



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 99 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL WAITHAKA ALIAS LEBA.....1ST ACCUSED

JEFF OCHIENG AYOO.....2ND ACCUSED

JUDGEMENT

INTRODUCTION

1. The accused persons, were charged with the offense of murder contrary to section 203 as read with section 204 of the penal code, the particulars of which were that on the 19th day of march 2014 at Madoya in Huruma in Starehe Sub-County within Nairobi County jointly murdered **ALOISE OBONGE ODENY**.

2. They both pleaded not guilty to the said charge and on 7th February 2018, their trial commenced before me at the end of which the prosecution called and examined seven prosecution witnesses. When put of their defence, they tendered in sworn statement in defence and were duly cross examined thereon without calling any witness.

PROSECUTION CASE

3. On behalf of the prosecution, **PW2 ROSE ANYANGO WAORE** stated that she knew the accused persons, who were living with her in the same area and that on 19th March, 2014 she saw her brother in law standing with the accused persons together with the deceased as if in an argument. She noticed that the second accused had a knife in his right hand.

4. It was her evidence that she heard the deceased crying and shouting that the accused persons wanted to kill him, she then raised an alarm and went back into the plot to seek for help from her neighbours and when she returned back to the scene, she found the deceased lying down and saying that the accused persons had killed him with a stone, because he had stopped them from snatching a mobile phone from a passer-by.

5. It was her further evidence that at that stage, the deceased called her husband on phone and the accused persons left the scene, as the deceased proceeded to the police station alone to make a report, before proceeding to Huruma Nursing home for treatment. He was later on referred to Kenyatta National Hospital where he was treated and came back to the plot. He was thereafter take to the local clinic when his condition didn't improve, before been taken back to Kenyatta National Hospital from where he died in May.

6. In cross examination, she stated that she could not remember the kind of clothes the accused were wearing and that there was a big crowd at the scene, who were scared of arresting the accused persons. She stated further that she did not witness what had happened neither did she see the stone which had allegedly been used by the accused persons on the deceased.

7. She stated further that the second accused was standing at a distance of between five to six meters from the deceased and did not see him hit the deceased, but that the deceased was bleeding from his head. It was her evidence that the deceased took himself to the hospital and came back home where he was for a period of one and half week before he was taken back to Kenyatta.

8. **PW4 MARY ANYANGO** stated that on the 19th March, 2014 at 9.00 am she was at her place selling mandazi, when she saw a man who had passed by running back and the deceased who was selling chapattis nearby asked him what had happened, to which he replied that there were a group of youth who wanted to robe him.

9. It was her evidence that the deceased decided to go with him to the scene and one of the youths thereat started to beat him in the presence of the deceased. The passer by then ran away leaving deceased with the accused persons, who started to beat him up, while moving with him towards his door, when the 1st accused hit him with a stone, causing him to fall down and loss consciousness. She then took him to his house while the accused persons ran away from the scene.
10. The deceased was taken to hospital where he was treated and discharged, after one week he was taken to a local clinic called Marura where he was admitted for two weeks before being transferred to Kenyatta National from where he died.
11. In cross examination she stated that she heard the deceased asking the 1st accused why he had attacked the passer-by, who was his father's age mate and that she did not see any of them with a weapon. It was her evidence that whereas the 1st Accused was present at the scene, the fight was between the deceased and the 2nd accused. It was her evidence that there were a bout fifty people at the scene, where the deceased and the 2nd accused were fighting.
12. She stated further that she saw the 1st accused take a block of stone which he hit the deceased with. It was her evidence that before the said date the deceased had not been sickly, he was thereafter taken to Huruma Nursing Home where he was admitted for one week, discharged for one week before being admitted at Marura clinic for two weeks and then to Kenyatta for one week.
13. **PW5 DAVID OUMA OTIENO** stated that on the material day he was sick and on bed in his house, when his wife called him and informed him of the fight. When he got out, he saw the 1st accused holding a rock which he threw at and hit the deceased with, he then held the 1st accused whom he knew very well and the same surrendered
14. He stated that the deceased started to cry holding his head and that when the 2nd accused saw him, he disappeared from the scene, since they were scared of him. The 1st accused then moved from the scene towards the riverside. He later on heard that the deceased had been taken to the hospital.
15. In cross examination, he stated that his wife called him and told him that there was a fight without giving him the details of those who were fighting and that when he went to the scene, he found the accused persons there and the 1st accused threw the stone at the deceased. He had known the 1st accused for seven years. He stated further that he did not see the 2nd accused holding any weapon and did not see him fight the deceased.
16. **PW6 BERNARD ABUTO ODENYO** stated that the deceased called him on phone and told him that he had been beaten by LEBA and JEFF who had hit him on the head. He later on found him being attended to at Huruma Nursing home, the next day he went to Kenyatta where he was treated and discharged, his condition later on became worse and was taken to Mama Lucy from where he was referred back to Kenyatta National hospital.
17. It was his evidence that when the deceased died, he witnessed the post mortem examination and was thereafter called to the police station where he positively identified the accused persons. It was his evidence that he had known the 1st accused for over twenty years.
18. In cross examination he stated that Leba the 1st accused had been arrested over a different offense and at the station he was removed from the cell for him to confirm that he is the one who had attacked the deceased. He stated that after the accused persons had attacked the deceased, they left the area to unknown place and that the deceased had injuries to his right side of the head.
19. **PW3 MICHEAL SIMBIRI ODENYO** on 2/5/2014 identified the body of the deceased for purposes of post mortem. It was his evidence that the deceased had earlier told him how he had been attacked by two people whom he knew as "leba" and "Jeff".
20. **PW1 DR. BENARD OWINO MIDIA** performed post mortem examination on the body of the deceased and noted that the head had a swelling around the left eye, there was blood on the scalp on the left side and internally there was infection of the lung and that injuries could have been as a result defensive or from a fall.
21. In cross examination he stated that there was a scar on the head and that the same could have been caused by either a fight or a fall and possibly caused by a blunt object and that the same had pneumonia.
22. **PW7 CI DAVID WAMBUA** stated that he was the duty when the report was booked at the station that the deceased had been assaulted by people known to him. He was later on informed that the same had died while undergoing treatment, he later visited the scene and recorded statements from witnesses who mentioned two suspects one of whom was later arrested on a different charge and one of the relatives of the deceased identified him at the station as LEBA.
23. It was his further evidence that the 2nd accused was arrested while at the station in connection with another offence where he was positively identified by PW3, MICHAEL SIMBIRI ODENTA as one of those who had assaulted the deceased.
24. In cross examination, he stated that the deceased reported having been assaulted by people known to him but did not give their name. He stated that after the assault the accused persons disappeared and were not arrested immediately. He stated further that he was not told of any bad blood between the deceased and the accused persons. He confirmed that the deceased had gone to rescue someone who was being attacked by the accused persons before they turned against him.
25. It was his evidence that the motive for the assault of the deceased was that he interfered with the accused persons mission of robbing a passer-by. It was his evidence that the 2nd accused was known to most of the prosecution witness since they lived in the same area.

26. **PW8 JOHN ODHIAMBO** a director of Huruma Nursing Home produced a copy of the prescriptions which were issued to the deceased by the Doctor who attended to him and in cross examination stated that he could not ascertain whether the deceased was assessed for other ailment

DEFENCE CASE

27. The 1st accused **MICHAEL WAITHAKA alias LEBA (DW1)** in his defence stated that on the material day he was at his place of work at the farm when he heard shouts which he did not respond to. He later on proceeded to the Kiosk for tea, when he met many people whom he did not join. He went back to his farm and was within the area until he was arrested a year later on a framed up case

28. He stated that at the police station, he was identified by PW3 whom he did not know, he stated further that there was contradiction in the testimony of the prosecution witnesses as to what side of the head the deceased sustained injuries and whether they ran away from the scene

29. In cross examination he confirmed that he was living in the area where the incidence occurred but did not know any of the prosecution witnesses. He confirmed having been arrested for the offence of robbery with violence which later on turned into murder and that he was arrested on a raid within the area

30. The 2nd Accused **JEFF OCHIENG AYO O (DW2)** stated that on the material day he was selling water when he heard an alarm being raised between 7.30 – 8.00 am and he decided to go to the place, where he met a crowd of people where, some old man called pastor Ben was talking to the deceased known in the area as “Baba Chapo” and that the deceased told him that some two boys had gone to his place of business and destroyed his flour

