I retreated further fearing (*sic*). They pushed each other out. There was door No. 6. The deceased was pushed by the other one towards the iron sheets. He knelt or sat down facing B7. The attacker was hitting deceased and deceased said, “Morara nimalizie”. I was near them. The attacker had something in his hands and was using it on the deceased’s neck right side. There was no light but I could see. I knew they were tenants. I did not know them. Deceased mentioned name Morara as the attacker was hitting him (*sic*). I shouted for help. Many people came. The attacker tried to run away. There was another person inside B7. Neighbours called him “Brian, you have to tell us the name of the attacker”. He said the attacker was Morara.”

PW6 told the court further that **“I did not see the attacker well”** although she maintained she could identify him and pointed at the accused in the dock. On cross examination PW6 told the court as follows:

“I do not see well at night. There is no actual time when I begin not to see well but when I have not eaten I cannot see well.”

From this evidence it is clear that other than the accused and the person he was fighting with who is said to be the accused, there was Brian. There were no lights around the scene. PW6 suffered from diabetes and this affected her sight. It was at night and the court was told there were no lights at the scene. She had retreated from the fighting and was standing at some distance from the fighting duo. Were these conditions conducive to positive identification of the person who was attacking the deceased?

Evidence touching on the identification of a suspected in a criminal offence must be treated with utmost care. The guidelines to be followed are set in various decisions including **Regina v. Turnbull (1976) 3 WLR**. These guidelines are as follows:

- i. How long did the witness have the accused under observation?
- ii. How far was the witness when (s) he made the observation?
- iii. In what light was the observation made?
- iv. Was the observation impeded in any way by anything for instance by passing traffic or a press of people?
- v. Had the witness ever seen the accused before? How often? If only occasionally, had he any special

- reason for remembering the accused?
- vi. How long elapsed between the original observation and the subsequent identification to the police?
 - vii. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?

PW6 on her own admission did not know the fighting duo. She admitted in evidence that it was dark and she did not see well due to a condition caused by diabetes. She said she heard the deceased call the name Morara. She said there was also one Brian and that the neighbours who answered to her call for help asked Brian who the person who attacked the deceased was and Brian named Morara. This confirms that PW6 did not know the person who was attacked the deceased and who ran away. Brian did not testify. Evidence shows that the accused who was alleged to have attacked the deceased was arrested by members of public before he escaped and taken to the Police station. The members of public who arrested him did not come to court to testify. It is true the accused was taken to the Police Station and PW3 and PW5 informed that he is the one who had attacked the deceased. This evidence is not corroborated by those who allegedly arrested him. There evidence could have shed more light at to his arrest and what led them to arrest the accused.

PW6 identified the accused in court. Given that she did not know him before, this identification amounts to dock identification. Dock identification is frowned upon by courts. In **Amolo v. Republic (1991) 2 KAR 254** the court held that:

"Following Gabriel Njoroge v Republic (1987) 1 KAR 113, visual identification must be treated with the greatest care and ordinarily dock identification alone should not be accepted unless the witness has in advance:

(a) given a description of the assailant,

(b) identified the suspect on a properly conducted parade."

The burden of proving a criminal case never shifts from the prosecution to the accused. An otherwise good case can be lost due to poor investigations. In this case crucial witnesses were left out: Brian who was said to have been in the same house with the deceased and another person alleged to be the accused and the members of public or even one of the members of public who arrested the accused and took him to Ongata Rongai Police Station. This omission has left gaps in the prosecution evidence and these gaps are fatal.

My careful analysis of the evidence by the prosecution leads me to a finding that the prosecution has failed to prove the identity of the accused as the assailant who fought and inflicted fatal wounds on the deceased that led to his death. The evidence by the prosecution has fallen short of proving beyond reasonable doubt that the accused stabbed the deceased. With this ingredient settled in the negative in respect of the accused person it would be an academic exercise to proceed to consider and determine the third ingredient, whether the accused possessed malice aforethought.

In conclusion therefore, after careful analysis of all the evidence in this case I find that the evidence on record does not prove beyond reasonable doubt that the accused committed this offence. He shall benefit from the doubts created by the gaps in the prosecution evidence. Consequently, I find Charles Morara Ondara not guilty of the murder of Victor Mogwasi. He shall be set at liberty forthwith unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 16th day of March 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Mr. Masake for the accused

Mr. Charles Morara Ondara, the accused

Mr. Daniel Ngumbi, Court Clerk