



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WALTER OSOYA NYAKOYE.....ACCUSED

JUDGMENT

1. Walter Osoya Nyakoye is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 19th day of January, 2018 at Konyango location, North Karachuonyo Sub County of Homa Bay County, murdered Calvin Ojwang.
3. The prosecution case is that the accused and the deceased disagreed over unknown reasons. The accused who was armed with a knife fatally injured the deceased.
4. In his defence the accused contended that some security guards had a fight amongst themselves. He was falsely implicated.
5. The issues for determination are:
 - a. Whether the accused was the one who inflicted the fatal injury to the deceased; and
 - b. Whether the offence of murder was established.
6. Shairi Odhiambo Saad (PW3) was one of the security guards at the Club Hague. His evidence was that he knew the accused as one of their patrons. On 19th January at about 2 a.m. the deceased who was with him outside the entrance to the Club went inside the Club. He returned with the accused and the two were engaged in a quarrel. The two went outside the Club compound and shortly thereafter, he heard shouts outside the Club. When he rushed there, he found the deceased on the grounds; he had injuries. Meanwhile the accused was being beaten by boda-boda riders who allegedly arrested him with a knife.
7. The evidence of Kennedy Onyango Otieno (PW4) another security guard at the Club was that he noticed the accused and the deceased quarreling. The deceased ejected the accused from the Club. After a few minutes, he heard the deceased screaming and alleged he had been stabbed. When he went out, he saw the accused running while wielding a knife. He was chased and arrested while still in possession of the knife.
8. Jane Akinyi Wambogo (PW1) the then manager at the Club Hague, testified that she saw customers running out and she followed them. She found the deceased lying down and had been badly injured. Another group of people were chasing the accused who had a knife.
9. The accused contended that while he was waiting to be picked by a boda-boda, he heard a commotion at the entrance of the Club; some security guards were fighting amongst themselves. He heard somebody say, “*Ndiyo huyu*” – meaning he is the one. He was arrested and subjected to mob beating. His witness, Brian Opanja Wangulu, testified of the fight among the security guards but said this took place after he had left the Club. This is therefore inadmissible hearsay.
10. The contention by the accused that the security guards were fighting amongst themselves is clearly an afterthought. None of the security guards who were called as witnesses were challenged with these facts. There is no rationale from the evidence on record that can make the guards to falsely implicate the accused. I therefore dismiss this line of defence.

11. There was no direct evidence against the accused. No one testified to have witnessed the stabbing. They all went to the scene after the fact. This therefore amounted to circumstantial evidence. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

12. Earlier the Court of Appeal in the case of **Rep vs. Kipkering Arap Koskei & another 16 EACA 135**, had held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In the instant case, the accused was seen and heard quarrelling with the deceased. He was thereafter seen running away while wielding a knife and was apprehended at the scene of the stabbing. All these facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I find that the accused inflicted the fatal injury on the deceased.

13. In order to found conviction of the offence of murder on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

14. In the instant case, there was no evidence that was adduced to show why the accused and the deceased were quarrelling and what led the deceased to be stabbed. Malice aforethought was not established. I therefore, find that the prosecution has not proved the offence of murder against the accused. I acquit her of the charge of murder. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I find him guilty and convict her for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE