



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 30 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

FREDERICK KIPKIRUI KORIR.....ACCUSED

JUDGMENT

Introduction

The accused is charged with murder contrary to section 203 as read with section 204 of Penal Code (Cap 63) Laws of Kenya, in respect of the murder of the deceased, Charles Rotich.

The accused denied the charge and did not call any witnesses in his defence.

Mr. Onduso for the accused filed submissions in which he urged the court to acquit the accused

The prosecution called eight witnesses in support of the charge. No submissions were filed by the prosecution as the prosecuting counsel was not the Director of Public Prosecutions or his deputy. See section 310 as read with section with 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The case for the prosecution

The prosecution called Frederick Kipyegon Langat (Pw 1). Pw 1 testified as follows. On 12/3/2017, he was drunk having taken both busaa and chang'aa, which he had started drinking in the morning in the house of one Kiplekwet. At about 1.00 pm or 2.00 pm he heard people screaming saying that someone had died. As a result, he went out of the house where he saw a person lying down a hundred metres. He also heard people shouting "huyo, huyu." The person who was being chased went to the home of Mogoro. He decided to go to his home.

It was also his evidence that the deceased entered the house, where they were drinking and left. Those who were chasing the person mentioned the name of the accused. He had known the accused for years, whom he knew as Raphael. The accused is known as Frederick Kipkirui Langat. Pw 1 also testified that he knew that the accused was also called Frederick Kipkirui Langat, when he was testifying in court. He also testified that he never wrote a statement at the police station. Finally, under cross examination he admitted that what he told the police was true.

In addition to Pw 1, the prosecution called Polycarp Lutta Okwengu (Pw 2). Pw 2 is the Government analyst attached to the Government Chemist at Kisumu. He testified as follows. Pw 2 testified that his duties include receiving exhibits or samples submitted to his department in addition to going to the scenes of crime to collect samples such as in cases of arson and exhumation of bodies. He also testified that on 17/9/2017 he received from No.69535 PC Lukas Kamara (Pw 9), four samples namely a blood stained dagger (knife-exhibit 4), a blood stained white and brown T-shirt (exhibit 5), blood sample of the deceased and that of the accused. He then proceeded to carry out analysis technically known as DNA profiling.

Furthermore, Pw 2 continued to testify that every person has unique DNA, which one acquires from his parents. He then concluded as follows. The DNA profile from the sword (dagger) matched the blood from the body of the deceased person. The DNA generated from the blood of the accused did not match any DNA profile from the items submitted to him for analysis. He also generated a profile from the white and brown striped shirt and found that the DNA profile belonged to an unknown male person. In his opinion that DNA did not originate from the blood of the accused and deceased. He then produced his report as exhibit 1.

While under cross examination he testified that in his preliminary tests he had to ascertain whether the stains on the said the white and brown

stripped T-shirt were human blood. He also testified that he could locate a blood stain under ultra violet light even if the house had been cleaned. The said light will detect the presence of blood and that they can preserve DNA profile for over ten years. It was also his evidence that they can generate DNA from blood, bones and any tissue. He further testified that it was possible to generate a DNA profile from the sweat on a dry piece of cloth.

Kipyegom Mutai (Pw 3), testified that he was a boda boda rider. Pw 3 testified that he saw the accused stab the deceased. After stabbing the deceased, the accused tried to run away. He followed him into the house of Mogoro; where the accused locked himself. As a result, people raised an alarm and arrived at the scene of crime. The accused opened the house and its owner namely Morogo arrested him. The accused was in a white and red stripped coat. It was his further evidence that he arrested the accused with the knife exhibit 4. He had known the accused for about five years. The accused was wearing a T-shirt, exhibit 5.

Furthermore, Pw 3 testified that he heard the deceased saying that “*unanitungia nini*” that is, why are you stabbing me? As at that time the deceased was following Pw 3. After hearing the deceased utter those words Pw 3 turned back to see what was going on. He then saw the deceased falling down. That is when he started to chase the accused, because he had stabbed the deceased. The accused is his neighbour, although he does not know his parents. Finally, in re-examination Pw 3 testified that he did not see the accused drop the sword.

The prosecution also called Dr. Stanley Byegon (Pw 4), who performed a postmortem examination on the body of the deceased person. He produced his report as exhibit 6. According to him the cause of death was due to severe haemorrhage secondary to multiple injuries viscera, that is, the spleen and the liver after a penetrating injury into the abdomen which severed the liver.

Pw 6 Kipkorir Rono (Pw 6) and Pw 7 identified the body of the deceased to Dr. Stanley Byegon (Pw 4).

The prosecution finally called No 69535 PC Lukas Kamara (Pw 8), who was the investigating officer. Following his investigations, he found the accused had a land dispute with the accused. They were neighbours. He further found that they quarreled in a chang’aa den. It was also his evidence that it was the accused who confronted the deceased and then stabbed him in the stomach. Finally, it was his evidence that he received the exhibits from PC Paul Sangau.

The submissions of the prosecution

I have already noted that the prosecution did not file any written submissions since the prosecuting counsel was not the Director of Public Prosecutions or his deputy. See section 310 as read with section with 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The case for the defence.

