



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 62 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CLIFF PETER VOREM....ACCUSED

JUDGMENT

1. On 27th January, 2014 the accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 8th day of December, 2013 at Mwangeka Road, Makupa area within Mombasa County murdered Erick Kabaka Kwanya.

2. The case commenced hearing on 2nd October, 2014 before Judge Muya. It was thereafter heard by Judge Ongeri. The evidence of PW1, Wycliffe Juma was that on the night of 8th December, 2013 at 9:00p.m., while he was at his workplace at Texas Alarms, they received orders to go to Futuru (sic) developments at Makande. They reached there after 3 minutes and found the officer who had pressed the alarm. He informed them that a man had been assaulted by another who was sitting on a stone nearby. He further testified that the man who was lying down unconscious, was a watchman in nearby premises.

3. On going to where the accused person was, he said he could not talk to them. They talked to the controller who called police from Makupa Police Station. PW1 further stated that police went to the scene and arrested the accused person. PW1 learnt that the victim passed on the following day when undergoing treatment in hospital.

4. PW2, Fredrick Achoka Onyango of Texas Security Guards was on duty on 8th December, 2013 at 9:00p.m. His evidence was that he was sent by the controller to Future Developments Company. On arrival, they asked the security guard why he had pressed the remote (alarm). He reported that a man had been assaulted. He showed them the said man. They were also shown the attacker who was wearing a red T-shirt and a grey pair of trousers. It was PW2's evidence that the attacker said he could not talk to them.

5. PW2 further testified that the victim was bleeding from his head. PW2 stated that there was security light at the place where the security guard was but there was no light at the place where the victim lay. He further stated that there was a stone nearby which had been used to hit the victim. Police went to the scene, arrested the accused person and took away the victim. The following day they were told that the victim had died.

6. PW3 was No. 70754 PC Alfred Muturi who was attached to Makupa Police Station. He recounted that when he was on duty as a station guard, security guards went to the police station and reported an incident of a person who had hit the deceased with a stone. He and PC Njeru visited the scene. They found the deceased lying down by the side of the road. PW3 testified that the deceased had a fracture of the head and he was bleeding from the nose and mouth. There was a stone by the road side and some security men at the scene.

7. It was PW3's evidence that the deceased could not talk. The police took the accused into police custody and the deceased was taken to hospital. PW3 further stated that after 2 days, they were told that the deceased had died. He collected the stone from the scene. They also took a grey pair of trousers which the accused person was wearing as it had a lot of blood. He handed over the 2 exhibits to the Investigating Officer, Corporal Ngei.

8. PW4, Kenneth Kaunda Kwaya, was the deceased's younger brother. He identified the deceased's body at Coast Province General Hospital to the Doctor who performed the post mortem.

9. PW5, was Doctor Nafisa Seif. She produced the post mortem report on behalf of Doctor Harunany whose handwriting and signature she was familiar with. She stated that the deceased's cause of death was severe traumatic head injury due to assault.

10. The Investigating Officer was No. 42398, Corporal Ngei Nzomo of Makupa Police Station. His evidence was that on 8th February, 2013 when on duty, he received a report from security guards of Texas Alarms to the effect that a person had been seriously assaulted along Mwangeka road. The person who was assaulted was a security guard at Stanley Godown.

11. PW6 further testified that he rushed to the scene and found the assailant having been detained by security guards attached to Texas Alarms Security Guards. The evidence of PW6 was to the effect that the victim was lying down between two gates of FDC and he was bleeding from the head, nose and mouth. PW6 ordered PC Githinji and PC Njeru to escort the assailant to Makupa Police Station.

12. PW6 and PC Omollo took the victim to Coast Province General Hospital (CPGH) for treatment, where he was admitted in the ICU. PW6 recovered a stone at the scene.

13. PW6 stated that on 9th December, 2013 at around 7:00 p.m., he went to CPGH to check on the condition of the victim and he was told that he died when undergoing treatment due to the injury sustained on his head due to a blow caused by a stone.

14. It was PW6's evidence that he went back to Makupa Police Station and removed the accused person from the cells. He noticed that the grey pair of trousers the accused person was wearing had blood stains on the right side near the knee region. PW6 retained the said trouser as an exhibit. He stated that during the postmortem on the deceased's body, he requested for a blood sample from the said body. He prepared an exhibit memo on 30th December, 2013 and requested for the blood sample of the deceased to be examined to establish if it matched the blood stains on the pair of grey trousers and the stone.

16. PW6 produced the Government Chemist's report which established that the DNA profile generated from the deceased's blood sample matched the blood stains found on the grey pair of trousers. The stone did not generate any DNA profile.

16. This court put the accused person on his defence. He gave a sworn defence. He stated that on 8th December, 2013 at around 8:30p.m., he was sitting beside the gate of FDC on a concrete beacon, when a group of not less than 5 people approached. He said that one was armed with a panga and 4 with rungus which had metal bolts which had been fixed on them. He was asked what he was doing at the scene and was ordered to leave. He said that he moved away but one person followed him and after walking for 5 steps the said person hit him with his fist at the back of his neck. The accused person indicated that when the man tried to hit him a second time, he held his shirt. He said that 4 other men came to where he was and wanted to hit him but he used the man whose shirt he was holding as a human shield. The accused person indicated that blows from the man's colleagues landed on the man whose shirt he was still holding. The man fell down.

17. The accused said that the people who killed the deceased were his colleagues and they ran away. He further stated that security guards from Texas Alarms came to the scene. He said that he wanted to hit the man on the ground with a stone but they asked him to board their motor vehicle and took him to Makupa Police Station. After 9 days he was told that the man who was injured had died. He denied having beaten the deceased.

18. Mr. Mushelle, Learned Counsel for the accused person filed written submissions on 25th September, 2019. He submitted that the accused person was going home when he was stopped from proceeding there. It was stated that he sat on a pavement for sometime as he was tired and needed to rest but a security guard thought that his intention was to commit a crime and that is the reason why he confronted him. This resulted in a fight which drew in the other security guards who were guarding nearby premises who beat up the accused person.

19. It was also submitted that the security guards wanted to hit the accused person with a stone lying at the scene but he used the deceased as a human shield. The appellant's Counsel further stated that when the stone was thrown at the accused person, he used the deceased to block it and he was hit by the stone.

20. In Mr. Mushelle's view, the deceased was the aggressor and not the accused person as claimed by the prosecution. He submitted that the prosecution failed to prove that the deceased's death was caused by the accused person and that he had malice aforethought. Mr. Mushelle prayed for the acquittal of the accused person.

21. The Prosecution Counsel, Mr. Muthomi, filed written submissions on 29th October, 2019. He was of the view that there was ample circumstantial evidence which pointed to the accused person as the one who caused the death of the deceased. He relied on the case of **Abang alias Onyango vs Republic**, Criminal Appeal No. 32 of 1990 and **Sawe vs Republic** [2003] KLR 363 to show what constitutes circumstantial evidence. He submitted that an alarm was triggered and PW1 and PW2 responded to the same shortly thereafter. They found the officer who sounded the alarm. He showed them the person who had been assaulted and the person who had assaulted him, who was seated on a stone nearby.

22. It was stated that the accused person's blood stained trouser was subjected to forensic examination and the DNA generated by the blood stains matched the deceased's blood. In the Prosecution Counsel's view, the foregoing was sufficient circumstantial evidence to prove that the accused person killed the deceased.

23. Mr. Muthomi referred to the accused person's defence as a sham because if he was beaten as suggested, he would have sustained injuries. He had none.

ANALYSIS AND DETERMINATION

24. In arriving at a decision herein, this court has considered the submissions filed by the Advocates on record and the authorities relied on. The court has also considered the prosecution and defence case. The issues for determination are:-

- i. **If the accused person caused the death of the deceased; and**

ii. If he did so, whether he had malice aforethought.

If the accused person caused the death of the deceased.

25. PW1 and PW2 were security guards working for Texas Alarms. On 8th December, 2013 at 9:00p.m., they responded to an alarm which had been raised by a security guard at Future Development Company (FDC). On reaching there, the security guard who had pressed the security alarm pointed to a man who was lying down unconscious. He was bleeding from injuries on his head. The injured man was a watchman at a nearby premises. They were told that he had been beaten by the accused who was seated on a stone nearby, beside the road. The accused person said he could not talk to them. They reported to their controller who placed a call to Makupa Police Station. The police went to the scene and arrested the accused person. They took the victim to hospital. He died the following day. His body was identified by his younger brother PW4 for post-mortem purposes.

26. PW3, PC Alfred Muturi Githinji a Police Officer attached to Makupa Police Station received a report of the incident and went to the scene with PC Njeru. They found the deceased lying by the roadside as he bled from his head, nose and mouth. They found the accused person at the scene of crime. They arrested him and took the deceased to hospital. They collected a stone from the scene. He saw that the accused person's grey pair of trousers had a lot of blood. They retained the stone and the said trousers as exhibits.

27. PW6, Corporal Ngei Nzomo, was on duty on the night of 8th December, 2013 when he received a report that a person had been seriously assaulted. The person was said to be a security guard at Stanley Godown. They went to the scene and found him bleeding from the head, nose and mouth. The accused was sitting nearby. He recovered a stone from the scene. He took the victim to hospital. The accused was taken to Makupa Police Station by PC Njeru and PC Githinji. PW6 took the grey pair of trousers the accused was wearing as it had bloodstains. It was taken to the Government Chemist for analysis to ascertain if the blood stains on it were from the deceased. The stone they recovered at the scene was also taken for forensic examination. The stone and the grey pair of trousers tested positive for human blood. The stone did not generate a DNA profile. The said trousers generated a DNA profile which matched the blood sample taken from the deceased.

28. The watchmen who pressed the alarm to call security guards from Texas Alarms did not testify. The evidence tendered in court against the accused person was as such not direct evidence. The prosecution relied on circumstantial evidence to prove its case.

29. What constitutes circumstantial evidence was well articulated in the case of **Abang alias Onyango vs Republic**, Criminal Appeal No. 32 of 1990 where the court held thus:-

“1. The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

2. Those circumstances should be of a definite tendency pointing towards guilt of the accused.

3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no one else.

4. The circumstances and facts must be absolutely incompatible upon reasonable hypothesis with the innocence of the accused and incapable explanation other than of guilt of the accused.”

30. The pieces of evidence linking the accused person to the commission of the offence were the fact that he was found sitting at the scene where the deceased lay unconscious on the ground. The first report given to PW1 and PW2 who were security guards from Texas Alarms was that the accused person was the one who had assaulted the deceased. The evidence of PW2 was that when they found the accused person at the scene he was wearing a red T-shirt and a grey pair of trousers. PW3 and PW6 who were police officers from Makupa Police Station observed that the said trousers had blood stains. It was submitted to the Government Chemist for analysis of the said bloodstains. A blood sample that had been taken from the deceased's body revealed that the blood stains on the accused person's grey pair of trousers originated from the deceased due to similarity in the DNA profile.

31. The accused person in his defence denied having beaten the deceased and stated that when the deceased's colleagues tried to beat him, he used the deceased as a human shield and that is how he sustained injuries that led to his death. While on duty at Makupa Police Station, PW3 received a report that the accused person had hit the deceased with a stone. He and another police officer went to the scene and found the deceased bleeding from his nose and mouth. They found a stone by the roadside. PW1's and PW2's evidence was also to the effect that when they went to the scene, they were informed by the said security guards that the accused was the one who had hit the deceased with the stone which they found at the scene of the incident. That was the same report which was received by PW6. When the stone was examined by the Government Analyst, it was found to contain some human blood but it did not generate a DNA profile. The grey pair of trousers which the accused person was wearing had blood stains which generated the DNA profile of the deceased. The foregoing establishes that there was close contact between the deceased and the accused person as at the time the deceased was assaulted.

32. If indeed the accused person used the deceased as a human shield, as he claimed in his defence, it is beyond comprehension how the deceased's blood stains got onto his trousers in the area above the knee. Using the deceased as a human shield meant that the accused person was behind the deceased when the latter was allegedly being assaulted by his colleagues. It is therefore not possible that his blood would have stained the accused person's grey pair of trousers.

33. The accused person in cross-examination said that he was wearing a blue pair of jeans on the night of the incident. That claim cannot be true as from the first instance, PW2, PW3 and PW6 who went to scene of the incident found the accused person wearing a grey pair of trousers. It was subjected to forensic examination and established that it was stained with the deceased's blood. It was produced in court. This court's finding is that the defence raised by the accused person cannot stand in light of the evidence adduced by the prosecution. It is difficult to believe that the deceased's colleagues beat up the deceased whom the accused person claims to have used as a human shield.

34. A post mortem was conducted on 27th December, 2013 at CPGH. The Doctor found that the deceased had sustained subdural haematoma, compression of the sphenoid bone and had a swelling on his scrotum. The cause of death was established to be due to severe traumatic head injury due to assault. From the totality of the evidence adduced in regard to the circumstances surrounding the deceased's death, this court finds that the tests laid out in **Sawe vs Republic** [2003] KLR 364 on circumstantial evidence were met. It is evident that the facts of this case are incompatible with the innocence of the accused person but unerringly point to him as the one who caused the death of the deceased.

If the accused person had malice aforethought when he committed the offence

35. For a charge of murder to hold, it must be proved that the accused person had malice aforethought when he killed the deceased. 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 death or grievous harm to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish it may be caused;

(c) An intention to commit a felony; and

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who committed or attempted to commit a felony.”

36. In this case, the security guards who were present at the scene of crime when the accused attacked the deceased were not called to testify as to what triggered the attack. A firsthand account of whether there was aggression on the part of the deceased towards the accused person before the former was attacked would have assisted this court to determine if the conduct of the deceased instigated the accused person to hit him on the head.

37. In the absence of the said evidence, I am inclined to hold that the prosecution failed to prove malice aforethought on the part of the accused person. I therefore find that the offence of murder contrary to section 203 as read with 204 of the Penal Code was not proved beyond reasonable doubt.

38. This court has however found that the accused person occasioned severe head injuries on the deceased, which led to his death. The accused person is therefore culpable for having killed the deceased. Since malice aforethought was not established, this court finds the accused person guilty of the lesser charge of manslaughter contrary to Section 202 as read with 205 of the Penal Code. I hereby convict the accused person under the said provisions of the law.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Accused person present

Mr. Mushelle for the accused person

Ms Mwangeka, Prosecution Counsel for the DPP

Mr. Oliver Musundi- Court Assistant.