



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 4 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BENARD WANGILA WANYONYI.....ACCUSED

J U D G M E N T

The accused **Bernard Wangila Wanyonyi** is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 5th day of January, 2018 at Namidole Village, Sitikho location of Webuye We-sub Country within Bungoma Country murdered Kennedy Sudi.

Jane Nasumba Wanjala, PW 1 testified that on 5th January, 2018 at 4 pm. He saw the deceased who was with the accused walking on the road. She was also walking on the same road going to the same direction. She passed the accused and deceased; while walking towards Mangane market. She was with accused with Nanjala. She looked back but did not see accused and deceased whom were supposed to be behind her. She then saw one Khamala with a jembe stick. She then head a bang as of something being hit. Nanjala who was with her ran towards the place where the noise was coming from. She then heard Nanjala scream. She ran there and found deceased lying done and bleeding from the head. She saw accused running away and people started chasing the accused. The deceased was taken to hospital where he died.

PW 8 Evaline Nanjala testified that on material day she was going to buy vegetables, while walking on the road she head a bang behind her. She looked behind and heard people screaming from the farm of Wasike. She went there and saw the deceased lying down bleeding form his head. She found accused, Belina and Khamela at the scene. She saw accused carrying a jembe stick. She asked why they were killing deceased. Accused threatened her. She screamed and accused and Khamala left the scene. On being cross-examined by Otsula for accused, this witness said she did not see who hit the deceased but found the accused armed with a jembe stick at the scene.

PW 3 Samu Kweyu heard screams and ran to the scene where he found the ceased lying down bleeding. He and others took him to Webuye Hospital where he was pronounced dead. **PW 6 Dr. Wambasi Mutoro** performed a post-mortem on body of the deceased on 11th January, 2018. On examination he found the deceased had a cut wound on top of the head measuring 6 cm on back of head measuring 6 cm.. On opening he found compression of spinal code at C3, cracked C3 bone and bleeding on cervical 3,4. He formed opinion that cause of death was due to spinal injury due to trauma.

The accused gave sworn evidence. He testified that on the material day he was paid salary and went to drink busaa at 9 a.m.. At 2.30 p.m. he decided to go home. He then met the deceased on the road who was also drunk. He greeted him. Deceased then went towards his home. At 8.00 p.m. police officers came to his home and arrested him on allegation of killing the deceased. He admitted meeting **PW 1 Jane Nasumaba** with **PW 8 Nanjala** on the road while he was with the deceased. He denied ever knowing how deceased was killed.

Mr. Otsua counsel for the accused submitted that the prosecution has failed to establish the motive or intent of accused to commit the offence. He submitted that the evidence of the prosecution witnesses is scanty and does not point to the guilt of the accused. He referred this court to the decision in **R Vs Andrew Omenga (2009) eKLR** in support of his submissions.

The accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code. Section 203 provides: -

203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

From this definition for the accused to be conorated of murder the prosecution must prove that he caused the death of the deceased with

malice aforethought by an unlawful act or omission. There are, therefore, four ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: -

- a. The fact and cause of death of deceased.
- b. The unlawful act or omission which caused the death of the deceased.
- c. That the accused had malice aforethought.
- d. That it is accused who executed the unlawful act or omission.

PW 6 Dr. Wambai Matoro performed a post-mortem examination on the body of deceased on 11th January, 2018. On examination, he found deceased had cut wounds on head; cracked C3 bone and compression of the spinal code at C3. He formed opinion that cause of death was due to spinal injury at C3, C4 and C5 caused by trauma. This witness, therefore, proved not only the fact of death but also cause of death.

PW 6 Jane Nasumba testified that when she heard sound of something being hit and **PW 8 Nanjala** screaming, she ran there and found deceased lying down and bleeding from the head. **PW 8 Evaline Nanjala** who also went to the scene found the deceased lying down bleeding from the head. **PW 3 Same Kweyu** and **PW 4 Amos Wefwafwa Waswa** who also went to scene found the deceased lying down bleeding from the head. All these witnesses testified as to observing deceased who had sustained injuries. The doctor confirmed that these injuries were caused by trauma as a result of assault. The death, therefore, was caused by an unlawful act of inflicting the injuries on the deceased. This was by way of forcibly inflicting injuries on the deceased which was an unlawful act.

On the ingredient of malice aforethought Section 206 of the Penal Code provisions for instance which if proved will indicate malice aforethought on the part of the perpetrator of the unlawful Act Section 206 provides: -

“206. 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.**

R Vs Tubere S/O Ochen 1945 12 EACA 63 to discern malice aforethought the court considered the following elements: -

- 1. Nature of weapon used**
- 2. The manner in which it was used**
- 3. The part of the body targeted.**
- 4. The nature of the injuries inflicted either a single stab wound or multiple injuries.**
- 5. Conduct of the accused before, during and after the incident.”**

From the evidence of the Doctor the perpetrator inflicted injuries on the head where there were cut wounds. He also targeted the cervical spine which led to crushed C3 bone and compression of spinal code. These are all vulnerable parts of the body which the perpetrator targeted. The injuries which were multiple show that the perpetrator did not do so once but severally. All these demonstrate an intention to kill or cause grievous bodily harm on the deceased. This satisfied the criteria of Section 206 Penal Code for the court to find that malice aforethought has been established.

The prosecution in an offence must prove that it is the accused to who committed the offence. This is for two reasons: -

- a. To ensure that it is the accused who is found guilty and convicted and making sure an innocent person is not convicted for an offence he did not commit and therefore protect the innocent.**
- b. That because punishment is meted out to the person who committed the offence.**

Identification of the accused as the perpetrator of the offence can be proved by direct evidence or circumstantial evidence. Direct evidence is where an eye witness testifies about what they saw, heard or observed with their senses. Circumstantial evidence is where facts are proved which lead to a reasonable inference that it is accused who committed the offence.

In the case of **PW 1 Jane Musumba** testified that she met the accused and the deceased on the road and passed them. Shortly later she heard noise of something being hit. She ran there. She saw the deceased lying down bleeding and accused running away from the scene. PW 8 Evaline Nanjala also responded to the noise as of a bang. She ran there and found deceased lying down. She found accused and one Khamela at the scene with accused armed with a jembe stick. She asked accused what they had done and accused threatened her. People came and accused ran away. She, however did not see who had hit the deceased.

The accused in his defence denied killing the deceased. He, however, admitted that he met the deceased on the road and the deceased went towards his home and accused went to his home. He admitted that he met PW 1 Jane on the road on the material day. The evidence PW 1 Jane and PW 8 Nanjala is that they met accused with deceased on the road and passed them. Shortly later they heard noise and ran there. They found accused present with another person called Khamela. The accused and Khamela were armed with accused armed with a jembe stick. On being asked about the deceased's injuries accused threatened PW 8 and when people came they ran away. Though the accused denies it, I find the evidence of these two witnesses places him at the scene of the incident.

The accused in his defence testified that on the material day he was drunk having started drinking busaa from 9.00 a.m. to 2 p.m. when he decided to go home. He testified that he met the deceased on the road who was also drunk. Intoxication can be pleaded as a defence by an accused person to show that as a result thereof he did not understand the nature of his actions or know that when he was doing was wrong or form the necessary intent to commit the crime.

In **Boniface Muteti Kioko & Another Vs Republic (1982-88) I KAR 157** the Court of Appeal said: -

“It is the duty of the judge to deal with alternate defence such as intoxication that emerged from the evidence which might reduce the charge to man-slaughter.”

Intoxication can be involuntary or voluntary while involuntary intoxication where a person is intoxicated by an unlawful act of another person is a defence, voluntary intoxication is not a defence. Section 13 of the Penal Code provides follows: -

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph

(a) thereof the accused shall be discharged, and in a case falling under paragraph

(b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.

Even where the accused raised a defence of intoxication wither as a specific defence or from his evidence, the prosecution still retains the burden of proof. In **Kanguro S/o Muisho Vs R (1956) EACA 532** the Court of Appeal for Eastern Africa referred to the case of **Chemingwa Vs Republic EACA CR. No. 450 of 1955 (Unreported)** in which it was stated: -

“It is of cause correct that if the accused seeks to set up a defence of insanity by reason of intoxication the burden of establishing that defence rests upon him in list he must be least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute an offence charged it is a misdirection if the trial court lays the onus of established this upon the accused (See also Joshua Ndonye Vs Republic (2001) eKLR, Criminal Case No. 122 of 1991.

In case the accused in his defence state that after being paid salary on that day, he went to a busaa drinking place at 9 a.m. to drink. He admitted in cross-examination that on that day he was drunk. He also testified that he met the deceased who was also drunk. He readily admits that he is the one who went to a busaa place with an intention to drink. He did drink and was drunk. His drinking was, therefore, voluntary.

In **Roba Galma Wario Vs Republic (2015) eKLR**. The Court of Appeal in analyzing the effect of intoxication stated: -

“On the issue of intoxication, the appellant simply states that he was really drunk. The extent of his intoxication is unknown, and further it is the evidence of PW4 and PW5 that the appellant was not drunk to the extent that he was incapable of knowing what he was doing. For someone who claims to have been really drunk; the appellant recalls the events of that fateful night in great detail, all except the stabbing. He alleges being unaware of the stabbing and denies that he stabbed the appellant.

Was the appellant so intoxicated as to be unable to form the required malice aforethought necessary to sustain a murder charge”

Where the accused wishes the court to find that as a result of intoxication he was not able to form the necessary intention, he must lead evidence to that fact which he wishes the Court to accept in **Kupele Ole Kitaiga Vs Republic (2009) eKLR, Cr. No. 26 of 2007** the Court stated: -

“A clear message must also go out to those of the appellants’ ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of section 13 of the Penal Code it will not avail an accused and does not avail the appellant in this particular case.”

Upon considering all the evidence, I am satisfied that accused was seen with the accused, walking along the road; that when the witnesses heard a sound of something being hit they ran there and found accused and another. Accused was armed with a jembe stick and deceased was lying down with injuries on the head. They were the only people present and on being asked he ran away. Though the accused contends he was drunk, he was able to explain the details the happenings so the day which shows that he was using drunkenness to cover the crime.

I am, therefore, satisfied that it is accused and another who inflicted the injuries in the deceased from which he died. I find accused **Benard Wangola Wanyonyi** guilty of the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed and delivered at Bungoma this 7th day of May, 2020.

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S N RIECHI

JUDGE