The accused (DW 1), testified on oath and denied the charge. DW 1 testified that on 12/3/2017 he awoke up and went to buy a spray for his cattle. After spraying them, he left for the forest to graze his cattle till 3.00 pm. Thereafter he left the forest after grazing his cattle. After driving his cattle for 200 metres from the forest, he saw a group of people. As he proceeded he heard them saying that “*sii ndio huyo jamaa mbona munamwachilwa?*” The literal translation being that “*is this not the person and why should you let him go?*” The accused then turned back. They told him that they were referring to him. They ran towards him and those people were armed with walking sticks. They removed a shirt from a container and told him it was his shirt. Some of those people were drunk and they started to assault him. They were told to stop assaulting him but they did not stop. He concluded that they were going to kill him. He struggled with them until he managed to jump over the fence. He then ran towards the lower side and other people from the other side asked him as to what was wrong. He told them that those people were assaulting him claiming that he had killed a person.

Furthermore, those people who were following him reached where he was. They told the other people that he had killed a person. They removed a shirt to show that he had killed a person. Those people gave Raymond the blood stained shirt and he was then taken to Tendwet police post. He was eventually charged with this offence.

The submissions of the accused.

Mr. Onduso, counsel for the accused submitted that the evidence against the accused was circumstantial. And that for the court to convict upon that evidence it must exclusively point to the guilt of the accused. He further submitted that for an accused to be convicted of murder, malice aforethought must be proved. He cited *Nzuki v Republic [1993] e-KLR* and section 206 of the Penal Code in support of his submissions in respect of malice aforethought. He therefore concluded that the prosecution had not proved that it was the accused who caused the death of the deceased. He therefore urged the court to acquit his client.

Issues for determination

I have considered the prosecution and defence evidence including the defence submission in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1 Whether or not it is the accused who caused the death of the deceased.
- 2 Whether or not the evidence supports a charge of murder or manslaughter.

Issue 1

There is direct evidence of Robert Kipyegom Mutai (PW 3). It was the evidence of Pw 3 that he saw the accused; whom he had known for five years stab the deceased with a knife in the stomach. The evidence of Dr Stanley Byegon (4), was that the cause of death was due to

severe haemorrhage secondary to multiple injuries viscera, that is, the spleen and the liver after a penetrating injury into the abdomen which severed the liver. I find that this is consistent with the evidence of Pw 3, that the deceased was stabbed in the stomach with a knife, which was produced as exhibit 4. The usage of this lethal weapon in stabbing the deceased is clear evidence of an intention to cause death of the deceased.

Furthermore, Pw 3 identified the knife which he claimed was used by the accused person. That the knife (exhibit 4) was used is materially contradicted by the evidence of the Government analyst namely Polycarp Lutta Okwengu (Pw 2). According to Pw 2 the DNA profile from the sword (dagger) matched the blood drawn from the body of the deceased person. But the DNA generated from the white and brown striped T-shirt was found to belong to an unknown male person. This is the white and brown T-shirt which Pw 3 testified was worn by the accused. It therefore follows that the evidence of the accused that this was not his T-shirt is factually correct. This T-shirt belonged to an unknown male person according to the report of Pw 2, which was put in evidence as exhibit 1. Pw 2 also testified that the DNA generated from the blood of the accused did not match any DNA profile from the items submitted for analysis. These items were the sword (knife), the white and brown striped T-shirt and the blood samples drawn from both the bodies of both the accused and the deceased.

The Government analyst report of Polycarp Lutta Okwengu (Pw 2), who is the Government analyst has exonerated the accused from the commission of this offence. It has discredited the direct evidence of Robert Kipyegon Mutai (Pw 3).

Furthermore, the prosecution failed to call crucial witnesses namely Morogo and PC Paul Sangau. The evidence of Robert Kipyegon Mutai (Pw 3) is that the accused entered the house of one Morogo from where he opened the door and was then arrested. Morogo, who was an essential witness was not called as a witness by the prosecution. Additionally, the prosecution failed to call Paul Sangau who handed over the exhibits to No. 69535 PC Lukas Kamara. Paul Sangau would have shed light from where he recovered those exhibits, which were crucial to the prosecution case.

The lacuna created by lack of the evidence of recovery and chain of custody of the exhibits has fatally created a fatal defect in the prosecution case. Furthermore, the report of the Government analyst (exhibit 1) exonerated the accused of the murder of the deceased. It appears that Robert Kipyegon Mutai (PW 3), was mistaken in respect of the identity of the accused.

In the premises, I find that it is not the accused who caused the death of the deceased person.

Issue 2

I find from the evidence of Dr Stanley Byegon that the deceased sustained multiple stab wounds in the abdomen; which led to his death. It is therefore clear that whoever inflicted those injuries intended to cause his death. The evidence therefore discloses murder and not manslaughter.

The upshot of the foregoing is that the accused is not guilty and is hereby acquitted of murder under section 322 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The accused is hereby ordered set free unless otherwise held on other lawful warrants.

Judgement signed, dated and delivered in open court at Narok this...6th day of May 2020 in the presence of Ms. Torosi for the state and Mr. Tanyasis Holding Brief for Mr. Onduso for the accused through Video link to Prison and counsel for both parties.

J M Bwonwong'a

Judge

06/05/2020