31. It was his evidence that he said that the two boys started to fight him and in the process he was hit with a stone from the crowd and that pastor Ben advised the deceased to go and report to the families of the two boys, to seek compensation, to which the deceased said he will go to the chief instead and he then left the two at the place and went back to his business

32. He stated that he was thereafter in the area until the year 2016 when he was arrested and while at the police station, someone called Mike went to the station and called his name and identified him as the one who had assaulted the deceased, leading to his being charged with the present offense. It was his evidence that there was contradiction in the prosecution evidence

33. In cross examination, he stated that he was living in Huruma and stated that he was known in the area because he was selling water and that his grandmother was a neighbour of the deceased and PW4 who had a grudge with his grandmother whom she had threatened and said that she will get her through him by denying her support.

34. It was his evidence that there was contradiction in the evidence of prosecution witnesses as to whether he had stabbed the deceased with a knife or hit him a stone or a blunt object. He confirmed that he was at the scene and that he knew the deceased and that he was arrested for an offense of robbery with violence but was released for lack of evidence.

SUBMISSIONS

35. At the close of the defence case, the accused persons filed written submission, while the prosecution made oral submission. On behalf of the accused persons, it was submitted that considering the contradiction in the witness account on the nature of injuries sustained by the deceased, there was a doubt on the culpability of the accused persons and it was therefore submitted that the prosecution case was not proved beyond reasonable doubt for which the cases of **MOHAMMED SWALE KAEZE v REPUBLIC [2005] eKLR** and **PHILIP MUIRURI NDARUGA v REPUBLIC [2016] eKLR**.

36. On behalf of the prosecution it was submitted that the inconsistency in the prosecution case was not material to the prosecution case. It was submitted that there were eye witnesses who identified the accused persons who gave their names and their identification was not mistaken.

ANALYSIS AND DETERMINATION

37. To sustain a conviction on a charge of murder, the prosecution is under a duty to prove beyond doubt the following: -

- a. the fact and the cause of death,
- b. that the said death was caused by unlawful act on the part of the accused person,
- c. that it was caused with malice aforethought.

38. The fact of death of the deceased was not disputed, the second accused confirmed in his defence that he heard of the death of the deceased, thereby corroborating the evidence of the prosecution witnesses. The cause of death was proved through the evidence of **PW1 Dr. MIDIA** who performed post-mortem on the body of the deceased whose evidence was that the cause of death was injury to the head.

39. Whereas there was inconsistency on the witnesses account as to which side of the head was hit, I am satisfied that the fact and cause of death of the deceased was proved beyond reasonable – through the post mortem report produced and that the fact that the deceased was found to be suffering from pneumonia was doubt notwithstanding the fact that he was also found to have been suffering from pneumonia was immaterial as the same was not the immediate cause of the deceased death.

40. On whether the said death was caused by the accused persons, from the evidence presented before the court the only issue in disputed is whether the accused persons were positively identified and put at the scene. Both the accused persons were living in the same area with the deceased and the prosecution witnesses, they were known to the deceased who gave their names to his brother PW6 when he called him on phone.

41. The deceased was very clear that he had been beaten by the two accused persons whom he called Jeff and Leba, this evidence was corroborated by **PW2 ROSE ANYANGO WAORE** who was at the scene and who was a neighbour of both the deceased and the two accused persons, she positively identified the accused persons. **PW2 MICHAEL SIMBIRI ODENY** corroborated the evidence and stated that when he visited the accused at the hospital, he told him that he had been attacked by two people whom he knew.

42. The accused persons were further positively identified by **PW4 MARY ANYANGO** whose evidence was not challenged by the accused persons in cross examination and in rebuttal. **PW5 DAVID OUMA OTIENO** who knew both the accused persons and the deceased positively put them at the scene. He knew the accused persons by their alias names of JEFF and LEBA.

43. The 2nd accused in his defence put himself at the scene and stated that he found the same with someone called Pastor Ben whom he told that he had seen two boys had destroyed his flour from making chapatti, which line of evidence I find to be an afterthought taking into account the prosecution evidence on record.

44. From the evidence it is clear to my mind and I find and hold that the death of the deceased was caused by the accused persons who were positively identified and place at the scene. I have looked at their evidence in their defence and note that the 2nd Accused person placed himself at the scene and the 1st Accused confirmed in his defence that he was within the area he knew the deceased with his name of Baba Chapo.

