



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 8 OF 2017

THE REPUBLIC.....PROSECUTION

-VRS-

1. KELVIN OBARE OBWOCHA.....1ST ACCUSED

2. JOB MAINYE OBWOGI.....2ND ACCUSED

JUDGEMENT

The accused persons herein were charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the night of 17th and 18th October 2017 at Nyandemi village, Manga Sub-county within Nyamira County jointly with others not before court the accused persons killed **OBARE NYABUTI NYANG'AU**.

They both pleaded not guilty to the charge whereupon a trial at which the prosecution called ten witnesses ensued. However, at the close of the case for the prosecution upon consideration of the evidence this court found there was no evidence at all to connect the 2nd accused to the death of the deceased and acquitted him under Section 306 (1) of the Criminal Procedure Code leaving the 1st accused now before this court to enter his defence.

In summary the facts of the case are that on the morning of 18th October 2017 the body of the deceased who was well known in his area was found lying in a pool of blood by the roadside along the Nyamira – Kisii highway. The deceased had injuries on the face and head and besides him were pieces of timber of the cypress variety. Since cypress is not common in the area those who went to the scene decided to go to a nearby home where it was suspected the pieces of timber had come from. That home belonged to Mageto (Pw5) but before they could do so Mageto (Pw5) who was already inside a vehicle going to Kisii saw the crowd near his home and alighted and joined the group. Evans Nyakundi Nyang'au (Pw3) the Chief of Central Kitutu had also been alerted of the matter and had proceeded to the scene after finishing some business that had taken him to Manga. He was soon joined at the scene by police officers. He was conferring with Sgt. Kiprono when he saw a blood stained offcut which seemed to have been used as a bridge. The said offcut was roughly sixty metres from the body of the deceased and the blood on it was fresh. He explained that he concluded it had a connection to the body and that the killers might have used it to go to a nearby homestead that happened to be the home of Mageto (Pw5) where they found other cypress timber like the one found next to the body. Further investigations revealed trickles of blood on a footpath leading all the way to a house identified as that of the 1st accused. Ezron Nyasungu Motuku (Pw1) and Maisiba Muma (Pw2) had also been to that house as they suspected the 1st accused was involved in the death of the deceased. They stated that the door of the house was shut but not locked and that when they entered they saw pieces of timber similar to the one they had seen next to the body of the deceased and blood stained clothes on a hanging line in the house. They immediately left the house and went to inform the Chief, Assistant Chief and officers who were at the scene. In their testimonies they identified those clothes as a white jacket and a pair of blue denim trouser. The Chief (Pw3) and the Assistant Chief (Pw7) testified that upon receiving that information they went to the house with police officers and saw the white jacket and blue denim trouser (jeans) that had fresh blood as well as mud and that a further search conducted by Inspector Samuel Maiyo (Pw9) of DCI Manga, revealed in the same house a blue jumper, black jean short, checked shirt, whitish shirt and black trouser which also had blood. They carried those clothes, a knife and timber which they found in the house. In the meantime, the 1st accused had been apprehended and had been whisked to Manga Police Station for fear that he would be lynched.

The court heard that the scene was photographed by Sgt. Charles Kiprono (Pw6) on the same day. He also took two photographs at the house of the 1st accused one depicting the house generally and the other showing assorted clothes some visibly stained with blood. (Those photographs were produced in evidence as Exhibit 1 (a) to (f)). Thereafter the deceased's body was taken to Nyamira County Hospital Mortuary.

On 19th October 2017 a post-mortem was conducted on the body of the deceased by Dr. Steve Osasi (Pw8) who opined that the cause of death was: -

i. Compressed skull fracture on the parietal region which was bilateral.

ii. Fracture of the manibulum bone also bilateral.

iii. Bleeding of the brain.

Pw8 testified that during the post-mortem a blood sample of the deceased was collected for purposes of DNA. On 1st November 2017 that sample and the exhibits collected from the 1st accused's house were taken to the Government Chemist Kisumu for analysis. Richard Kimutai Langat, (Pw10), a government analyst working at the Government Chemist Kisumu, confirmed that on 1st November 2017 he received the following items from one Idi Salim of Manga CID: -

1. Blood stained clothes of the 1st accused namely –

- a. Blue jeans
- b. Black trouser
- c. Cream/white shirt
- d. Checked (stripped) shirt
- e. Blue trouser
- f. Pink jacket
- g. Blue jumper

2. Blood stained clothes of the deceased –

- a. White jumper
- b. Black trouser
- c. Blue T-shirt
- d. Blood sample of the deceased.

3. Blood sample of Kelvin Obare (1st accused)

4. Blood sample of Job Mainye (2nd accused).

5. Blood stained plank of timber.

He stated that on 28th February 2019 he did an analysis on the sample and exhibits and found that all the articles of clothing as well as the timber were stained with human blood. He also stated that all the articles were then subjected to a DNA analyser and they all generated DNA profiles; that the blue T-shirt, black trouser, white jumper, blue jeans trouser, checked shirt and pink jacket matched the DNA profile of the deceased while the DNA from the blue trouser and the blue jumper matched the DNA profile of the 1st accused. However, the DNA generated by the black trouser (A2) and the cream shirt (A3) was from a male person who is unknown meaning it was not from either the deceased, the 1st accused or the 2nd accused. He clarified that none of the articles generated a DNA matching with that of the 2nd accused. Asked whether his having taken too long to examine the exhibits might not have affected the results Pw10 stated that the exhibits were well preserved and that for as long as they did not come into contact with moist surfaces nothing could change. It is for reason of Pw10's testimony that none of the articles had DNA matching that of the 2nd accused and the fact that none of the other evidence pointed to 2nd accused that this court found there was no evidence he had committed the offence and acquitted him at that early stage.

In his defence, the 1st accused stated that before this case he worked as a brick maker and that on 18th October 2017 he was sent to buy sugar and while on his way back he met his uncles Maisiba Muma and Samuel Nyanguti who requested him to accompany them to report that his aunt who was of unsound mind could not be traced. He stated that they went to Manga Police Station and he was left there. Later he was taken to Nyamira Police Station by an officer who took his identity card. At 6pm the officers took him to the CID office in Nyamira and interrogated him concerning a murder which he knew nothing about. He stated that the officer hit him on the head with a bottle. That his clothes got stained with blood as a result and the officer gave him other clothes to wear and took away the blood stained ones. He contended that the blood stained clothes were the ones that were tendered in evidence. He contended that he did not know how the deceased met his death. In cross examination he denied that the blood stained pieces of timber produced in evidence were recovered from his house. He also alleged to have informed the court about the assault on the day of plea and further stated that he stayed at the police station for a week and three days. He reiterated that he was apprehended by his uncles and that the police officer gave him a change of clothes.

There were no submissions either at the close of the prosecution's case or in closing.

What was required of the prosecution in this case was to prove the following elements beyond reasonable doubt: -

- a. The death of the deceased and the cause of that death.**
- b. That the death was caused by an unlawful act of the accused; and**
- c. That the accused acted of malice aforethought. (See *Antony Ndegwa Ngari v Republic [2014] eKLR*).**

The death of the deceased is neither disputed nor is it in doubt as it was confirmed by eye witnesses who knew him well and who confirmed at the scene that he was the one. It was also confirmed by the post-mortem conducted by Dr. Steve Osasi (Pw8) who also confirmed that the death was caused by injuries which he noted on the deceased's head. These injuries were consistent with the witness account that the deceased had multiple injuries on the face and head probably inflicted with a blood stained piece of timber that was lying beside the body of the deceased. It is therefore not in doubt and I must say it was established beyond reasonable doubt that the deceased's death was by a human hand or in other words that he was killed. I also find it a fact from the evidence that the act causing his death was intentional and unlawful as no person should be deprived of his life intentionally, except to the extent authorized by the Constitution or other written law – see *Article 26 of the Constitution*. In *Guzambizi Wesonga v Republic [1948] EACA 55* the Court of Appeal held that: -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excused, it must have been under justifiable circumstances, for example in self defence or in defence of property.”

There is nothing to suggest that any of the above circumstances exist in the instant case. Instead all evidence points to the deceased being bludgeoned with pieces of timber one of which was found lying next to his body. That evidence coupled with the nature and extent of injuries inflicted upon the deceased all point to an unlawful act.

As to whether the accused caused the death of the deceased I have evaluated the evidence by both sides carefully and have come to the conclusion that whereas there is no direct evidence connecting him to the offence there is circumstantial evidence so cogent and overwhelming to prove beyond reasonable doubt that he committed the offence. There is evidence that clothes with blood stains matching the DNA profile of the deceased, the 1st accused and another (unknown) person were found in the house of the 1st accused. That house was identified as his by persons who he admits were his uncles and who therefore knew him well. He also admitted that some of the blood stained clothes produced in evidence and which were referred to by the government analyst and the investigating officer were his. Whereas he alleged to have stained his own clothes with blood after being beaten by a police officer he did not offer any explanation for the clothes which were found in his house and which had blood stains matching the DNA profile of the deceased. The accused had the evidential burden under **Section 111 (1) of the Evidence Act** to explain how those clothes or the blood on those clothes got to his house as this were facts especially within his knowledge.

In his defence the accused only gave an account of how he was apprehended by his uncles. In the case of ***Dorcus Jebet Ketter & Another v Republic [2013] eKLR*** the court acknowledged that there are certain instances where such burden lies with the accused when it stated: -

“In our minds the facts of the case point to none other than the two appellants either alone or jointly with others as the people responsible for the death of the deceased. In any event under the provisions of Section 111 of the Evidence Act (supra), they had to explain what happened to the deceased who was last seen with them and in their custody and who was being tortured by them from later (sic) afternoon of 30th September, 2003 to early morning of 1st October, 2003. That Section provides as follows: -

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”

Thus as the deceased was removed from his house and home by the two appellants among others to the second appellants where Wilfrida saw him being tortured as the first appellant was also present and thereafter he was never seen again, the burden of showing what happened to him was on the appellants which burden is only confined to some explanation not amounting to proof beyond reasonable doubt. This was not availed and hence on these circumstances, they and their colleagues were responsible for the death of the deceased.”

Similarly, in this case I find that there being no explanation at all from the accused as to how the clothes with DNA matching that of the deceased found their way into his house then it can only mean that he was responsible for the death of the deceased. There are no other co-existing circumstances which would weaken or destroy that inference and the only other issue left for determination is **whether the accused caused the death of the deceased with malice aforethought**.

The nature and extent of the injuries inflicted upon the deceased, the part of the body on which those injuries were inflicted, the type of weapon used and the place where the deceased was left upon inflicting those injuries all point to an intention to cause the death of the deceased which is one of the circumstances by which malice aforethought is established – see **Section 206 (a) of the Penal Code**. That completes the offence of murder and I am satisfied therefore that the charge against the 1st accused was proved beyond reasonable doubt.

In the premises I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered in open court this 13th day of February 2020.

E. N. MAINA

JUDGE