



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO. 22 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STEPHEN WALTER NYAKWAKA.....ACCUSED

JUDGMENT

1. **STEPHEN WALTER NYAKWAKA (the accused)** herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On the 31st July, 2017 at about 1600hrs at Ongalo village in Kisumu West Sub-County, within Kisumu County murdered GILBERT INYANGALA

2. The prosecution summoned a total of 7 (witnesses) witnesses in support of its case while the defence called accused and one other witness.

Prosecution Case

3. **PW 1 Beatrice Chahenda** the mother of the deceased recalled that on the morning of 31st July, 2017, she saw some 4 young men that she did not know outside the house of her son Gilbert Inyangala (deceased) and upon going to check what was happening found accused who was armed with a panga in the house and next to him was the deceased who was bleeding from an injury on the head and he informed her that he had been assaulted by the accused. That immediately thereafter, accused left with the deceased and she followed them to the deceased's in-laws home where she found the deceased lying outside the compound with serious injuries. She escorted him to Jaramogi Oginga Odinga Teaching and Referral Hospital where he died while undergoing treatment.

4. **PW 2 Derrick Otieno Agumba** was on 28th July, 2017 given a CPU by the deceased who asked him to sell it. That on 31st July, 2017, bodaboda riders went to his house and he handed over the CPU to them and immediately thereafter, accused arrived at the home armed with a panga and together with bodaboda riders assaulted the deceased injuring him seriously that he later the same day died in hospital where he was undergoing treatment.

5. **PW 3 Winnie Awuor Agumba**, deceased's wife stated that on the morning of 31st July, 2017, accused who is her neighbour and three others went to her home which in a white car with which they took the deceased away. That shortly afterwards, they returned to her house in company of a bodaboda rider and the deceased whose hands were tied with a rope and accused who was armed with a panga assaulted the deceased demanding that the deceased returns his CPC. That the deceased said that the CPU was at the home of her parents and they proceeded there and her brother Derrick (**PW2**) handed over the CPU and that later while she was in the house, she heard screams and found the deceased being attacked by accused and 5 touts who left him seriously injured that he later the same day died in hospital where he was undergoing treatment.

6. **PW4 Sheila Akinyi Omindo** and **PW6 Walter Omondo Oduwo** who are deceased's sister and father respectively were not at the scene of crime but they received information that the deceased had been assaulted as a result of which he died.

7. **PW5 Clementina Atieno**, deceased's sister in law stated that she was at home when accused, deceased and others went to their home on the morning of 31st July, 2017 where her brother Derrick (**PW2**) handed over a CPU to accused after which the group walked away with the deceased. She stated that she followed the group and that she saw Okoth, Opiyo and others beat the deceased and when he fell down, accused cut him on the head with a panga seriously injuring him that he later the same day died in hospital where he was undergoing treatment.

8. **PW7 Dr. Lucy Ombok** of Jaramogi Oginga Odinga Teaching and Referral Hospital with the consent of defence counsel produced the deceased's post mortem form **PEXH.1** filled by her colleague *Dr. Paul Ogolla who conducted an autopsy on deceased's body on 07th August, 2017. The report shows that deceased's body had multiple lacerations on the head, bleeding on right side of scalp and bleeding inside left side of the scalp. The doctor formed an opinion that deceased died of extensive epidural hematoma secondary to assault.*

9. **PW8 PC Charles Nyabuti Momanyi** produced a CPC machine S/No. ESN69F63D64 which was alleged to have been the genesis of deceased's death as **PEXH. 2**.

The Defence Case

10. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence. Accused in his sworn defence denied the offence. He recalled that his house was broken into on 28th July, 2017 and items among them a CPU were stolen from therein. He stated that he was at home on the morning of 31st July, 2017 when a group of people who included bodaboda riders went to his house and reported that they had arrested the person that stole from his house and they took him to the house of his neighbor, the deceased herein. It was his evidence that the bodaboda riders attacked the deceased demanding that he hands over the CPU to them. That they later went to the home of deceased's in-laws home where the CPU was handed over to him by Derrick (**PW2**) after which he asked the crowd to disperse and he went away and later learnt that the deceased had died.

11. **DW2 Peter Jomo Orimbo** recalled that on the morning of 31st July, 2017, the deceased was attacked by a crowd for allegedly stealing accused's CPC. He denied that accused attacked the deceased and stated that him and accused ran away from the scene after they were attacked for trying to shield the deceased from the crowd and he later received information that deceased had died.

ANALYSIS AND FINDINGS

12. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR**, the main elements of the offence of murder were listed as follows: -

a) **That the death of the deceased occurred;**

b) **That the accused committed the unlawful act which caused the death of the deceased; and**

c) **Malice aforethought**

(a) The death of the deceased

13. The deceased's postmortem form **PEXH. 1** indicates that the apparent cause of death was *extensive epidural hematoma secondary to assault. The deceased met his death as a result of assault which resulted in multiple lacerations on the head, bleeding on right side of scalp and bleeding inside left side of the scalp.*

(b) Proof that accused committed the unlawful act which caused the death of the deceased

14. *The issue for determination is whether accused was responsible for the heinous crime.* The contention by the state is that the accused was one of the culprits. On the other hand, accused contends that the deceased was assaulted by bodaboda riders.

15. I have considered the evidence on record. The genesis of the assault on the deceased was theft of accused's CPC. **PW1 Beatrice Chahenda** the mother of the deceased and **PW3 Winnie Awuor Agumba**, deceased's wife stated that accused and others beat up the deceased at his home demanding that he gives them a CPU stolen from the accused after which they took him to his in laws house where and the CPU was handed over to accused by Derrick (**PW2**) after which accused and others attacked the deceased the more leaving him seriously injured. **PW 2 Derrick Otieno Agumba** and **PW5 Clementina Atieno**, deceased's brother and sister in law respectively stated that on the material date, accused, deceased and others went to their home and after PW2 handed over a CPU to accused and others attacked the deceased seriously injuring him.

16. Accused's concedes that he was at the two scenes of crime both at accused's house and at deceased's in laws home where PW1, PW2, PW3, PW5 stated that they witnessed him particularly assault the deceased on the head with a panga.

17. The description of the assault on the deceased by PW1, PW2, PW3, PW5 is more or less consistent in detail. Upon a careful evaluation of the evidence, this court finds that the prosecution evidence that accused and others assaulted the deceased as a result of which he died is overwhelming and effectively dislodges the defence offered by the accused and his witness. Indeed, by the time the assault stopped the deceased lay in a heap on the ground, immobile and had to be carried away to hospital where he died on the same day while undergoing treatment.

18. The assault on the deceased by accused and other, whether or not he had stolen a CPU was an unlawful act. The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act. (See **Dickson Mwangi Munene & Another v Republic [2014] eKLR**).

19. Section 21 of the Penal Code defines common intention as arising: -

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

20. The foregoing provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of the Court of Appeal held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

21. In Njoroge-Vs-Republic, [1983] KLR 197 at p. 204, the Court of Appeal stated that: -

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

22. As to proof of common intention, the predecessor of the Court of Appeal held referring to its earlier decision in R v Tabulayenka s/o Kirya (1943) EACA 51, it continued to state that: -

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

23. Common intention does not only arise where there is a pre-arranged plan or joint enterprise and can develop in the course of the commission of an offence. The Court of Appeal in Dracaku s/o Afia v R [1963] E.A.363 where there was no evidence of any agreement formed by the appellants prior to the attack made by each held that **“that is not necessary if an intention to act in concert can be inferred from their actions”** like **“where a number of persons took part in beating a thief.”**

24. So it is in this case. Accused and other unknown people engaged in what has become commonplace: public participation in assaulting suspects of theft, the so called **“mob justice.”**

25. The deceased may have succumbed to injuries inflicted severally by different self-appointed executioners but the accused also assaulted him. He too was a part of the mob, and is equally guilty of committing the unlawful act which caused the death of the deceased which constitutes the ‘actus reus’ of the offence.

(c) Proof that deceased had malice afterthought

26. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under Section 203 of the Penal Code.

27. The ingredients of murder were explained in the case of Roba Galma Wario vs Republic [2015] eKLR where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

28. Malice aforethought was defined in a number of cases. In Nzuki Vs Republic [1993] KLR 171, the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intention to cause death

- Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

29. In DANIEL MUTHEE VS REPUBLIC CRIMINAL APPEAL NO. 218 OF 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

30. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the accused and his witness. I am persuaded that accused masterminded the attack on the deceased to revenge for his stolen goods and that he and others inflicted the injuries that led to the death of the deceased. From the severity of the attack, I have no doubt that it was their intention to cause the deceased grievous harm if not death. I am therefore satisfied that malice aforethought has been established in terms of Section 206 (a) and (b) of the Penal Code.

Disposition

31. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

DATED AND SIGNED AT KISUMU THIS 06th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant Amondi/Okodoi-

Accused - Present

For Accused -

For the State - Ms. Gathu