43. There was no evidence that any of the prosecution witnesses had a grudge to pick with any of the accused persons and the 2nd accused person's allegation against the PW2 was an afterthought as he did not put the said allegations to her in cross examination so as to enable her respond to the alleged threat to his grandmother and alleged fight between them.

44. I further find and hold that the deceased made a dying declaration to both PW3 and PW5 both whom he told that he had been attacked by the accused persons which declaration corroborated the evidence of PW2 who heard the deceased shout and cry that he had been killed by both accused persons. In this I find support in the case of **REPUBLIC v YIENDE HIGH COURT CRIMINAL CASE NO. 16 of 1990** where a court of parallel jurisdiction held:-

1. Any statement made by a deceased is admissible as a dying declaration if it is established that it was made by him when he was in immediate expectation of death and had lost every hope of living.

2. It is not required in law, in order to support a conviction, that a dying declaration must be corroborated. There is need for exercising caution though before a conviction is based solely on it.

3. A dying declaration is the weakest of all evidence. It must be remembered that it is made in the absence of the accused and is not subjected to cross examination.

4. In the instant case, the evidence fails to establish that the deceased made a statement when he was under the solemn belief of impending death. Accused acquitted."

47. Whereas there were minor contradictions on the prosecution witnesses account as to what took place between the deceased and the accused persons, those contradictions did not go to the root of the prosecution case and when looked at against the accused defence, I find and hold that the prosecution case was proved beyond reasonable doubt

48. The final issue for determination is whether the accused persons had the necessary malice aforethought, as defined in section 206 of the Penal code. The evidence before the court is that the accused persons were robbing someone when the deceased went to his rescue only for them to turn against him and a fight ensued between them. It was in this process that he was hit on the head causing him injuries which led to his death.

49. In the case of **REPUBLIC v ISMAIL HUSSEIN IBRAHIM [2018] eKLR** the had had this to say on malice aforethought:

a) With regard to the third element the prosecution has a duty to prove malice aforethought on the part of the accused.

What is malice aforethought? Malice aforethought describes the mensrea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. In our laws Section 206 of the penal code provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established:-
(a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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”.

It is instructive to observe that in injecting live to these provisions courts have firmly considered the question of malice aforethought in various cases. I am alive to the fact that courts have asserted themselves on this issue but still they exist no coherent principles of precisely applying it in different cases and circumstances. The definition of malice aforethought as currently prescribed in section 206 of the penal code all together is also incoherent. I hold the view that sometimes difficulties arise in applying it particularly on borderline cases. To meet the approach may be parliament has to amend the law and even remove it all together to create a new definition for the offence of murder. However, the law as it stands it is still good law but with a bit of reform it will even be made better.

The formulation of the law in Rex Versus Tubere S/O Ochen 1945 12EACA 63 laid down the guidelines for trial Judges where the court held that: “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

The English Courts while grappling with the same issue stated as follows in the case of Cunliffe v Goodman 1950 1 ALL ER 724 Asquith L.J in regard to the definition of intention in homicide offences: “An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition”

This to me seems to be the right approach when it comes to manifestation of malice aforethought as defined under section 206 (a) and (b) of the penal code. Where the circumstances of the case demonstrate that in carrying out the unlawful act the accused acted with full knowledge that the act was highly capable of causing death or grievous harm malice aforethought should be inferred. In reference to R. v Moloney case two questions arise to be answered in the concept of intention and malice aforethought.

(a) Was death or very serious injury a natural consequences of the defendant voluntary act?

(b) Did the defendant foresee that the consequence of being a natural consequence of his act?

50. It is clear that the death of the deceased was as a result of injuries inflicted upon him by the accused person who had picked up a fight with him, the deceased was hit on the head and the injury so serious enough to cause his death some weeks thereafter. The act was further as a result of a commission of a felony on the part of the accused persons jointly and severally.

51. I therefore find and hold that malice aforethought was proved beyond any reasonable doubt.

DISPOSITION

52. In the final analysis I have considered the prosecution account against the accused defence and find and hold that the prosecution proved all the elements of the offence of murder and accordingly find both the accused persons guilty of the murder of **ALOISE OBONGE ODENY** on 19th day of March, 2014 and convict the same accordingly.

53. It is ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2021

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo/Gikonyo for the State

Mr. Mburu for the 1st and 2nd accused persons

Court assistant Gitonga